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PRACTICE AND PLEADING

IN

IN ACTIONS

IN THE

COURTS OF RECORD IN THE STATE OF
NEW YORK,

UNDER

THE CODE OF PROCEDURE,
AND OTHER STATUTES, WHERE APPLICABLE.

WITH

AN APPENDIX OF FORMS.

BY

HENRY WHITTAKER,
COUNSELLOR AT LAW.

THIRD EDITION, IN TWO VOLUMES.

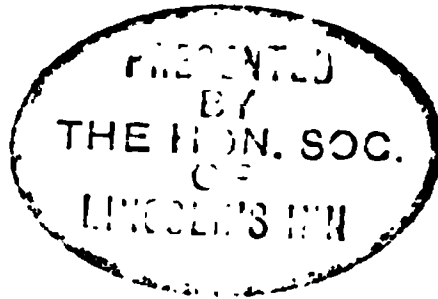
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BOOK VIII.

OF THE OTHER PLEADINGS AND PROCEEDINGS DOWN TO JOINDER OF ISSUE.

COMPLAINT, with its numerous and important incidents, having been fully considered in the preceding book, the responsive branches of pleading and the proceedings of the parties in connection therewith, or appropriate to that period of the suit, will be treated of in the present, so as regularly to bring down the subject, in its numerous bearings, to the period of the final joinder of issue; the different subjects comprised in the plan thus laid down, being considered in their natural order.

CHAPTER I.

OF THE DEFENDANT'S COURSE OF ACTION ON BEING SERVED WITH PROCESS.

THE present chapter will be devoted to the consideration of the different proceedings, which may, or which must be taken by the defendant, on being served with process, including, in the last place, the time allowed to him for the purpose of pleading in the action.

§ 159. *Proceedings before Appearance.*

(a.) EXAMINATION OF PAPERS SERVED.

As a general rule, the service of notice of appearance is the first proceeding to be taken on the part of the defendant. It is a proceeding, however, that should not be rashly or inconsiderately taken.

The summons, if served alone, or the summons and complaint, if:

served together, should first be carefully inspected, to see whether they, or either of them, are open to objection on the ground of irregularity or variance. Inquiry should also be made as to whether the service has been regular. Defects of this nature are impeachable by motion, but, to be available, such motion must be made at once, and in connection with a limited and special appearance, either by separate notice, or by statement on the face of the papers themselves. A general appearance will wholly waive them. A defendant, by taking that course, will have admitted himself to be regularly in court, and, having done so, all defects in the summons, or its service, or even the want of any summons at all, will then become immaterial. *Dix vs. Palmer*, 5 How., 233; 3 C. R., 214; *Flynn vs. The Hudson River Railroad Company*, 6 How., 308; 10 L. O., 158; *Webb vs. Mott*, 6 How., 439; *Voorhies vs. Scofield*, 7 How., 51; *Hewitt vs. Howell*, 8 How., 346. So also, as to irregularities in the complaint, or in the proceedings generally, prior to such appearance. *Beck vs. Stephani*, 9 How., 193; *Hubbell vs. Dana*, 9 How., 424; *Baxter vs. Arnold*, 9 How., 445; *Dole vs. Manley*, 11 How., 138; *Granger vs. Schwartz*, 11 L. O., 346; *Mahaney vs. Penman*, 4 Duer, 603; 1 Abb., 34; *Bogardus vs. Livingston*, 7 Abb., 428. See likewise, as to waiver in other proceedings, *Hyde vs. Patterson*, 1 Abb., 248; *Utica City Bank vs. Buell*, 17 How., 498.

This rule is, however, only applicable, in all its strictness, to patent defects. A motion directed to such as may be latent and undiscoverable upon the face of the papers served, may still be maintainable, notwithstanding a general appearance prior to their discovery. For instance, a defendant who, after service of summons only, has demanded a copy of the complaint, may move, on the ground of variance between the complaint and the summons, if then first discovered, provided he moves at once and with due diligence, on the discovery of such variance.

Vide Voorhies vs. Scofield, 7 How., 51; *Shafer vs. Humphrey*, 15 How., 564. It has been even laid down that this particular objection of variance is not waived by a general appearance, after service of summons and complaint. *Tuttle vs. Smith*, 14 How., 395; 6 Abb., 329; *Shafer vs. Humphrey*, *supra*. A special appearance will, however, be the better course to adopt under these circumstances. Nor does appearance waive an objection which goes to the jurisdiction in matters of substance. *Harriott vs. New Jersey Railroad Company*, 2 Hilt., 262; 8 Abb., 284. But otherwise, as to one which is purely personal: *Mahaney vs. Penman*, *supra*.

(b.) REMOVAL TO UNITED STATES COURTS.

This proceeding is adoptable in that class of controversies in which the jurisdiction of the federal and state courts is concurrent, as above

noticed, *i. e.*, in controversies in which suit is brought against an alien, or by a citizen of this against one of another state. Being only admissible "at the time of entering an appearance," it presents itself naturally for consideration in the present section, as the adoption of the step, and the preparation of the papers, must necessarily accompany, and virtually precede that measure. The power for this purpose is conferred by the United States Judiciary Act, passed on the 24th of September, 1789, chapter XX., section 12. See Dunlop's Collection, p. 49 to 51. That section provides thus :

CHAPTER XX.

§ 12. That if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought, against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court ; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next Circuit Court, to be held in the district where the suit is pending (with special provisions as to the districts of Maine and Kentucky) ; and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein ; it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment, in the same manner as by the laws of such state they would have been holden to answer final judgment, had it been rendered by the court in which the suit commenced.

The requisitions of this section may be shortly stated, thus :

1. The case must be one in which the federal tribunals have jurisdiction.
2. The value of the matter in dispute must exceed \$500, exclusive of costs.
3. The application must be that of the defendant. It must be made at the time of entering his appearance, and such appearance must be simultaneously entered.
4. It must be made by petition to the state court, and filed therein, praying as directed.
5. The facts necessary to bring the case within Nos. 1 and 2, must appear upon that petition to the satisfaction of the court.

6. The petition must be accompanied by a good and sufficient bond or undertaking to the effect prescribed.

7. Upon the petition, when filed, an application must be made to the court, on notice to the plaintiff, or order to show cause, in the ordinary course, and with the ordinary incidents of a motion. Any objection, if existent, may be made patent by affidavit on the part of the plaintiff, in the usual course. See *Denniston vs. New York and New Haven Railroad Company*, 2 Abb., 278; affirmed, 2 Abb., 415. The form of an order to show cause for the above purpose, will be found in *Carpenter vs. New York and New Haven Railroad Company*, 11 How., 481 (486).

In *Illius vs. The New York and New Haven Railroad Company*, 3 Kern., 597, an *ex parte* order is stated to have been obtained, but such can hardly be considered the correct practice, though refused in that case to be vacated.

This done, and no sufficient objection being shown, it becomes the positive duty of the state court to make the order, and to proceed no further with the cause. And, once made, that order cannot be vacated or interfered with. *Livermore vs. Jenks*, 11 How., 479. Nor is the refusal of such an order appealable to the Court of Appeals. *Illius vs. New York and New Haven Railroad Company*, 3 Kern., 597. In case of any irregularity the remedy seems to lie by application to the federal court. See *same case*. See also *Cooley vs. Lawrence*, 5 Duer, 605 (608); 12 How., 176 (181), and case cited.

The petitioner must perfect the proceeding by filing in the Circuit Court copies of the process against him, and appearing in that court, and by entering special bail in the cause, if bail was originally requisite, or has been given therein.

He must do so at once, and before the next term of such Circuit Court, and must proceed regularly according to its rules. See, as to further course of proceeding, *Martin vs. Kanouse*, 1 Blatchf., C. C. R., 149, referred to, 11 How., 567.

He cannot, however, deprive the plaintiff of the benefit of any attachment issued in the state court, but such attachment holds good, to abide the event of the removed proceeding.

The following points have been decided in the state courts upon the subject :

The mere service of a notice of retainer upon the attorney for the adverse party is not the entering of appearance contemplated by the statute. The notice must be filed with the clerk, simultaneously with the petition; thus filed, it satisfies its provisions. *Field vs. Blair*, 1 C. R. (N. S.), 361; affirming *same case*, 1 C. R. (N. S.), 292. A defendant who serves notice of retainer, before filing his petition, does so, however, at

his peril, for it is in the power of the plaintiff, by filing such notice, to make it an entry of appearance; if so filed, it will be a bar. *Same case*, 1 C. R. (N. S.), 293, rule 11.

The petition, to be regular, should state affirmatively, upon its face, that the plaintiff is a citizen of the state in which the suit is brought. This defect is not, however, fatal; where the facts exist, it may be supplied by filing a subsequent affidavit. *Same case*, 1 C. R. (N. S.), 361.

Once removed, the federal court has entire possession of the case, both as to matters of law and of practice, and the state laws and state rules are no further applicable. *Suydam vs. Ewing*, 1 C. R. (N. S.), 294.

To bring the statute into operation, the case must be brought within its terms and wholly covered by it. Where, therefore, three out of four plaintiffs were aliens, and the fourth a citizen, an application of the defendant was denied. The statute makes no provision for such a case. *Denniston vs. The New York and New Haven Railroad Company*, 2 Abb., 278; affirmed, 2 Abb., 415. See also, as to the duty of the state court to supervise the proceedings on the application, and to see, before granting the order, that the statute is fully complied with, *Cooley vs. Laurence*, 5 Duer, 605; 12 How., 176, above referred to.

The above doctrine as to parties is, it is true, somewhat qualified in *Livermore vs. Jenks*, above cited, where the fact that a resident, against whom no relief was really sought, had been joined as a nominal defendant, was considered to have been no bar to the granting of an order, on the petition of the actual defendants, citizens of another state. The decision is however at special term, and the actual adjudication turned upon another point, viz: the inability of the state court to take any action whatever, after the order has been once actually granted.

In *Carpenter vs. New York and New Haven Railroad Company*, 11 How., 481, a petition filed with notice of appearance after the defendant was in default for not answering, but before judgment had been actually entered by the plaintiff, was held to be still in time, and sufficient to stay proceedings and to effect the removal.

Any action of the defendant in open court, equivalent to an actual entry of appearance, has been held to bar the application. The statute must be strictly followed, and the jurisdiction of the court first seized of the cause continues, unless the case be clearly brought within its terms. Thus, where, on a motion for an injunction, the defendants had appeared, read affidavits, and resisted such motion in the ordinary form, such action was held to amount to a virtual entry of an appearance, and a subsequent petition for removal was denied. *Cooley vs. Lawrence*, 5 Duer, 605; 12 How., 176, above noticed.

The giving of bail upon arrest is not, however, such a proceeding as will amount to a virtual appearance. *Durand vs. Hollins*, 3 Duer,

686. The words "entering an appearance," import an act in court, by which the defendant concedes that the state court has full jurisdiction over him.

But if, on the other hand, the defendant move to be discharged from the arrest, the motion is a concession of the above nature, and the right to remove will be lost, the state jurisdiction having been actually invoked. *Dart vs. Arnis*, 19 How., 429.

The form of an order for removal will be found in *Carpenter vs. New York and New Haven Railroad Company*, 11 How., 481 (485), above cited. As to the possibility of provision being made by the court below on granting the order, for the continuance of an existent injunction, see *Liddle vs. Thatcher*, 12 How., 294.

Although not strictly pertinent to this stage of the action, it may be convenient, before quitting the subject of removal into the United States courts, to notice that the section of the United States judiciary act, above cited, contains provisions for a similar removal at any time before trial, on its being made apparent that a controversy between two parties, citizens of the same state, where the matter in dispute exceeds \$500, exclusive of costs, involves a question as to the validity of conflicting grants of two different states. This proceeding is, in its main features, analogous to the foregoing, but differs materially both as to the time when it is entertainable, and also, in the fact that it may be made by either party. Nor is a petition necessary in this case; all that is requisite for the purposes of the motion being that the fact should appear by affidavit. The application is likewise directed to the obtaining of information as to the adversary's claim in the first instance, and the issues on that branch of the case are narrowed down to the claims of the parties as stated.

The proceeding being one of comparatively rare occurrence, will not again be adverted to, the above notice being sufficient for all practical purposes.

The statutes of the United States also contain provisions for a similar removal of actions brought against any officer, or other person, on account of any act done under, or under color of the revenue laws, or of any right, authority, or title, set up, or claimed, under them. See act of March 2d, 1833, chapter LVII., section 3, Dunlop's Collection, page 830.

The proceeding is, however, effected by means of writ of *certiorari*, or *habeas corpus*, issued by the federal tribunal, on petition of the defendant, and not by any application to the state court in which such controversy is pending. As such it falls wholly beyond the limits of this work, though a notice of it, at the present juncture, may be convenient. It must, by the terms of the provision, be made before

trial. If delayed until afterwards, the jurisdiction of the state court cannot it would seem, be interfered with.

§ 160. *Appearance and its Incidents.*

Under the Code, an actual entry of appearance is no longer necessary. Any act on the part of the defendant, admitting the pendency of the controversy, or the jurisdiction of the court, has that effect, unless expressly qualified; and no such entry is necessary to enable the plaintiff to pursue his remedy should the defendant neglect, or omit, to take action in the matter.

Rule 11 (7) makes express provision on the subject of the present practice, as follows :

Service of notice of an appearance, or retainer generally, by an attorney for the defendant, shall, in all cases, be deemed an appearance. And the plaintiff, on filing such notice, at any time thereafter, with proof of service thereof, may have the appearance of the defendant entered as of the time when such notice was served.

As to the expediency and effect of this last proceeding by the plaintiff, in cases where a removal into the United States courts may be applied for, see preceding section.

Where the summons is for a money demand, on contract, and the demand so made is correct, and no actual defence is contemplated, the giving of notice will be an useless ceremony.

The same will usually be the case where the defendant is a mere nominal or formal party, and has been served with the notice of no personal claim, prescribed by section 131. If he defend under such circumstances, he does so at the risk of costs if his defence be adjudged unreasonable. If suspicious of the plaintiff's proceedings, or desirous of obtaining information, he may appear in the first instance without incurring that risk, provided only he refrains from putting in an answer.

Where, however, no such notice is served, and the summons is one for relief, or where, on an ordinary money demand, that demand is incorrect, and the complaint unverified, the precaution is one that should never be omitted. Even though he may really contemplate no actual defence, the defendant gains by it the power of supervising the plaintiff's proceedings on the assessment of his claim, or on the application for the judgment under section 246, and also during the proceedings consequent on that application, if any.

It has been held that service of such notice, even if made after actual default to answer, will still entitle the defendant to the notice of assess-

ment provided for by section 246, subdivision 1, provided such service be made before the actual entry of judgment. See *Abbott vs. Smith*, 8 How., 463 ; approved, and the case next cited stated to be substantially overruled, in *Carpenter vs. New York and New Haven Railroad Company*, 11 How., 481 (483). The contrary conclusion is come to in *White vs. Featherstonhaugh*, 7 How., 357. All are special term decisions, the point coming up for adjudication directly in the last, and collaterally in the other cases.

To be effectual in entitling the defendant to notice of the plaintiff's application for judgment in cases where the summons is for relief, the notice must, however, be served before default suffered. See section 246, subdivision 2. And it is the safer course to do so in all cases.

To enable a party to retain and appear by an attorney, he must, as prescribed by the Revised Statutes (2 R. S., 276, section 11), be of full age and sound mind. If deficient in either of these requisites, the proceeding will be invalid. See, as to the case of an idiot, *Rogers vs. McLean*, 31 Barb., 304, where an appearance entered by a foreign guardian, without service on the defendant himself, was declared to be a nullity.

An infant must, in all cases, appear by his guardian *ad litem*, and a lunatic by his committee. Before the amendment of section 114, in 1851, a *feme covert* could only intervene by her next friend ; but, since that amendment, she may instruct her attorney or counsel in the ordinary manner, in those cases in which she is authorized to sue or be sued alone. See, as to the practice before that amendment, *Phillips vs. Burr*, 4 Duer, 113.

In *Eckerson vs. Vollmer*, 11 How., 42, it was held that, in a case where the wife was joined with the husband, the latter is bound, where the action does not concern her separate property, to put in a joint appearance for both, even although the summons was served on him only.

As to the peculiar right of a landlord, or any person having any privity of estate with him or with his tenant, to enter an appearance, either with or without such tenant, in a case where the latter has been served with process in ejectment, see 2 R. S., 342, 343, section 17.

Provision is also made, in respect to the service of notice of appearance in proceedings to compel the determination of claims to real estate, by chapter 511 of Laws of 1855, p. 943, section 2, amending the provisions of the Revised Statutes on that subject.

A defendant not actually served may appear voluntarily, in a case where judgment is prayed against him, and that step is really necessary for the protection of his interest. *Higgins vs. Rockwell*, 2 Duer, 650 ; *Lyle vs. Smith*, 13 How., 104. In case he does so, and discloses

a hitherto unknown defence, which will be so far fatal to the plaintiff's action, the latter may be allowed to discontinue without costs. *Wellington vs. Classon*, 18 How., 10; 9 Abb., 175; *Waterbury Leather Manufacturing Company vs. Krause*, 9 Abb., 175, note. But where such defendant has really no interest which needs protection, the appearance will be a nullity, and the court will not recognize it. *Tracy vs. Reynolds*, 7 How., 327.

As to the effect of an unauthorized appearance, and as to when it will or will not be effectual to sustain consequent proceedings, see *Bogardus vs. Livingston*, 7 Abb., 428; *Williams vs. Van Valkenburg*, 16 How., 144; *Binney vs. Le Gal*, 19 Barb., 592; 1 Abb., 283; *Blodgett vs. Conklin*, 9 How., 442:

As before stated, any act on the part of the defendant acknowledging that the court has general jurisdiction of the controversy, or invoking the exercise of that jurisdiction, will, unless a special reservation be made, amount to an appearance, and be equivalent to a regular notice.

Thus, the service of a notice of motion in the cause, signed by the attorney for the defendant, has been held to amount to a notice. *Kelsey vs. Covert*, 16 How., 92; 6 Abb., 336, note. Or, an appearance and argument upon a motion for an injunction. *Cooley vs. Lawrence*, 5 Duer, 605; 12 How., 176. Or, the obtaining and service of an order extending the time to answer. *Quin vs. Tilton*, 2 Duer, 648. See, likewise, citation in the previous section.

And the signature of a notice of motion by the attorney, in general terms, may have the effect of a general appearance, as regards the waiver of technical defects.

To secure the right to make a motion on that ground, the signature to the notice should be special, and should expressly state that the appearance is restricted, and for the purposes of the motion only. *Dole vs. Manley*, 11 How., 138; *Baxter vs. Arnold*, 9 How., 445. See, however, the more liberal doctrine upon this subject, to the effect that an ordinary notice of appearance served with motion-papers on the ground of irregularity, must be held as a notice only for the purposes of the motion, as held in *Bierce vs. Smith*, 2 Abb., 411.

There can be no doubt, but that the more prudent and proper course will be to add a special and limited form of signature to every notice given under such circumstances.

Duly given, an appearance entitles the defendant, under section 414, to the usual notices of all ordinary proceedings in the cause, whether he defend or not. *Saltus vs. Kip*, 5 Duer, 646; *Walsh vs. Kiershad*, 3 Abb., 418. But not, it would seem, to those which are not ordinary proceedings in the cause, such as an *ex parte* application for an injunc-

tion. *Becker vs. Hagan*, 8 How., 68. It effects, on the other hand, a complete submission to the jurisdiction, so far as personal objections are concerned. *Dart vs. Farmers' Bank of Bridgeport*, 27 Barb., 337. And, as regards the summons, it is equivalent to a personal service, so as to entitle the plaintiff to take judgment by default, if not followed up in due time by the service of an answer. Section 139.

It is, of course, equally competent for a party to give notice of appearance in person, if he so think fit. Whether so given, or given by the attorney, the residence of the party, or the place of business of the attorney, should, in all cases, be indicated upon the face of the notice, in order to entitle him to service of papers in the usual manner, and not by mail. See rule 10 (5).

(a.) DEMAND OF COPY OF COMPLAINT.

Thus far the subject of appearance has been treated in its general aspect, and as applicable to all cases in common, whether the complaint has, or has not, been served with the summons.

When the summons has been served alone, the notice should be accompanied by a demand of a copy of the complaint. This proceeding is expressly provided for by section 130. It usually accompanies and forms part of the ordinary notice of appearance. It must be in writing, and must specify a place within the state where such copy may be served. Where the defendant appears by attorney, the latter is, of course, the proper party to make it (see section 417). See *Mercier vs. Pearlstone*, 7 Abb., 325.

The demand must, under section 130, be made within twenty days after service; whether at the outset or the close of that period, is, of course, a question of expediency. If it be wished to gain time, service on the last day will, of course, involve a corresponding delay of the period at which the plaintiff will be entitled to claim an answer, or to take judgment.

In case the plaintiff complies with the demand, and serves the copy, the defendant's time to answer runs from the date of that service, without regard to the original service of the summons. It is clearly, therefore, his interest to do so, as speedily as possible. An attorney, representing several defendants, is entitled to only one copy (see section 130).

Under the Code of 1849, this proceeding could only be taken within ten days after service, and service of the complaint after that time was not obligatory, nor was any time limited within which the copy demanded was to be served. On the amendment of 1851, these defects were remedied. See, as to the practice previous to that amendment, *Bennett vs. Delliker*, 3 C. R., 117; *Engs vs. Overing*, 2 C. R., 79;

Littlefield vs. Murin, 4 How., 306 ; 2 C. R., 128 ; *Walrath vs. Keller*, 2 C. R., 129 ; *Ecles vs. Debeand*, 2 C. R., 144 ; *Colvin vs. Bragden*, 5 How., 124 ; 3 C. R., 188 ; *Munson vs. Willard*, 5 How., 263 ; 3 C. R., 250 ; *Luce vs. Trempert*, 9 How., 212. See also, as to a supposed necessity of filing the complaint within the twenty days allowed to answer, *Tuomey vs. Shields*, 9 L. O., 66.

A general notice of appearance, requiring all papers in the action to be served on the attorney appearing, has been held to be a sufficient demand of a copy of the complaint. *Walsh vs. Kiershad*, 8 Abb., 418.

It is essential that a defendant, if not served at the outset, should make such a demand before preparing his answer. If he assumes to do so without knowledge of the contents of the complaint, it will be irregular, and a fraud upon the court. *Phillips vs. Prescott*, 9 How., 430. In that case the complaint was actually not drawn at the time. Where drawn and filed, so that the defendant may acquire actual knowledge of the contents, it seems as if this rule could scarcely apply.

Where two demands are made by the same attorney, the first served will govern the time within which service of the complaint will be necessary. *Luce vs. Trempert*, 9 How., 212.

After demand made by the attorney, service upon the party will be wholly irregular ; and this rule holds good also as to an amended complaint. *Mercier vs. Pearlstone*, 7 Abb., 325.

The provisions of section 130, only apply to cases where the summons has been personally served. Where it has been published, the defendant cannot make a demand of this description. His course is to apply to the court for an order for service and time to answer. *Mackay vs. Laidlaw*, 13 How., 129.

A voluntary service of the complaint by the plaintiff, not accompanying the summons, but subsequently, in connection with other proceedings, will, it seems, be of no operation in extending the defendant's time to answer, or preventing the plaintiff from entering up judgment, at the expiration of twenty days from the original service. *Van Pelt vs. Boyer*, 7 How., 325.

Of course, if any objection exists to the summons, or on the ground of deficient service, the defendant's attorney must not give notice of appearance, until the question shall have been decided. See last section, and cases there cited. If, pending the motion for that purpose, the time for answering should be drawing out, he may apply for a stay of all proceedings until a decision of the motion, and some reasonable time after, but without prejudice to the questions raised upon the motion. Such an order as this would doubtless be held not to be a recognition of the validity of the plaintiff's proceedings.

161. *Motions Consequent on or Preliminary to Appearance.*

(a.) MOTION ON GROUND OF DEFECTS IN SUMMONS.

This proceeding must of necessity precede a general, or be accompanied by a qualified appearance or notice, specially stating that the attorney acts for the purpose of the motion only. The omission of this precaution will, as before noticed, be fatal to the application.

This will be the proper form of proceeding to raise the objection, either that the summons is irregular upon its face, or that it has been imperfectly or irregularly served. *Nones vs. Hope Mutual Insurance Company*, 8 Barb., 541; 5 How., 96; 3 C. R., 161; *Van Rensselaer vs. Chadwick*, 7 How., 297.

So also where the service has been fraudulently effected. *Bulkeley vs. Bulkeley*, 6 Abb., 307.

Subsequent receipt and retention of the summons may, however, if brought home to the defendant, have the effect of defeating the motion.

Wallis vs. Lott, 15 How., 567. So also may the form of the defendant's application, if too broadly made, or in a manner which amounts to a recognition that he has been effectually brought into court. *Vide Allen vs. Allen*, 14 How., 248; *Dole vs. Manly*, 11 How., 138.

(b.) MOTION TO DISMISS FOR WANT OF SERVICE.

If, after demand made, the plaintiff fail to serve his complaint in due time, the defendant will be entitled to move for a dismissal of the action on proof of such demand made, and of non-compliance within the prescribed period.

Service within that period, is, under the present measure, absolutely obligatory; the word "must," having been substituted on the amendment of 1851, for "may," employed in the measure of 1849. The defendant's attorney will not be bound to accept service of a copy, served after the time has elapsed. *Mandeville vs. Winne*, 5 How., 461; 1 C. R. (N. S.), 161. He is entitled to give his notice of motion to dismiss, immediately the plaintiff is in default in this respect; and, if the copy be served after that notice, the not returning it immediately will not be considered as a waiver of the objection. *Baker vs. Curtiss*, 7 How., 478. If, however, the complaint had been served before such notice, and had been either retained or returned by the defendant's attorney, without giving notice of the objection to receive it, it was considered, in the same case, that the doctrine of waiver might have been applied.

See last section and cases there cited, as to when the right of a defendant, not served, to appear voluntarily, will or will not be recognized.

If he does so unnecessarily he cannot make a motion of this description. See *Tracy vs. Reynolds*, 7 How., 327, there referred to.

A similar motion was recognized under the section, as it stood before the amendment of 1851, fixing a definite period, the only question being as to what would or would not be a reasonable time for such service after demand. The period of twenty days, now fixed by the amendment, was, in the majority of those cases, fixed as being the most reasonable. See *Littlefield vs. Murin*; *Walrath vs. Killer*; *Ecles vs. Debeand*; *Colvin vs. Bragden*, and *Munson vs. Willard*, cited in last section.

In the cases last alluded to, a "*locus pœnitentiæ*" was given to the plaintiff. Under the present measure that privilege can no longer be depended upon, and, therefore, special care should be taken by the plaintiff to complete and serve his complaint within the twenty days, in all cases. If he cannot do so, he should, on no account, omit to apply to the court for an order extending the time allowed, and this application should be made before the time in question has expired. If this precaution be neglected, the order cannot afterwards be obtained *ex parte*, or, if obtained, will be set aside. *Stephens vs. Moore*, 4 Sandf., 674.

As to the motion on this ground falling properly within the powers of the court, to dismiss, for want of due prosecution, as conferred by section 274, see *Colvin vs. Bragden* and *Baker vs. Curtis*, above cited.

The effect of service by mail on the fixing of time for a service of this nature, must not, of course, be lost sight of. If the demand be served by mail, it will probably be held to have the usual effect of doubling the plaintiff's time for service of a copy pursuant to such a demand.

The motion for this purpose must be made in the district, or in a county adjoining that in which the summons states the complaint will be filed. That county will be presumed to be the county of venue. *Johnston vs. Bryan*, 5 How., 355; 1 C. R. (N. S.), 46.

(c.) MOTIONS ON GROUND OF DEFECTS IN SUMMONS AND COMPLAINT.

When the complaint is served in pursuance of demand, as above, or where it has been served with the summons in the first instance, this class of motions will be appropriate, and the present will be the proper time for making them.

The objection on the ground of the misnomer of defendant will properly be taken in this form, by motion to set aside the summons and complaint, and not by answer, the proceeding being in the nature of the former plea in abatement. *Elliott vs. Hart*, 7 How., 25. See also *Gardiner vs. Clark*, 6 How., 449, there referred to. *Dole vs. Manley*, 11 How., 138. In *Miller vs. Stettiner*, however, 22 How., 518, it was considered that a motion of this nature was not, and that a plea in

abatement was the proper remedy. The court did not pass, however, upon the point as to whether a motion to correct, or a motion to dismiss the complaint only, on the ground of variance, might not be admissible. See also, as to a defence containing matter purely in abatement, in connection with one on the merits, *Van Buskirk vs. Roberts*, 14 How., 61.

The present will also be the proper stage for making a motion for the same purpose, on the ground of variance between the summons and complaint, the preponderance of decisions leading to this conclusion, *i. e.*, that where such variance is established, it is the complaint, and not the summons, which is defective, the latter being the proceeding first in order, and the motion should be framed accordingly. See this point fully considered, and numerous decisions cited heretofore, under the head of *Summons*, book III., section 51. See also book VII., section 139. The right to make a motion of this description will be waived by demurring. See *Campbell vs. Wright*, 21 How., 9.

A motion to set aside will also be the appropriate remedy in a case where an action has been commenced on a judgment without obtaining the previous leave of the court, as prescribed by section 71. *Finch vs. Carpenter*, 5 Abb., 225.

A motion of this nature, or for a stay of proceedings, will also be appropriate in the case of suit brought by or against a receiver, or on behalf of or against a lunatic, without previous leave of the court. And, where the objection is only apparent on the face of the complaint, it will not be waived by a previous appearance and demand of a copy. *Vide Taylor vs. Baldwin*, 14 Abb., 166.

It was also held in *Shepard vs. Walker*, 7 How., 46, that the now untenable objection that a suit in chancery is brought for a claim of less than one hundred dollars, was properly raised in this manner.

Mere technical objections on the ground of irregularity will not, however, be favored. *Van Namee vs. Peoble*, 9 How., 198; *Yates vs. Blodgett*, 8 How., 278; *Van Benthuyssen vs. Stevens*, 14 How., 70. See also, as to answer, *Wilkin vs. Gilman*, 13 How., 225.

Where a complaint in ejectment wholly failed to describe the property claimed with sufficient certainty, as required by the statute, a motion for a dismissal was held maintainable at the trial, and probably^t might be made at the outset. *Budd vs. Bingham*, 18 Barb., 494.

So, where a complaint against a foreign corporation wholly failed to state the facts necessary to confer jurisdiction under section 427 of the Code, a motion to dismiss was granted. *House vs. Cooper*, 30 Barb., 157; 16 How., 292.

As to a motion that the complaint be made more definite and certain, see *Waters vs. Clark*, 22 How., 104.

The applications above noticed have all reference to a total discrepancy or deficiency in the plaintiff's proceedings. Those grounded on partial defects will also be in order at this stage, such as applications under section 160, on the ground of irrelevancy, redundancy, or uncertainty. They must, in fact, by the special provisions of rule 50 (40), be noticed before demurring to, or answering the pleading sought to be impeached, and within twenty days from the service thereof. If not, they will be waived. *Vide Campbell vs. Wright*, 21 How., 9. No special appearance or special signature to the notice will be admissible; the proceeding being one in the ordinary progress of the cause, and not preliminary in its nature.

The nature and characteristics of this class of motions have been already fully entered upon in chapter IV. of book VI. It will therefore be wholly unnecessary to refer to them on the present occasion.

It remains to notice, before passing on to the next section, a few other applications more peculiarly cognizable at this stage of the action.

(d.) MOTION TO STAY.

A motion of this nature, on the ground of irregularity or oppressiveness in the proceedings of the plaintiff, will be appropriate at this period. See, as to such a motion, *Ten Broeck vs. Reynolds*, 13 How., 462; *Lynch vs. Cunningham*, 6 Abb., 94. See, however, as to such an application, on the ground of non-payment of the costs of a former action, *Davis vs. Duffie*, 5 Duer, 688; 3 Abb., 363.

See also, as to a motion to stay proceedings in an action against a receiver, commenced without leave of the court, *Taylor vs. Baldwin*, above cited.

(e.) MOTION TO ELECT.

Of a similar nature is an application that the plaintiff elect between inconsistent causes of action, or in the event of his pleading being bad for duplicity, or want of due separation of several causes of action, as prescribed by section 167.

In the latter case a motion to strike out, or to compel him to make such election, will be the appropriate remedy. The objection cannot be taken by demurrer, see *Gooding vs. McAllister*, 9 How., 123; *Young vs. Edicards*, 11 How., 201; *Atwell vs. Le Roy*, 15 How., 227; 4 Abb., 438. See also, *Hess vs. Buffalo and Niagara Falls Railroad Company*, 29 Barb., 391 (395); *Cheney vs. Fisk*, 22 How., 236.

But such a motion will not be granted except upon the assumption that the principle sought to be applied, is well settled law. If there be any doubt upon the point, the pleading should not be interfered

with, and the relief to be granted, left to be determined upon the trial. *Redmond vs. Dana*, 3 Bosw., 615.

(f.) OTHER PRELIMINARY APPLICATIONS.

In ejectment cases, the defendant may require the production of the authority of the plaintiff's attorney, to commence the action, as provided by the Revised Statutes, 2 R. S., 305, 306, sections 17 to 21, the application being made *ex parte*, at any time before pleading, on affidavit that no proof of such authority has been served. See *Howard vs. Howard*, 11 How., 80.

Under circumstances calling for such interference, the court will also entertain an application that the residence and occupation of the plaintiffs, and also the authority of their attorney be disclosed: see *Vincent and Forty-five Others vs. Vanderbilt*, 10 How., 324; *The Ninety-nine Plaintiffs vs. The Same*, 1 Abb., 193; Decision of Supreme Court, p. 196; Decision of Superior Court, p. 199; also reported, 4 Duer, 633. See likewise, *Board of Commissioners of Excise vs. Purdy*, 22 How., 506; 13 Abb., 434. See form of order on such motion, as given, 1 Abb., 202; 4 Duer, 638.

But, when a responsible attorney appears, the court will not ordinarily inquire into the facts of his authority. *Republic of Mexico vs. Arrangois*, 5 Duer, 634; 1 Abb., 437. See *same case*, 3 Abb., 470 (473).

(g.) MOTION IN RELATION TO PARTIES OR INTERPLEADER.

A motion to bring in parties omitted by the plaintiff, will also be properly entertainable at this stage of the cause. See this subject heretofore fully considered, and the decisions in point cited under the head of *Parties*, book II., section 39.

So also will proceedings by a defendant standing in the position of a mere stakeholder to get rid of his responsibility, and be dismissed from the cause, by means of an order for interpleader obtained under section 122. This subject has also been fully considered, and the decisions in point cited, in the same book, section 40.

The application in the former case, if made by a party to the suit, must be brought forward by motion in the ordinary form, the facts necessary to show the title of the party to the relief asked for, being shown by affidavit. If made by a stranger to the record, a verified petition will be the more advisable form, which may or may not be supported by collateral affidavits. Notice must of course be given of such application, in the ordinary form, to all the parties.

A motion for the purpose of interpleader, must be made before answer (section 122). It must be grounded upon affidavits, showing upon its face that "a person not a party to the action, and without col-

lusion with the applicant, makes against him a demand for the same debt or property ;" this allegation should especially be made in terms, and a sufficiently full and specific statement of the facts should accompany it, showing clearly the circumstances of the case, the nature of the claim made, and the fact that the applicant has no personal interest in, or personal liability in respect of, the fund which is the subject of the motion.

The application must be made upon due notice to the claimant who is sought to be brought in, and also to the adverse party. The relief sought, is to substitute such claimant in the place of the applicant, as a party to the action, and to discharge the applicant himself from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct. The notice of motion should be framed accordingly, asking also for payment of his costs, with the usual demand for further relief.

If the motion be granted, the applicant must see that the conditions of the order, as to the payment of the money, or delivery of the property, as directed by the court, are strictly and immediately complied with, as, until then, his discharge from the action will not be complete.

He will, as a general rule, be entitled to retain or to be paid his costs, and should make application to that effect at the time of the motion, and see that proper provision is made on the subject in the order. See *Willetts vs. Waite*, 13 How., 34; *Miller vs. De Peyster*, 1 Abb., 234.

On the order being granted, it will usually be necessary for the plaintiff to amend his complaint, and the substituted party will of course be entitled to demand and obtain a copy, and to have time to put in his answer in the usual course. It may be doubtful, however, whether, in strictness, he can make that demand, under section 130; and the better course will be for him to apply at the time of the motion, or afterwards, if necessary, for a special direction of the court upon the subject.

§ 162. *Proceedings to Obtain Information.*

(a.) DEMAND OF ACCOUNT OR PARTICULARS.

Although the complaint be perfect in its form, it may, in certain cases, be deficient in the necessary information for the defendant's guidance, in cases where an account is alleged, and the plaintiff avails himself of the permission conferred by section 158, and omits to state the items of it. In this case, the defendant should forthwith demand a copy of such account, under the powers of that section.

The demand so made must be in writing. The plaintiff must comply with it, and deliver a copy of the account alleged by him, within ten days, and the copy so furnished, must, if his pleading be verified, be also verified by his own oath, or by that of his agent or attorney, if within the personal knowledge of such agent or attorney. That oath must be to the effect, that the party so verifying, believes such account to be true.

The copy so delivered must, of course, contain all proper items. If defective, the court or judge, or a county judge, may order a further account; and, if so ordered, such further account must be delivered in the same manner.

The penalty for non-delivery in either case is, that the party so making default be precluded from giving evidence of such account.

And, by the same section (158), it is lastly provided, that the court may, in all cases, order a bill of particulars of the claims of either party to be furnished.

This last provision gives full power to the defendant to obtain from the plaintiff all proper information as to the items, details, or amount of his claim.

The Code of 1849 was defective, in confining the defendant's right, in such respects, to cases in which an account was alleged in the complaint. The amendment of 1851 cured this defect, and the defendant may now apply to the court in all proper cases.

Whenever, therefore, the statement of the plaintiff's case is too general, and the details require to be given, in order to enable the defendant to meet that case in a proper manner, he should apply forthwith for an order of this description, which may be obtained *ex parte*, and without any further evidence than that afforded by the pleading itself; and, if the plaintiff meet this requisition evasively, a second order, for a further and more particular bill, should be obtained. The plaintiff possesses similar rights as against the defendant, in cases where a set-off is claimed, or a counter-claim is made by the latter.

And, if in the answer an account is alleged, under the enabling provision of section 158, a demand may be made for it in the same manner as in the case of a complaint.

Special provision is made by the Revised Statutes, 2 R. S., 341, section 16 (saved by section 455 of the Code), enabling a defendant in ejectment to obtain a particular description of the premises claimed by the plaintiff. Under the preceding sections 13 to 15, inclusive, he is also empowered to have a survey of those premises made, if necessary. See, however, as to a complaint wholly deficient in giving a proper description, *Budd vs. Bingham*, 18 Barb., 494.

If the account or bill of particulars be defectively verified, it will no

doubt be competent for the defendant to return it, as in other cases of irregularity, with notice of the objection. If the defect be one of substance or mode of statements, a motion for a further account or further bill will be the proper course. If any extrinsic facts be necessary to show the defect complained of, those facts must be stated, and the defect made apparent upon the moving affidavit. If the defect be patent upon the face of the paper itself, extrinsic proof will of course be unnecessary. The motion must be made in the usual course, grounded on the complaint, or complaint and answer, if the motion be against a defendant, the demand or order for delivery, on the defective paper itself, proof in the usual manner of service of the demand or order, and of the paper impeached, and further proof of any extrinsic facts as above, when necessary. See generally, as to the right to make such a motion, *McKinney vs. McKinney*, 12 How., 22.

The case of *Wiggins vs. Gans*, 3 Sandf., 738; 1 C. R. (N. S.), 117, will, though not strictly in point, afford a clearer indication as to what a court would clearly consider to be an insufficient compliance with a demand or order when made.

In *Kellogg vs. Paine*, 8 How., 329, the following is stated as the criterion: A party setting up an account is bound, when called upon, "to specify the several items, stating, with all practicable particularity, the date and extent, and general character of each item, as he intends to have it allowed at the trial. The account, like the pleading, should state the facts which the party pleading proposes to establish by proof, if controverted." If it fall short of this, it will be defective.

Where the particulars applied for are actually or presumptively within the personal knowledge of the applicant himself, he cannot claim, as a matter of right, that the defendant deliver them, and the latter will not be bound to do so, unless under special order, upon special necessity shown. *West vs. Brewster*, 1 Duer, 647; 11 L. O., 157; *Depew vs. Leal*, 5 Duer, 663. See also, *Young vs. De Mott*, 1 Barb., 30, as to imposing an application for discovery as a condition precedent to the application for such an order. See likewise, as to allowing time for that purpose prior to granting a final order for exclusion of evidence, *Kellogg vs. Paine*, 8 How., 329 (333).

Nor can a plaintiff, on giving a bill of particulars, be compelled to furnish those of offsets or payments, with which he has volunteered to credit the defendant. *Williams vs. Shaw*, 4 Abb., 209.

The right to demand particulars does not extend to compel a statement of items which may enter into the computation of damages, in an action for their recovery. *Murphy vs. Kip*, 1 Duer, 659.

Nor, in an action for conversion of property, can the plaintiff be compelled, as of course, or of right, to deliver a particular description of the

property in respect of which his claim is made. The making of an order rests in the discretion of the court. *Blackie vs. No Bosw.*, 681.

The right to demand a further, and more particular bill, extended and is exercisable in, proceedings to foreclose a mechanic's lien. *Brown vs. Wood*, 2 Hilt., 579.

As to this being the proper form of procedure where the complaint or other pleading is merely deficient in specification of details, and in certainty of statement of a claim when made, see heretofore, the head of *Motion for Uncertainty*, book VI., chapter IV., sections and cases there cited.

On the other hand, a demand of this nature will be construed as an admission that the pleading is otherwise sufficient, and as waiving the right to make a motion on that ground. See *McKinney vs. McK*, 12 How., 22.

When delivered, a bill of particulars limits the amount of recovery of the party pleading, and he cannot introduce evidence of claims not embraced in it. *Bowman vs. Earle*, 3 Duer, 691. It is regarded as an amplification of the pleading to which it relates, and is to be construed as forming a part of it (694). It may, however, in the same manner as a pleading, be made to conform to the facts proved. See *Barth vs. Walther*, 4 Duer, 228. And, doubtless, is, in like manner, amendable, by leave of the court.

And, when furnished, it is subject to the same rules as a plea, with regard to the disregard of immaterial variances between it and the evidence given, when there is no proof that the adverse party has been surprised or misled. *Seaman vs. Low*, 4 Bosw., 337.

The case of delay in furnishing a particular or account when demanded has, in one respect, been left unprovided for. An order, when granted, has no operation either as a stay of proceedings or as an extension of the applicant's time to answer. A special application must be made for either purpose. This may, of course, be applied for separately, but a more convenient course will usually be to make a demand for that purpose as part of the original application. Nor will a mere stay of proceedings effect, *per se*, an extension of the time to plead. An extension must be specially applied for, and the special affidavit prescribed by rule 22 (20), presented upon that application. *Platt vs. Townsend*, 4 Duer, 668 ; 3 Abb., 9.

In *Yates vs. Bigelow*, 9 How., 186, it was held that a further account of this nature may be enforced by motion, after all the pleadings have been put in, its chief object being to enable the defendant to prepare for the trial.

The order for a further bill of particulars should show upon its face

the points in which the former one was defective, and as to which a further specification is required. *Kellogg vs. Paine*, 8 How., 329.

And, in the same case, it was held to be the better practice for a party who intends, under the provisions of the section, to preclude his adversary from giving proof of his demand, on the ground of a default of the above nature, to apply for an express order to that effect, on motion, before the trial, so as to have the question previously settled. *Vide Graham*, 519, there cited.

(b.) DISCOVERY, &c.

The next point to be considered is, as to whether the inspection of any books, papers, or documents, in the possession or under the control of the plaintiff, is necessary or advisable, on the part of the defendant, for the purpose of enabling him to prepare his answer in the action. If so, he possesses, under section 388 of the Code, the power of enforcing that inspection, and obtaining a copy, or permission to take a copy of the documents inspected, by means of an order of the court, which order, as before remarked, stays all proceedings, and extends the time to answer until it is either complied with or vacated. The measures for this purpose, and the cases on the subject, will be found fully treated of hereafter, in connection with the proceedings between issue and trial.

Of a similar nature are the powers conferred by the chapter of the Code in reference to the examination of parties, chapter VI. of title XII. of part II., and particularly by section 391, in that chapter. In *Chichester vs. Livingston*, 3 Sandf., 718; 1 C. R. (N. S.), 108, doubts were entertained as to whether this proceeding could be taken before issue joined, unless upon leave specially obtained from the court. This opinion is, however, expressed very doubtfully, and with an express reservation, that cases might arise, where the ends of justice required such examination, before answer or reply; and *Miller vs. Mather*, 2 C. R., 101, is direct authority to the contrary. It was there held that "such examination, being provided by the Code as a substitute for the former bill of discovery, is governed by the rules applicable to such bills; and a discovery, by bill of discovery, might be had at any time during the progress of the suit." The latter view seems the correct one. Under section 391, the examination may be had "at any time before the trial, at the option of the party claiming it;" and all that is there prescribed, is a previous notice to the party to be examined, and any other adverse party, of at least five days, unless by special order of the court. There is nothing in this section, or in any other part of the chapter above referred to, to qualify the above provision; and, therefore, it appears to be clear that, in cases where an examination of the plaintiff is absolutely essential for the purposes of the defence, that

examination may be had in this manner, before answer put in, the purposes of that answer. Of course, this proceeding will be taken without due deliberation, because the chapter in question contains no provision enabling the defendant to repeat such examination, when once had. At the actual trial, however, the adversary may, it would seem, be called as a witness, in all cases; though, if called, his previous examination cannot then be used. The principles in relation to the above measure, on the part of the defendant, will also be found fully considered, and the cases cited in detail, in connection with the proceedings between issue and trial.

§ 163. *Precautionary Proceedings.*

The next point to be noticed, is that of certain precautionary proceedings which the defendant is at liberty to take, with reference to the further prosecution of the suit by the plaintiff.

(a.) SECURITY FOR COSTS.

The first of these is the defendant's power to require security for costs, in certain cases.

This is a matter of statutory regulation, the provisions as to which will be found in title II., chapter X., part III. of the Revised Statutes, 2 R. S., 620, 621.

Under section 1 of that title, the defendant may require the plaintiff to file security for the costs of the suit or proceeding, when commenced in any court.

1. For a plaintiff, not residing within the jurisdiction of the court, or for several plaintiffs who are all non-residents; or,

2. For, or in the name of the trustees of any debtor; or

3. For, or in the name of any person being insolvent, who shall have been discharged from his debts, or whose person shall have been liberated from imprisonment, pursuant to any law, for the collection of any debt contracted before the assignment of his estate; or,

4. For, or in the name of any person committed in execution for crime; or,

5. For, or in the name of any infant whose next friend has not given security for costs.

If, too, after the commencement of the suit, the plaintiff, or all plaintiffs shall subsequently become classifiable under Nos. 1, 3, or 4 of the above provisions, the defendant may likewise require such security under section 2. As to actual non-residence being the criterion, without regard to any future intentions of the party, see *Gilch vs. Barnard*, 1 Bosw., 657; 7 Abb., 19.

In addition to the provisions above noticed, there is also a special power contained in section 317 of the Code, empowering the court to require the plaintiff to give security for costs, in actions prosecuted or defended by executors, or other parties standing in a fiduciary relation.

The giving of security for costs is also imposed as a condition on suits brought by a foreign corporation. See section 1, article I., title IV., chapter VIII., part III., of the Revised Statutes; 2 R. S., 457, § 1. An omission to do so in the first instance is, however, only an irregularity, and may be cured by subsequent compliance with the statute. See *Hartford Quarry Company vs. Pendleton*, 4 Abb., 460; or it may be waived. *Merchants' Bank vs. Mills*, 3 E. D. Smith, 213; *Perse & Brooks' Paper Works vs. Willett*, 14 Abb., 119.

It has been held also that the giving the ordinary undertaking, on the part of the plaintiff, on taking property in replevin, satisfies this provision, and that he will not be obliged to file a separate bond for that purpose. *Wisconsin Marine and Fire Insurance Company Bank vs. Hobbs*, 22 How., 494. See however, generally, *per contra Boucher vs. Pia*, 14 Abb., 1.

By section 3 of the title now immediately in question, title II., chapter X., part III., it is thus provided:

§ 3. The order to file such security, and that all proceedings on the part of the plaintiff be stayed until such security be filed, and the sureties shall justify, if excepted to, may be made by the court in which the action is pending, or by any judge thereof in vacation, upon due proof, by affidavit, of the facts entitling the defendant thereto.

Section 4 provides that such security shall be given in the form of a bond, in a penalty of at least \$250, with one or more sufficient sureties, to the defendant, conditioned to pay, on demand, all costs that may be awarded to the defendants in such suit.

Under section 5 such bond is to be filed with the clerk of the court, and notice thereof is to be given to the defendant or his attorney. Within twenty days after service of that notice the defendant may except to the sufficiency of the sureties, by giving notice of such exception to the plaintiff's attorney.

The form of justification is thus specially provided for:

§ 6. Within twenty days after such notice of exception, the sureties shall justify, by an affidavit, that they are worth double the penalty of such bond, over and above all debts; of which affidavit a copy shall be served on the defendant or his attorney. Such justification shall operate to discharge the order to stay proceedings.

In cases in which the defendant is entitled to require security at the

commencement of the suit, the attorney for the plaintiff is section 7, liable for such costs to an amount not exceeding \$100 security be filed, whether required by the defendant or not.

But, under section 8, he may discharge himself from such liability by filing security as above, without being required to do so, or giving notice to the defendant or his attorney.

The mere obtaining of an order by the defendant does not discharge the attorney from such liability, in case the security required is not perfected, even though the defendant proceed without waiting for the result. The demand of such costs does not, however, entitle the defendant to process against the attorney in the first instance. That process can only be founded on a demand after the order is made, and the service of a certified copy, and is not obtainable until the expiration of the twenty days allowed by rule 57 for that purpose. *Boyce vs. Boyce*, 8 How., 495. In the proceedings for this purpose, the original order to require security must be affirmatively shown. *Moir vs. Brown*, 8 How., 270. Where the plaintiff, originally resident, becomes non-resident during the progress of the cause, the attorney is under no liability though he subsequently continue to carry on proceedings in the cause. See *Long vs. Hall*, 1 C. R. (N. S.), 114; *Moir vs. Brown*, *supra*.

In *Gardner vs. Kelly*, 2 Sandf., 632; 1 C. R., 120, it was contended in opposition to a motion for this purpose, that the above provisions were repealed by section 303 of the Code. The court held, however, that such was not the case, that those provisions were still subsisting, and that the defendant was, accordingly, entitled to such security under them.

The affidavit necessary for such purpose is short and simple; all that is necessary being to state the existence and stage of the suit, and to bring the case, by clear and definite allegations, within one of the categories mentioned in section 1 or 2, introducing in the allegation the precise words of the subdivision which is relied on.

The proceeding is *ex parte*, and no notice of the application need be given to the plaintiff.

The order, when applied for in term time, should properly be entitled as at special term. The application is, under section 3, to be made to the court; a judge thereof is only strictly entitled to make the order on vacation.

The order should properly be framed in the alternative according to the old practice, *i. e.*, that the plaintiff file such security within two days, or show cause why such security should not be required, although the statute does not strictly prescribe that it be made in this form. The court should proceed to provide that, in the mean time and until such security be filed and the sureties shall justify, if excepted to, or until such cause

be shown, all proceedings on the part of the plaintiff be stayed. See *Bronson vs. Freeman*, 8 How., 492; *Colt vs. Wheeler*, 12 Abb., 388.

It must be forthwith served upon the plaintiff or his attorney in the usual manner, and accompanied by a copy of the affidavit. The twenty days allowed to the plaintiff to file security, or except to the sureties, will run from the date of such service.

The bond as security for costs need not follow the exact words of the statute. It will be a sufficient compliance with it, if it be equally favorable to the defendant, and if the spirit of the statute is carried out by it. *Smith vs. Norval*, 2 Sandf., 653; 2 C. R., 14. It must, however, provide that the obligors pay on demand; a condition making the costs payable by the plaintiff will be bad. See *Tallmage vs. Wablis*, 1 How., 100.

The bond, when executed, should be acknowledged before a commissioner. •Rule 6. See also *Colt vs. Wheeler*, 12 Abb., 388.

It seems to be competent for the defendant to object to the amount for which it is given, on proper cause shown. He must do so, however, at once, and within the period allowed for justification. If delayed longer, the court will not entertain the application. *Castellanos vs. Jones*, 4 Sandf., 679.

The bond, when completed, must be filed at once with the clerk of the court, and notice of such filing should be at once given to the defendant, from the date of which notice his time for excepting to the sureties will run.

It seems not to be necessary to serve any copy of the bond with the notice. It is, however, a frequent custom to do so, and to add to the bond an affidavit of justification by the sureties sworn in the first instance. This will be a convenient course, as it may probably have the effect of preventing an exception being taken. For the defendant to do so will, under these circumstances, be practically of little or no use, except in the case of intermediate insolvency of a surety, as all he can call for will be a repetition of the affidavit.

He has, however, the right so to except, and if he does, the justification must be repeated. *Bronson vs. Freeman*, 8 How., 492.

In the New York Common Pleas the practice is more strict, being regulated by the 56th rule of that court, adopted prior to the Code, and claimed not to be vacated. It is there held that the defendant should serve with his notice of filing a copy of his bond, copies of the affidavits of justification, and a notice of two days that the sureties will appear and justify. If he omits this precaution, the stay will be absolute against him, until notice of exception is served, and an affidavit of justification is also served after that exception. See *Colt vs. Wheeler*, 12 Abb., 388.

The stay of proceedings is determined by such justification made on exception. It would seem, however, to continue the whole of the twenty days allowed for exception, even although an affidavit be made in the first instance. See, however, as to this, in the New York Common Pleas, *Colt vs. Wheeler*, above cited.

If the defendant, having obtained such an order, afterwards in the cause before it is complied with, it will effect a waiver of the stay of proceedings, and the plaintiff will be at liberty to appear and prosecute the cause. The defendant's claim against the attorney will, however, be prejudiced by his adopting this course. *Boyce vs. How.*, 495.

The statute provides, as will be seen, a special form of justification by the sureties, which must be strictly followed. When made, an affidavit would seem to be conclusive, as no provision is made for the examination of the sureties, or for otherwise testing their sufficiency. In case of a fraudulent justification, it might probably be held that it is competent for the defendant to make a special application to the court, under its general powers, grounded on proof of the fraud committed, but no such remedy is provided for by the statute.

The exception to the sureties must be taken in due form, as shown in compliance with the provision of the statute. A notice that the defendant did not accept the bail put in by the plaintiff, was held to be wholly inefficient, and that the security remained good, though a justification had been subsequently made. *The Hartford & Connecticut Company vs. Pendleton*, 4 Abb., 460.

Justification by one surety only on exception taken to a bond executed by two, was held to be sufficient in *Riggins vs. Willis Duer*, 678.

And, when once security has been given, it would seem that the plaintiff cannot be called upon to repeat it, notwithstanding the original sureties may have become insolvent. *Hartford Quarry Company vs. Pendleton*, *supra*; *Slater Bank vs. Sturdy*, 21 How., 436; 13 N. H. 224; *Boucher vs. Pia*, 14 Abb., 1. See also, collaterally, *Willis vs. Stringer*, 6 Duer, 686; 15 How., 310; *Dudley vs. Goodrich*, 16 N. H. 189; 7 Abb., 26.

Whilst a defendant is actually in default, and the plaintiff is entitled to take judgment against him, he cannot demand security. *Butler vs. Wood*, 10 How., 313; *The Merchants' Bank vs. Mills*, 3 E. D. S. 210. But see *per contra*, *Abbott vs. Smith*, 8 How., 463. If, however, such default be opened, and he be let in to defend upon the merits, he may then be in a condition to require it. See *Butler vs. Wood*, *supra*; *Merchants' Bank vs. Mills*, *supra*; see also *Gardner vs. Kellogg*, Sandf., 632; 1 C. R., 120. In that case it was held, however, that

on the application to open the default, the plaintiff had asked that a restriction against doing so be imposed upon the defendant, it would probably have been granted.

A defendant who has actually obtained judgment cannot afterwards demand security under the statute. There is nothing to prevent him from proceeding on his judgment so recovered. If the plaintiff appeals, he must either give security for both debt and costs, or, if he apply for a stay, the defendant's right to security will be considered in fixing the terms to be imposed on the application. *Steam Navigation Company vs. Weed*, 8 How., 49. In *Johnson vs. Yeomans*, 8 How., 140, it was held that the change of nomenclature in a writ of error, under the old system, did not impose this obligation upon an original defendant thereby becoming a plaintiff in error.

It is not imperative upon the court to grant the defendant's application, if unreasonably delayed. Thus, in *Florence vs. Bulkley*, 1 Duer, 705; 12 L. O., 28, where the application, as against an infant, was not made till after the cause had been referred and noticed for trial, the attorney and guardian being both responsible, the application was refused. In the same case it was laid down that, if the plaintiff is permitted to sue *in forma pauperis*, he cannot be required to give security for costs, nor can he be permitted to sue in that character, on application made after he has been required to file such security. Where, too, a cause had been long at issue, and had been several times noticed by the defendant himself for trial, these acts were construed to be a waiver of the right, and the application was denied. *Swan vs. Mathews*, 3 Duer, 613. See also, as to waiver by unreasonable delay, *Fearn vs. Gelpecke*, 13 Abb., 473; *Persse and Brooks' Paper Works vs. Willett*, 14 Abb., 119.

But a delay of a few days after ascertaining the facts under which security may be required, will not be *laches*. *Boucher vs. Pia*, 14 Abb., 1.

The case of a non-resident administratrix has been held to be within the statute, and that, though prosecuting in right of the intestate, she is bound to give security, if required, for such costs, if any, as may be awarded against her, "*de bonis propriis*." *Murphy vs. Darlington*, 1 C. R., 85.

The power of requiring security from an executor, administrator, or trustee, under section 317, is, however, strictly discretionary. It will not be required merely upon the ground that the estate he represents is insolvent. *Darby vs. Condit*, 1 Duer, 599; 11 L. O., 154. Nor upon a mere imputation of bad faith in his proceedings, unsupported by sufficient allegations to make that imputation at least highly probable. *Shepherd vs. Burt*, 3 Duer, 645.

And the mismanagement or bad faith subjecting such a give security, must be imputable to him in the commenced conduct of the action itself, and not as regards his general conduct in the management of his trust. *Kimberley, Receiver, &c. vs. 22 How.*, 281; *Kimberley vs. Blackford*, 22 How., 443. By heedlessness in bringing and prosecuting, amounting to bad faith, as shown, an order was made. *Kimberley vs. Goodrich*, 22 How.

In *Ranney vs. Stringer*, 4 Bosw., 663, a non-resident as creditors was compelled to file security, after appeal taken by judgment entered in favor of the defendants, it being held that it came within section 117. See likewise as to a suit for penalty under the liquor law, *Board of Commissioners of Excise vs. Purdy*, 506; 13 Abb., 434.

Where the plaintiff is non-resident, the defendant's right to require security subsists, notwithstanding that the former may have frequently assigned the alleged cause of action to a resident, and the latter has, in fact, become the real party in interest. The plaintiff on the record cannot, by his own act, divest himself of his liability as defendant for costs. *Phoenix vs. Townshend*, 2 C. R., 2; see also 2 Sandf., 634.

It has been held that a plaintiff, originally non-resident, is required to give security, even although, since the commencement of the action, he may have become, and may, at the time of trial, be an actual resident. *Ambler vs. Ambler*, 8 Abb., 10.

A plaintiff resident in any other county, and instituting an action in the Superior Court, must, it has been held, give security. *vs. Adams*, 2 C. R., 59; 7 L. O., 314; *Ashbahr vs. Cousin*, 2 C. R., 10. See also *Hicks vs. Paysen*, 7 Abb., 326. This last case is decided rather on authority than on principle (see opinion in *vs. Macdonald*, 12 Abb., 213).

The question seems therefore open, as regards authority, and on principle, the view which may ultimately prevail, will equalize the position of the plaintiff in this court with that in any other tribunal of similarly limited jurisdiction.

It has been held that, in a case, pending in a court of limited jurisdiction, the security must be given by some person residing within the jurisdiction. See *Herrick vs. Taylor*, 1 C. R. (N. S.), 382, note. Whether this doctrine be sustainable seems very doubtful.

An infant joint plaintiff cannot be required to give security, nor is the attorney liable, under the Revised Statutes, in such cases as in others where defendant cannot require such security. *Newell*, 4 How., 93.

The right of requiring security is confined to cases in which

plaintiffs are non-resident. If one of them be a resident, the defendant cannot demand it, however irresponsible he may be. *Ten Broeck vs. Reynolds*, 13 How., 462.

This rule does not, however, apply to a non-resident guardian *ad litem*, for an infant joint plaintiff. A different principle applies, as, under the statute, 2 R. S., 416, section 2, it is required that he should be a competent and responsible person. *Same case*. See also *Cook vs. Rawden*, 6 How., 233.

As to the power of the courts to require security from the next friend of a married woman, while such was the practice, and the extent to which its discretion in that respect would or would not be exercised, see *Thomas vs. Thomas*, 18 Barb., 149 ; 12 L. O., 274.

The fact that the plaintiff has given other security in the cause, as in the case of replevin, does not deprive the defendant of his right to require security under the statute now in question. *Gilch vs. Barnaby*, 1 Bosw., 657 ; 7 Abb., 19. See also, *Moir vs. Brown*, 9 How., 270 (272) ; *Boucher vs. Pia*, 14 Abb., 1. See, however, *per contra*, *Wisconsin Marine and Fire Insurance Company Bank vs. Hobbs*, 22 How., 494.

A foreign government is liable to be so called upon. *Republic of Mexico vs. Arrangois*, 3 Abb., 470.

It has been held that the stay of the plaintiff's proceedings effects an extension, *pro tanto*, of the defendant's time to answer. See *Thorpe vs. Baulch*, 3 Abb., 13 (note). This appears, however, to have been an *obiter dictum*, and, till the point has been formally decided, it will be more prudent to apply for and obtain a formal order of extension in regular course.

In the event of the plaintiff's failing to file security within the time limited by the order, or of the sureties failing to justify after exception duly taken, it will doubtless be competent for the defendant to move for a dismissal of the action. The motion will be founded upon proof of the order originally granted, and of the failure of the plaintiff to comply with its terms, and must be brought on on regular notice given, at some reasonable time after the default has been made. See relief of this nature granted in *Long vs. Hall*, 1 C. R. (N. S.), 114. See also *Graham*, p. 509.

(b.) CHANGE OF VENUE INTO PROPER COUNTY.

The present is the proper stage of the action for making an application of this description, when made on the above ground. This proceeding must not be confounded with the ordinary motion to change the venue on grounds of convenience, the proper time for making which is after issue, and which will, accordingly, be treated of hereafter, at that point in the progress of the cause.

The point as to what will or will not be the "proper county" in different cases, has been already discussed, and the statutory provisions and cases, bearing upon the rights of parties in this respect, are in the introductory chapter of book VII., sections 137 and 138.

The considerations entered upon in the present section will be confined to the mode in which the remedy so given is obtainable.

That remedy is given by section 126 of the Code, already referred to in section 137, above referred to.

To entitle himself to it, the defendant must demand, in writing, that the trial be had in the proper county.

He must make that demand before the time for answering expires.

And, when the demand is made, he must, thereupon, follow up the demand.

Either by obtaining the consent of the adverse party to such change, or by applying to the court for an order.

Unless such steps be taken by him, and such change be made accordingly, by one or the other of the foregoing methods, the trial may, notwithstanding, be tried in the county originally designated in the complaint, though not the proper county.

Under the Code of 1849, it was not in terms prescribed that the demand, when made, should be followed up by an application to the court for an order; but such was, nevertheless, held to be the proper practice in *Hasbrouck vs. McAdam*, 4 How., 342; 3 C. R., 39; *Moore vs. Gorton*, 5 How., 243; 3 C. R., 224; and *Mairs vs. Remsen*, 3 C. R., 138. *Vermont Central Railroad Company vs. The Northern Railroad Company*, 6 How., 106.

The question is now placed beyond a doubt by the section amended in 1851.

The demand must, of course, be duly served upon the adverse party in the ordinary manner. It should be in the terms of the statute, *i. e.*, "that the trial should be had" in the "proper county;" if the words be omitted, and a county simply named, it would seem that the demand would not be good. *Beardsley vs. Dickerson*, 4 How., 106. If one county be named in the demand, a motion to change the venue into another cannot be grounded upon it, but a fresh demand must be made. *Vermont Central Railroad Company vs. The Northern Railroad Company*, 6 How., 106.

Such demand, and the application consequent thereon, may be made by one of several defendants. The consent of the others should, however, be obtained, or notice of the application given to them. *Mairs vs. Remsen*, 3 C. R., 138.

Nor does the denial of such an application on the part of one defendant, affect the right of another, subsequently served, to make and enforce it. *New Jersey Zinc Company vs. Blood*, 8 Abb., 141.

The defendant must be careful to make his demand in due time, or his right to do so will be gone; and he may also waive that right, by acts inconsistent with its assertion.

Thus, where a defendant had served his answer before the expiration of the time allowed, and afterwards, within that time, demanded a change of venue under this section, it was held that the application was made too late. *Milligan vs. Brophy*, 2 C. R., 118.

Such demand may, however, be made simultaneously with the putting in of the answer. *Mairs vs. Remsen*, 3 C. R., 138, above cited.

Although the demand must be made before the time for answering expires, it is not necessary that the consequent motion should be noticed within the same period. The defendant is on the contrary entitled to wait, and will not be chargeable with *laches*, until the plaintiff's time to serve an amended complaint has expired, in order to see whether the latter may not, on such amendment, obviate the objection. *Conroe vs. The National Protection Insurance Company*, 10 How., 403.

Where such an amendment is made after notice of motion served, the defendant's right to bring on a motion on this ground will, of course, be gone. If, however, such notice has been given on this and also on other grounds, such amendment, though it obviates one, will not affect his right to bring on that motion on the others. *Toll vs. Cronwell*, 12 How., 79.

Where the plaintiffs are non-residents, and the defendants residents of the state, a change to the county of residence of the latter, or one of them, will be *prima facie* a matter of right. *New Jersey Zinc Company vs. Blood*, 8 Abb., 147.

The defendant must be careful to bring on his application in due form. If he omit to make the necessary demand, a change on this ground cannot properly be granted on the denial of a subsequent application on that of the convenience of witnesses. *Houck vs. Lasher*, 17 How., 520.

The motion, when made, should be grounded on proof of service of, and non-compliance with the demand prescribed by the section. The moving affidavit should also state clearly the facts necessary to show that the county designated in the complaint is not the proper county, and likewise the date of the service of demand, to show that the time for answering had not expired when it was made. The notice should be upon the complaint, demand, and affidavit; should seek relief in the words of the section; and may properly ask for costs of the motion, which may be ordered to abide the event of the action. See *Northrup vs. Van Dusen*, 5 How., 134; 3 C. R., 140.

For further considerations on the subject of the change of venue, see chapter III. of book IX., where the subject is generally considered, in

reference to motions made for that purpose on general grounds after issue joined.

The above provisions do not, in any way, restrict the power of the court to grant a change of venue on other grounds, on a proper application for that purpose. Nor is the power of the opposite party to file such an application in due time, impaired by his having previously complied with a demand to change the venue into the proper county under the above provision. See *Moore vs. Gardner*, 5 How., 243, 224. Unless the question is brought up in the shape of conflicting motions (see *Mason vs. Brown*, 6 How., 481), the parties must appear in court, right, after which either has the privilege, at the proper time, of being heard, on the ground of the convenience of the court. See *Park vs. Carnley*, 7 How., 355; *International Life Insurance Company vs. Sweetland*, 14 Abb., 240.

The change, when made, carries with it a change of venue and venue poses, unless special provision to the contrary be made in the order. See section 136, concluding clause. See also rule 10.

An application of the same nature would doubtless be equally available in any case pending either in the New York Superior Court or in the New York Common Pleas, or in the Superior Court of Buffalo, where jurisdiction has been acquired simply by transient service, and where the parties is a resident, or where, in an action brought in a local tribunal, the venue is clearly local in some other county. An application must, however, in such a case, be made to the Superior Court under the special powers for that purpose contained in section 136 of the Code, as to the two former, and section 15 to 18 of chapter 10 of the Code in relation to the latter, heretofore cited in book I, section 10.

Should a similar contingency occur with respect to any other local tribunals, the remedy lies in an application to the Superior Court by way of *certiorari*.

(c.) TENDER.

In cases where this precautionary measure may be considered desirable, the present will be the appropriate time for its application. The subject, in its general bearings, will be considered in connection with the plea of such tender, when made, in the subsequent chapter. *Answer.*

§ 164. *Offer to Compromise.*

The facilities afforded by the Code in this respect are, obtainable at any period before trial. The present being, the proper period of the action at which a resort to them will be made.

sign must accompany the act. Nor will the signature of a firm name of the defendants, as such, be available for any purpose, or authorize the clerk to enter up any judgment whatever.

Where two joint-debtors are sued, and one of them makes no defence, an offer made by the other will be available to deprive the plaintiff of his costs. *La Forge vs. Chilson*, 3 Sandf., 752; 1 C. R. (N. S.), 159.

When the summons has been served on one partner or joint-debtor only, he may, it seems, make an offer, and such offer will be available for the entry of the usual joint-debtor judgment. *Lippman vs. Joelsen*, 1 C. R. (N. S.), 161, note; *Olwell vs. McLaughlin*, 10 L. O., 316; *Sterne vs. Bentley*, *supra*; *Emory vs. Emory*, 9 How., 130. See also *Paton vs. Wright*, 15 How., 484; *Lahey vs. Kingon*, 22 How., 209; 13 Abb., 192.

But, where more than one of such defendants has been served, one of them, it would seem, has no longer any power to bind the others, but an offer, to be valid, must be concurred in by all who have been brought into court, unless, indeed, they be in default at the time. See *La Forge vs. Chilson*, 3 Sandf., 752; 1 C. R. (N. S.), 159.

Where, however, there is any fraud or collusion in the case, or where one partner makes such an offer without the knowledge or consent of the others, it will be unavailable, and a judgment taken upon it will not stand. *Eversohn vs. Gehrman*, 10 How., 301; 1 Abb., 167; *Bridenbecker vs. Mason*; *Binney vs. Le Gal*; *Blodgett vs. Conklin*, *supra*.

As to the power of a defendant to make such an offer, under any circumstances, or for any purpose not actually fraudulent, and even at the outset of a suit expressly brought for the purpose of giving preference to one debtor over another, and that for future as well as existing indebtedness, see *Hill vs. Northrop*, 9 How., 525.

In *Smith vs. Olssen*, 4 Sandf., 711, the fact that the defendant had made an offer before answer, was considered sufficient reason for denying a motion that he satisfy the same amount, as subsequently admitted, and this doctrine appears to have been followed in *Ryder vs. The Union India Rubber Company*, 1 Abb., 444, note. See, however, these decisions qualified, and the principle that an offer, when refused, is a nullity as regards any subsequent proceedings whatever, maintained in *Dusenberry vs. Woodward*, 1 Abb., 443. See also *Meyers vs. Trimble*, 1 Abb., 220; 1 Abb., 399, and *Merritt vs. Thompson*, 10 How., 428.

As to offer, instead of tender, of the amount due, being the proper course to pursue with a view to stay proceedings in foreclosure, see *Thurston vs. Marsh*, 5 Abb., 389.

As to the inexpediency of acceptance, by the plaintiff, of an offer to take judgment for less than fifty dollars, in view of the defendant being entitled to his costs, in such case, under section 304, see *Johnson vs. Sagar*, 10 How., 552.

If accepted by the plaintiff, the course to be pursued by him after the entry of judgment, is clearly pointed out by the section. He must, within ten days after its receipt, give notice of his acceptance in writing, to be served in the usual manner. Such service must be proved by affidavit. He must then file in the clerk's office the summons, complaint, offer, copy notice of acceptance, and affidavit of its service; and the clerk must thereupon enter judgment accordingly. Where the offer is made at an advanced stage of the case, the safer course may be to give notice of taxation of the plaintiff's costs in the usual manner. If made at the outset, the omission of notice may be risked, as such costs will be trifling, and there is no practical risk of a motion for readjustment, the judgment being in effect, a judgment for want of an answer.

Where the offer is made with reference to the answer of the defendant, the answer must be filed with the other papers, so as to form part of the record. *Burnett vs. Westfall*, 15 How., 420. The section expressing the direction providing that judgment is to be entered by the clerk, no direction to the court, or of a judge is required. *Hill vs. Northrop*, 9 How., 100.

The course to be pursued on the acceptance of an offer to liquidate damages under section 386, is clearly pointed out. The plaintiff must signify his acceptance in writing, with or before the notice of trial. If he do so, he is entitled, if successful, to take judgment for that amount as admitted damages. If he omits to accept, he does so at the risk of being fixed with costs of that branch of the case, if he recover a favorable verdict.

When made, an offer precludes the defendant from taking any step in the cause, until the ten days allowed to the plaintiff have expired, or his written acceptance or refusal of it be received. The election to be made by the latter must be made in writing; evidence of one made orally, will not avail the defendant, or render any proceedings regular which he may take within the period in question. *Walker vs. Johnson*, 8 How., 240; *Pomeroy vs. Hulin*, 7 How., 161.

Nor can the defendant, by taking this course, deprive the plaintiff of his right to proceed. He must make the offer at such a time that the plaintiff may also have the full benefit of his election, and if it is served too late, so that the cause can be reached and tried within the ten days, the rights of the parties are in all respects as if no offer had been made. *Pomeroy vs. Hulin*, *supra*.

An offer, when refused, is in the nature of a pleading, and, on the trial, a copy of it should be given to the judge or referee with the other usual papers, to enable him to act intelligently as to the award of costs. *Post vs. The New York Central Railroad Company*, 12 How., 552.

When made before answer, and accepted by the plaintiff, an offer will

appropriate, it may be the more convenient course at once to consider the question, not merely in its partial, but in its general aspect, so far as regards the proceeding itself, and the benefit derived from it, when taken.

The statutory provisions on the subject constitute chapter IV., title XII., part II., of the Code. They run as follows :

§ 385. (338.) The defendant may, at any time before the trial or verdict, serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing, within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance ; and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence ; and, if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

Passed in its present form on the amendment of 1851. Prior to that year this remedy was confined to actions arising on contract, and the section itself was less explicit in its terms.

§ 386. (339.) In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fail in his defence, the damages be assessed at a specified sum ; and, if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages shall be assessed accordingly.

§ 387. (340.) If the plaintiff do not accept the offer, he shall prove his damages, as if it had not been made, and shall not be permitted to give it in evidence. And, if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defence in respect to the question of damages. Such expense shall be ascertained at the trial.

It is obvious that, wherever admissible, *i. e.*, in all cases where the defendant cannot dispute the correctness of a part of the plaintiff's demand, but contests it as to the residue, or where he is disposed to make a moderate sacrifice for the sake of avoiding a prolonged litigation, this course will be highly expedient, both with reference to its bearing on the eventual costs of the suit, and also as regards the possibility of its bringing about a compromise on some other terms, even if those actually tendered by the offer be not accepted.

Under the original Code this remedy was, as above stated, confined to actions arising on contract, but, by the amendment of 1851, it is extended to all cases indiscriminately. In actions sounding in tort, it may often be expedient, where the plaintiff has a *bonâ fide* cause of action, and the defendant is ready to pay a moderate sum, but not the amount

demanded, and there is a fair probability that a jury might be influenced by his estimate of the actual compensation due.

In making the offer, and with regard to its future operation, especial care should be taken to insert a sufficient amount, so that some slight excess may, in many cases, be advisable, especially where there is a probability of its not being accepted. See *Kilts vs. S. How.*, 270 (274).

No particular form is prescribed, but it is essential that it should be in full and exact compliance with the words of the section under which it is made, which wording should, in all cases, be carefully followed. It must, however, be so distinctly and openly made, that there be no doubt of the fact. *Post vs. New York Central Railroad Co.*, 12 How., 552.

It is not indispensable that an actual sum should be named, provided the effect intended be clearly stated, so that the amount can be ascertained by the clerk, by means of a mere computation. The offer should also be made with reference to the answer of the defendant, whether made before or with it. *Burnett vs. Westfall*, 15 How., 420.

Where served in connection with the answer, a subsequent amendment of the complaint, not materially changing the nature of the controversy, does not annul or deprive the defendant of the benefit of the offer. *Kilts vs. Seeber*, 10 How., 270.

It must expressly state that judgment may be taken with or without a jury. *Ranney vs. Russell*, 3 Duer, 689. *Megrath vs. Van Wyck*, 3 S. & C. R. (N. S.), 157, holding the contrary, was decided by an amendment of 1851, when this condition was expressly imposed.

The signature of the defendant's attorney is sufficient, as being equivalent to the signature of the defendant himself. *Sterne vs. S. & C. R.*, 109; 3 How., 331.

See, in relation to the power of an attorney to bind defendants with whom he has actually appeared, though without authority, in the absence of which neither fraud nor collusion, nor insolvency on his part is shown. *Bridenbecker vs. Mason*, 16 How., 203; *Binney vs. Le Gal*, 15 How., 592; 1 Abb., 283; *Blodgett vs. Conklin*, 9 How., 442.

By *Bridenbecker vs. Mason*, *supra*, the following requisites are laid down as essential to the validity of an offer:

It must be in writing. It must be signed by or in behalf of the defendants to be bound by it, against whom judgment is to be taken. It can only be signed in one of three ways: 1. By the defendant personally, each signing his own proper name. 2. By an agent authorized to sign the same for them and in their name; or, by the attorney of this court, whose authority to represent the parties is presumed. If signed by a special attorney, proof of his au-

on which it is granted, should, at the time of appearance or answer, be served upon the plaintiff.

(c.) APPLICATION ON SERVICE BY PUBLICATION.

Where this description of service is made, the defendant must, if he decide upon defending, apply to the court for leave for that purpose. Code, section 135. That application should be made upon the summons and complaint, if the same have been received, or else upon proof of the publication of the summons, and should be accompanied by the usual affidavit of merits, or by other proof that the defendant has a real defence to the action, so as to show "sufficient cause" for making it. When such cause is shown, the order would seem to be of course, as the section expressly provides that he "*must* be allowed to defend the action;" and the application may therefore be made *ex parte*, and not by special motion, or order to show cause. Where the complaint has not been received, the order should provide for the service of a copy, as it cannot, it seems, be demanded in the ordinary manner. See *Mackay vs. Lardlaw*, 13 How., 129.

Where the application is made after judgment, it is no longer a matter of right, and must be made by motion in the ordinary course.

§ 166. *Time to Plead.*

The answer or demurrer of the defendant "must be served within twenty days after service of the copy of the complaint." Section 143.

The same period is fixed by section 153, in relation to reply or demurrer to answer, when necessary or admissible, and the cases applicable to one description of pleading, are equally in point as regards the other. The subject of time to plead will, therefore, be here entered upon as a whole, and all the cases upon the subject cited, whether applicable to demurrer, answer, or reply. No time is fixed by section 155 in relation to the service of a demurrer to reply. There can be little doubt, however, but that the usual rules would be held applicable to that form of pleading, whenever adopted.

Special provision is made in cases where the defendant has been arrested by section 183, as amended in 1862, chapter 460, of 1862, p. 846, section 7. At whatever time the order of arrest may be served, the defendant is now allowed twenty days after that service in which to answer the complaint. It may probably be held that, where the order of arrest is served after answer, this provision will give the defendant twenty days' time to serve a new answer as of course, but the section being recent, has not yet been made the subject of judicial construction.

The first remark essential to be made on this head is with reference to the effect of an order for discovery of papers, &c., which order, under rule 17 (11) of the Supreme Court, operates as an entire stay of proceedings, until it is either complied with or vacated. The party obtaining such order, it is expressly provided by that rule, "shall have the like time to prepare his complaint, answer, reply, or demurrer, to which he was entitled at the making of the order."

The same is not the case, however, with regard to an order to furnish a copy account, or bill of particulars. It does not operate as an extension *per se*, but an order or consent must be applied for and obtained in the usual manner. *Platt vs. Townsend*, 5 Duer, 668; 3 Abb., 9.

Nor will a simple order for stay of proceedings, pending an application for extension, avail to validate the service of an answer after time but during the stay, provided the subsequent extension be refused. *McGown vs. Leavenworth*, 2 E. D. Smith, 24; 3 C. R., 151. It has been held, however, that an order to file security for costs has a similar operation to one for discovery, and effects an extension of time *pro tanto*. *Thorpe vs. Baulch*, 3 Abb., 13, note. This is, however, an *obiter dictum*, and the far safer course will be to obtain a regular extension in due form.

The mode of computation of the time so allowed is the same as in ordinary cases, as fixed by section 407 of the Code. The day of service of the complaint is excluded, and the party has the whole of the twentieth day thereafter for service of his answer. On the morning of the twenty-first day, however, the plaintiff may take his judgment of default, if such service be not duly made on the day previous. See this subject of time generally considered in a previous chapter, book IV., section 71. But, if the last day be Sunday, it is excluded, and the effect will be to give the party pleading an additional day for service.

The double time allowed by section 412, in cases where service by mail is admissible, must also be taken into account in the computation. Where the complaint is not served with the summons, but subsequently demanded, and, when so demanded, is served by mail by the plaintiff, it has been held that the defendant is entitled to double time to serve his answer, the same as any other paper, and that the same is the case in replying to an answer so served. See *Dorlon vs. Lewis*, 7 How. 132 (133); *Washburn vs. Herrick*, 4 How., 15; *Cusson vs. Whalon*, 4 How., 302 (305); 1 C. R. (N. S.), 27.

Where, however, the pleading to be answered or replied to is served personally, it would be most imprudent to incur this risk in the face of the positive provisions as to service within twenty days, made in sections 143 and 153. The precaution of obtaining a consent or order

not, of itself, have the effect of extinguishing a counter demand of the defendant. But, if such demand be subsequently set up by the answer, and extinguished upon the trial, the plaintiff will be entitled to his costs, as if he had generally prevailed, though his actual recovery did not exceed the amount tendered. *Ruggles vs. Fogg*, 7 How., 324; *Fieldings vs. Mills*, 2 Bosw., 489.

When made after, or in connection with an answer setting up a counter-claim, the counter-claim will be extinguished *per se*; and, if the plaintiff recover less than the sum offered, the defendant will be entitled to his costs. *Schneider vs. Jacobi*, 1 Duer, 694; 11 L. O., 220; *Kilts vs. Seeber*, 10 How., 270.

Although the defendant, on a verdict being given for less than the offer, is entitled to his costs, he cannot recover an extra allowance, under sections 308 and 309. *McLees vs. Avery*, 4 How., 441; 3 C. R., 104.

In such case, however, the plaintiff is entitled to recover his costs up to the time the offer was made. It is only those subsequent that are to be allowed to the defendant. *Keese vs. Wyman*, 8 How., 88; *Burnett vs. Westfall*, 15 How., 420.

In relation to an offer to take judgment, entitling the plaintiff to the performance of a specific act, and the mode in which that performance may be enforced, see *Fero vs. Van Evra*, 9 How., 148.

A similar proceeding is now provided for, in relation to appeals from justices' judgments, by section 371 of the Code, as last amended (1862).

(a.) COMPROMISE GENERALLY CONSIDERED.

With reference to compromise in general, the enabling provisions of chapter 257 of the laws of 1838, as amended by chapter 348 of those of 1845, with reference to compromises or compositions, effected by one out of several partners or joint-debtors, should not be lost sight of, where a defendant, desirous of compromising, stands in either of those positions. The remedy being obtainable by means of a special agreement, and not by way of proceeding in the course of a suit, its consideration here would necessarily be out of place. Assuming, however, such a compromise to be effected after a suit has been actually commenced, and before judgment, by one of several defendants, desirous of getting rid of his individual liability, a consent to dismiss the action, as against him, should be obtained from the plaintiff's solicitor, as part of the arrangement, and a judgment of dismissal, without costs, entered thereupon. If that consent be refused, the proper course will then be to plead the memorandum to be taken under the statute, or, if issue be already joined, to apply to the court for leave to file a supplemental

answer for that purpose, and then apply to the court for judgment thereon, by motion, or order to show cause, in the ordinary form.

§ 165. *Proceedings Preliminary to Answer.*

(a.) APPOINTMENT OF GUARDIAN, &c.

Where an infant is defendant, the first proceeding to be taken is the appointment of a guardian *ad litem*. Until this is done, no answer can properly be put in, or act properly done in the suit, on behalf of such infant. See previous chapter, in relation to the proceedings necessary for that purpose.

So likewise in the case of a lunatic or incapacitated person, for whom no committee has been appointed.

Before the amendment of 1857, it was likewise necessary that a married woman, if sued in respect of her separate property, or by her husband, should appear by her next friend. Since that amendment, this is no longer the case, but she may defend in the same manner as any other person.

(b.) APPLICATION FOR LEAVE TO DEFEND.

When sued jointly with her husband, in respect of some joint interest, the wife may answer separately in certain cases; *i. e.*, 1. Where the husband's interest is adverse to hers; 2. Where he is a defendant in her right, and she disapproves of the intended defence; 3. Where she lives separate from him; or, 4. Where he is out of the jurisdiction, or an alien enemy. So also in real estate actions, if the husband absent himself, and will not defend the wife's right. 2 R. S., 340, section 4.

In all these cases, however, the leave of the court to enable her to answer separately, must first be obtained. *Newcombe vs. Ketteltas*, 2 C. R., 152.

But, where the controversy relates to her separate estate, that leave will not be necessary. *Harley vs. Ritter*, 9 Abb., 400. See also *Arnold vs. Ringold*, 16 How., 158.

Where suit is brought against a receiver, or other party acting under the special authority of the court, an application of this nature will be advisable before assuming to defend. The same will be the case with regard to the committee of a lunatic, or incapacitated person, appearing and defending in his behalf.

The application in such cases should be by motion, grounded on petition or affidavit, showing clearly the circumstances under which the action is brought, and the reasons why such leave is required. The application will be *ex parte*, but a copy of the order, and of the papers

And, if any extension of time to answer or demur has been granted by stipulation or order, the fact shall be stated in the affidavit.

The above rule is, it would seem, not applicable to the case of an application for time to reply, or demur to answer. In the case of an application for time to answer, it is absolutely imperative. And when, from the papers served, it appears that its provisions have not been complied with, the order may be disregarded. *Ellis vs. Van Ness*, 14 How., 313.

In addition to the above requisites imposed by the rule, the affidavit should show clearly upon its face the date at which the current time expires, either with reference to the original service of the complaint, or the expiration of the last extension granted, making it clearly apparent that the applicant is not in default; and the circumstances under which the indulgence is required should be clearly, though concisely shown, care being taken, by the party swearing to the affidavit, to lay bare his own case as little as possible, whilst stating enough to induce the court to act.

The application is, in the first instance, strictly *ex parte*. The restriction in section 401, that no order to stay proceedings for a longer time than twenty days shall be granted by a judge out of court, except upon previous notice to the adverse party, is applicable to this as to other similar cases. The applicant must be careful, therefore, not to take an *ex parte* order for a longer period. If he does so, he does it at the risk of the order being either disregarded, or impeached by the adverse party as irregular. If from any cause it be necessary for him to ask for a longer time, it will be the better course for him to make an application on notice, on which it will be competent for him to take an order for any period, which, upon the face of his moving papers, he may show to be necessary.

In *Wilcock vs. Curtis*, 1 C. R., 96, it was held that the above restriction did not extend to an order of this description, inasmuch as it did not effect a general stay; and this case does not appear to have been directly overruled. The doctrine is one, however, not to be depended upon.

Nor is the practice sometimes pursued of obtaining a series of *ex parte* orders, each extending the period for twenty days or less, but, collectively, amounting to a longer period.

The only safe course of proceeding will be to answer within the original period, if possible; if not, to obtain an *ex parte* extension for twenty days, and, if that period should not be sufficient, then to apply to the court, on notice, for such further period as may be actually requisite. See, heretofore, book IV., section 74, under the head of

Ex Parte Motions, and cases there cited, especially those of *Sales vs. Woodin*, 8 How., 349; *Anonymous*, 5 Sandf., 656; and *Mills vs. Thursby* (No. 2), 11 How., 114.

When the order is made *ex parte*, no special form is necessary, and the usual form is to indorse on the affidavit, "Let the defendants have — days additional time to answer in the above entitled action," or some other memorandum to the same effect, the date being prefixed or added. An order in this form extends the time to demur. See *Broadhead vs. Broadhead*, 4 How., 308; 3 C. R., 8. The change of wording necessary, when the application is for time to reply, is obvious, and it would be more correct, though unnecessary, to insert the word "demur," as well as answer or reply in either case. A provision that the issue be of the date when the answer is first due, may also be properly inserted, and it is a frequent practice for the judge to add on to the order, if omitted, before affixing his signature.

The affidavit, containing the requisites above prescribed, with an order or memorandum subjoined, is presented to the judge at chambers or out of court, who, if he grant the application, affixes his signature. When obtained, a copy of such order, and also of the affidavit on which it was granted (which last is indispensable), must be served on the opposite party, and then the proceeding is complete. Neither order nor affidavit need be filed, or entered with the clerk of the court. See *Savage vs. Relyea*, 3 How., 276; 1 C. R., 42.

Though such an order be granted prematurely, it does not commence to run till the then current time to plead shall have expired, unless, of course, the contrary be expressed, or some specific date for its commencement be named upon its face. An order granted on the 1st, has been, accordingly, held available to extend the time until the 28th, the then current time to answer not expiring till the 8th of the same month. See *Schenck vs. McKie*, 4 How., 246; 3 C. R., 24.

It is competent for the defendant to make service of such an order by mail, as in other cases, and the service will be good if the copy be regularly mailed on the day at which the existing time expires, though it be not actually received by the plaintiff till afterwards. If he take judgment in the *interim*, it will be liable to be set aside, though not *per se*, irregular. See *Lawler vs. Saratoga County Mutual Fire Insurance Company*, 2 C. R., 114; *Schuhardt vs. Roth*, 10 Abb., 203.

(c.) NEGLECT TO EXTEND IN DUE TIME.

It may be looked upon as settled that, if the defendant allow the time to plead to go by without obtaining an extension, he cannot afterwards serve his pleading, in ordinary form, or without leave of the court, specially obtained on notice to the plaintiff; and this, although

for extension should in no case be omitted under these circumstances, where the party is not ready with his pleading at the expiration of the original period.

Service by mail, where otherwise admissible, is, however, so far allowable that if the party regularly mails the copy of his pleading on the last of the twenty days, or on the last day of any extension granted, the service will be good, though it be not received by his adversary until a subsequent day ; and, if the latter enters up judgment before the expiration of a reasonable period to be allowed for the receipt of the answer in due course of post, he will do so at his peril. See *Schenck vs. McKie*, 4 How., 246 ; 3 C. R., 24 ; *Noble vs. Trotter*, 4 How., 322 ; 3 C. R., 35, and *Brown vs. Briggs*, 1 How., 152 ; *Radcliff vs. Van Benthuyzen*, 3 How., 67 ; *Jacobs vs. Hooker*, 1 Barb., 71, there cited ; *Gibson vs. Murdock*, 1 C. R., 103 ; *Lawler vs. Saratoga Mutual Fire Insurance Company*, 2 C. R., 114.

Where service by publication has been made, the time to answer commences to run from the completion of the time of publication prescribed by the order, and the defendant will be allowed twenty days thereafter ; nor will personal service avail to alter this rule or limit the time allowed, if such service be made out of the state. See heretofore, book III., section 56, and *Tomlinson vs. Van Vechten*, 6 How., 199 ; 1 C. R. (N. S.), 317 ; *Abrahams vs. Mitchell*, 8 Abb., 123 ; *Dykers vs. Woodward*, 7 How., 313 ; *Mackay vs. Laidlaw*, 13 How., 129, and *Back vs. Crussell*, 2 Abb., 386, there cited.

Where the summons was served separately, and a copy of the complaint afterwards delivered to the defendant, but not on his demand, and merely as part of the proceedings on an arrest, it was held that the time to answer ran from the service of the summons, not of the complaint, and a judgment entered on the expiration of the former period, was held to be regular. *Van Pelt vs. Boyer*, 7 How., 325.

(a.) EXTENSION OF TIME BY CONSENT.

If the party, or his attorney, from any reason, finds himself unable to prepare his pleading within the time allowed by the above sections, the usual course is to apply to the adverse attorney for a consent enlarging the time, unless, for other reasons, the request be inadvisable. This consent must, of course, be in writing, and signed by such attorney, or else, under rule 13 (37) of the Supreme Court, it will not be binding ; but, within these conditions, no particular form is necessary. The party obtaining it will, of course, take care that the period allowed is distinctly expressed, and that the cause in which the consent is given, is distinctly referred to.

If, at the time of applying for such consent, the defendant has either

failed to examine the complaint, or has discovered that it is impeachable by motion, he should have such contingency specially provided for. A stipulation of this nature extending the defendant's time to answer, and to make such application as he should be advised, was held effectual to an extension of the defendant's time to make a motion of this nature in *Lackey vs. Vanderbilt*, 10 How., 155.

When such consent is applied for, it is an usual, and will be a very proper precaution on the part of the plaintiff, to provide upon its face that the issue in the action shall be of the date when the answer was first due, or of any other date which may be specially agreed upon, and, when a term approaches, that, notwithstanding the answer be not served, either party may be at liberty to put the cause on the calendar, and notice it for trial, as of the date of such stipulated issue. This course will prevent the plaintiff's interests from being prejudiced, whilst the defendant's object in obtaining time to prepare his pleading will be equally allowed. The consent is usually taken from the attorney. An agreement signed by the party will, however, be valid, and will render irregular a judgment subsequently taken by the attorney, even in ignorance of its existence. *Braisted vs. Johnson*, 5 Sandf., 671.

(b.) EXTENSION OF TIME BY ORDER.

If, for any reason, this course be unadvisable, or if time be refused, application may then be made for an order extending the time to plead. This proceeding is specially provided for by section 405 of the Code, which runs as follows :

§ 405. (366.) The time within which any proceeding in an action must be had after its commencement, except the time within which an appeal may be taken, may be enlarged, upon an affidavit showing grounds therefor ; or, if the action be in the Supreme Court, by a county judge ; the affidavit, or a copy thereof, must be served with a copy of the order, or the order may be disregarded.

Since 1854, the practice on this subject has been regulated by special rule in relation to the form of affidavit on which such extension must be applied for. This rule was again amended in 1858, by the addition of the concluding sentence. It runs thus :

Rule 22. (20.) No order extending the time to answer or demur to a complaint shall be granted, unless the party applying for such order shall present to the justice or judge to whom the application shall be made, an affidavit of merits, or an affidavit of the attorney or counsel retained to defend the action, that, from the statement of the case in the action made to him by the defendant, he verily believes that the defendant has a good and substantial defence upon the merits, to the cause of action set forth in the complaint, or to some part thereof.

party let in to defend, it may be rendered available with a view to the imposition of terms upon the granting of such application, if made.

To warrant the application, an affidavit of merits must in all cases be sworn to, and accompany, or be incorporated in the moving papers. The existence of a substantial defence must also be positively stated, and its nature and the circumstances under which it is made be distinctly disclosed; and, if the defendant has any excuse to present, for having allowed the default to go, by way of mistake, inadvertence, surprise or excusable neglect, that excuse should be made clearly apparent, so as to bring the case directly within the terms of section 174, from which the authority to make such application is derived. The proposed answer or other pleading, leave to put in which is asked for, ought also, as a general rule, to be drawn and sworn to, and a copy served with the other moving papers, in order that the court may judge, as to whether the case is a proper one in which to grant relief of that nature, and as to the proper terms to be imposed, as conditions on granting it. See this last principle, as held under the old practice, in *McGaffigan vs. Jenkins*, 1 Barb., 31. If this cannot be done, in time for service as above, good reason for the omission must be shown. See, as to the above principles, *Lynde vs. Verity*, 3 How., 350; 1 C. R., 97.

The motion must be brought in on the usual notice, or on order to show cause, asking that the entry of judgment should be stayed or vacated, as the case may require, grounded on affidavit showing the above facts, the complaint and the intended answer, where feasible. It will also be expedient, if practicable, to apply for an *interim* stay of proceedings, until such motion be heard or decided.

It will be useless to multiply the citation of cases in which relief of this nature has been granted, besides which, the subject will come up for future consideration, in connection with that of judgment and motions to vacate after its entry.

The payment of costs of the entry of the judgment, and of those upon the motion to open it, will, as a general rule, be imposed as a condition of the relief granted. It is a frequent practice, also, to direct that the judgment actually entered should stand as security, especially when the existence of an actual defence is not clear, or the circumstances of the defendant are doubtful. See *Allen vs. Ackley*, 4 How., 5; *Grant vs. McCaughin*, 4 How., 216.

It is also not unusual to impose terms as to the nature of the defence to be put in, as that the statute of limitations should not be pleaded. *Allen vs. Ackley*, *supra*. Also, that the defence, when put in, should be complete, and should raise all questions which may properly be litigated in the action; that the issue should be as of the original date, or

that the case may be referred at the plaintiff's election. *Mann vs. Provost*, 3 Abb., 446 (450), or other conditions of a similar or analogous nature.

Where, however, an unconscientious or dishonest defence is sought to be set up, after default, the court will not open that default, or relieve the party from the consequences of his own neglect. See *James G. King vs. The Merchants' Exchange Company*, 2 Sandf., 693; *Hawes vs. Hoyt*, 11 How., 454; see also *Fort vs. Bard*, 1 Comst., 43 (46).

Such imposition rests, however, entirely in the discretion of the court. See, as to a refusal to restrict the defence of usury, *Grant vs. McCaughin*, 4 How., 216; *Brown vs. Mitchell*, 12 How., 408; 2 Abb., 481, and cases there cited. See, however, *Jacobs vs. Mitchell*, below referred to.

The order of a judge, in exercise of such discretion, is not reviewable, however, either as to the nature of such terms as he may impose, or his refusal to impose them. See *Gale vs. Vernon*, 4 Sandf., 709; *Jacobs vs. Marshall*, 6 Duer, 689. Or even as to the granting or refusal of the application itself. *Bollen vs. Depeyster*, 3 C. R., 141; *Thompson vs. Starkweather*, 2 C. R., 41; *Fort vs. Bard*, 1 Comst., 43.

CHAPTER II.

DEMURRER.

§ 168. *Its Nature and Office.*

THIS line of defence is appropriate in those comparatively rare cases where the plaintiff's cause of action, as stated by himself, is essentially defective.

Limits are imposed to this right of a defendant, and the cases in which it is exercisable are defined by section 144 of the Code already cited in book VI., but which it may be convenient to repeat here. That section runs thus:

§ 144. (122.) The defendant may demur to the complaint when it shall appear upon the face thereof, either—

1. That the court has no jurisdiction of the person of the defendant, or of the subject of the action; or,
2. That the plaintiff has not legal capacity to sue; or,
3. That there is another action pending between the same parties, for the same cause; or,

the latter may not, at the time, have taken any steps to avail himself of the default suffered. See *Dudley vs. Hubbard*, 2 C. R., 70; *Mandeville vs. Winne*, 5 How., 461; 1 C. R. (N. S.), 161; *O'Brien vs. Catlin*, 1 C. R. (N. S.), 273. The same is implied in *Graham vs. McCoun*, 5 How., 353; 1 C. R. (N. S.), 43.

It is also decided, in *McGown vs. Leavenworth*, 2 E. D. Smith, 24; 3 C. R., 151, with this addition, that the service of a pleading, after time, and without actual extension, will be a nullity, even though made pending an actual stay of the plaintiff's proceedings, for the purpose of moving for such extension. See likewise, as to a joint answer served after the time of one of the defendants had expired, *Jaques vs. Greenwood*, 12 Abb., 232. The above decisions clearly overrule *Foster vs. Udell*, 2 C. R., 30, holding to the contrary. As to the general powers of the court to grant an extension, after the original twenty days have expired, see *Salutat vs. Downs*, 1 C. R., 120.

But, if the adverse attorney expressly receive or do not return a pleading thus irregularly served, within a reasonable time, the defect will then be waived; and that pleading may be sufficient. See chapter II., book VI., section 127, and numerous decisions there cited. The same is also implied in *McGown vs. Leavenworth*, above noticed.

The plaintiff, too, cannot take advantage of a default occasioned by the *laches* or bad faith of his own attorney, where the defendant's pleading has been ready, and attempted to be served within due time. Thus, in *Falconer vs. Ucoppel*, 2 C. R., 71, on the last day of service, the defendant endeavored, in office hours, to serve his answer at the plaintiff's office, and also at his dwelling, but both were closed, and no one was there to receive it; but, on the following day, such defendant succeeded in serving the answer on the plaintiff personally, with notice of the attempted service on the day before: under which circumstances it was held that the service was regular, and costs were given.

If the service of the pleading be delayed, until the regular or extended time for that purpose has expired, it will be no longer competent to make an *ex parte* application for extension. The only remedy will then be by means of a regular motion, on notice or order to show cause; an *interim* stay of proceedings being also applied for. *Stephens vs. Moore*, 4 Sandf., 674. See also *Doty vs. Brown*, 3 How., 375; 2 C. R., 3; *Snyder vs. White*, 6 How., 321 (325).

It would seem from the case of *The Columbus Insurance Company vs. Force*, 8 How., 353, that an extension of the time to answer does not, *per se*, deprive the defendant of his right to object to the legality of an arrest, though any *laches* on his part will, doubtless, do so. Nor does such extension waive the defendant's right to move to set aside

the complaint, on the ground of a jurisdictional objection. *Merrill vs. Grinnell*, 10 How., 31; 12 L. O., 286.

It being expressly provided by rule 50 (40), that motions on the ground of partial defects in the complaint, such as irrelevancy, &c., must be noticed within twenty days from its service, an extension of the time to answer will not prevent its operation, and the very obtaining of such extension has been held to effect a waiver. To obviate the defect and preserve the right, an express order must be obtained. *Bowman vs. Sheldon*, 5 Sandf., 657; 10 L. O., 338; *Isham vs. Williamson*, 7 L. O., 340; *Hollister vs. Livingston*, 9 How., 140. See, as to the effect of a stipulation to the same effect, *Lackey vs. Vanderbilt*, 10 How., 155.

(d.) EXTENSION OF TIME BY EFFECT OF AMENDMENT.

Lastly, in relation to the time allowed to plead, the effect of an amendment by the adverse party must not be forgotten. The consequence of such an amendment is, to establish a new period altogether, in lieu of that current before the service of the amended pleading. The time will then run in the usual manner, as from the date of such service, without any reference whatever to the proceedings prior thereto.

(e.) EXTENSION BY EFFECT OF ARREST.

Since the recent amendment of section 183 (1862), the service of an order of arrest effects, *per se*, an extension, or, it would seem, even a renewal of the defendant's right to answer, if already expired, for a period of twenty days after such service.

§ 167. *Relief, where Default Suffered.*

Positive as is, in terms, the limitation on pleading imposed by the above provisions, the courts have throughout shown a very strong disposition to relax the strictness of this rule in practice. The vexatious taking of a judgment by default, against a solvent party, and where an actual defence is known to exist, will be almost, if not entirely, unproductive of substantial advantage to the party who enters it, and an attempt at an unfair advantage will be defeated by the court, and may even subject the delinquent party to costs. See *Falconer vs. Ucoppe*, 2 C. R., 71, above noticed.

Where, on the contrary, the defendant is, or is believed to be in certain circumstances, or his defence be deficient in good faith, it may be expedient to enter up a judgment at once, if the opportunity is afforded, as even although that judgment may be set aside, and the

4. That there is a defect of parties, plaintiff or defendant; or,
5. That several causes of action have been improperly united; or,
6. That the complaint does not state facts sufficient to constitute a cause of action.

And the next section then further provides :

§ 145. (123.) The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

To enable this form of defence the following are, therefore, essential prerequisites :

1. The defect complained of must appear upon the face of the complaint.

2. It must fall within one of the six classes prescribed by section 144.

3. The demurrer must distinctly specify the ground of objection.

If it fails in any of these requisites it will be a nullity.

The demurrer, to be sustainable, must also be total, and must cover the whole of the complaint, or the whole of one of the causes of action stated therein. See *Tillotson vs. Hudson River Railroad Company*, 5 Seld., 575 (578). Mere partial defects, such as redundancy, irrelevancy, uncertainty, or deficiencies in the mere form, as contradistinguished from the substance of the statement of a cause of action, cannot be impeached in this manner, but only by way of motion. See this subject heretofore fully considered and numerous decisions cited in chapter IV. of book VI., section 133. Nor will demurrer lie to a supplemental complaint. *Spier vs. Robinson*, 9 How., 325.

The objection must, as before noticed, be absolutely patent upon the face of the pleading impeached. If it requires the slightest statement of facts, however trifling, to make it apparent, it cannot be raised in this form, and, if attempted, the demurrer will be bad. In such a case it must and can only be taken by answer, for which express provision is made by section 147. See, as to the above principle, *Humphreys vs. Chamberlain*, 1 C. R. (N. S.), 387; *Getty vs. Hudson River Railroad Company*, 8 How., 177; *Union Mutual Insurance Company vs. Osgood*, 1 Duer, 707; 12 L. O., 85; *Millard vs. Shaw*, 4 How., 137; *Mayhew vs. Robinson*, 10 How., 162; *Ripple vs. Gilborn*, 8 How., 456; *Crooke vs. O'Higgins*, 14 How., 154; *Brainard vs. Jones*, 11 How., 569; *Hornfager vs. Hornfager*, 6 How. 279; 1 C. R. (N. S.), 462; *Wilson vs. The Mayor of New York*, 15 How., 500; 6 Abb., 6; *Metropolitan Bank vs. Lord*, 4 Duer, 630; 1 Abb., 185; *Coe vs. Beckwith*, 31 Barb., 339; 19 How., 398; 10 Abb., 296. Nor will demurrer lie in either form for a mere misnomer, the remedy of which is

by motion. *Bank of Havana vs. Magee*, 20 N. Y., 355; *Elliott vs. Hart*, 7 How., 25; *Dole vs. Manley*, 11 How., 138; *Scofield vs. Van Syckle*, 23 How., 97.

And not merely so, but, to be impeachable by demurrer, instead of demurrer by answer, the objection to the complaint must be patent upon its face, and that affirmatively, and to its full extent. Recourse cannot be had to implication or presumption in any shape to sustain it. The presumption will lie, on the contrary, in favor of the pleading impeached. See *Perkins vs. Mitchell*, 31 Barb., 461; *Herkimer County Bank vs. Furman*, 17 Barb., 116; *Brainard vs. Jones*, 11 How., 569; *Wesley vs. Bennett*, 6 Duer, 688; 5 Abb., 498; *Humphreys vs. Chamberlain*, 1 C. R. (N. S.), 387; *Wolfe vs. The Supervisors of Richmond County*, 19 How., 370; 11 Abb., 270; *Foster vs. Hazen*, 15 Barb., 547.

Nor, as a general rule, will an omission in statement render a pleading demurrable, except it be of some fact essential to create or to sustain a cause of action. See *Carroll vs. Carroll*, 11 Barb., 293; *Maynard vs. Talcott*, 11 Barb., 569. Nor will a demurrer be sustained on a matter of mere form, if there are any merits in the case. *Howell vs. Frase*, 6 How., 221; 1 C. R. (N. S.), 270.

The demurrer under the Code, coupled with the provisions for striking out irrelevant matter, have swept away entirely the old chancery practice of exceptions. *Boyce vs. Brown*, 7 Barb., 80; 3 How., 391; *Co vs. Frazee*, 4 How., 413; 3 C. R., 43. It is a new species of pleading created, and its character and office defined by the Code, and the old rules on the subject exist no longer. Many objections under the old practice are no longer cognizable, whilst many others, which formerly were waived, unless pleaded in abatement, can now be taken in this manner. *Swift vs. De Witt*, 3 How., 280; 1 C. R., 25; 6 L. O., 31; *Manchester vs. Storrs*, 3 How., 410.

The old rule, as to a demurrer amounting to an admission of the plaintiff's case, holds good under the Code. A demurrer admits all facts stated upon the face of the complaint, which are relevant, and well pleaded, and all legal consequences flowing from those facts as stated, and, as above shown, all necessary implications and presumptions arising from those facts, will lie in the plaintiff's favor. It denies nothing except the conclusions of law which the plaintiff seeks to draw from such statement. See *Hall vs. Bartlett*, 9 Barb., 297; *Clark vs. Deussen*, 3 C. R., 219; *Spier vs. Robinson*, 9 How., 325 (330); *Richards vs. Edick*, 17 Barb., 260; *Graham vs. Camman*, 5 Duer, 697; 13 How., 360; *Mills vs. Forbes*, 12 How., 466; *Robinson vs. McIntosh*, 3 E. Smith, 221; *Hecker vs. De Groot*, 15 How., 314; *Spies vs. Access Transit Company*, 5 Duer, 662; *Borrowe vs. Milbank*, 6 Duer, 6

5 Abb., 28; *Wesley vs. Bennett*, 6 Duer, 688; 5 Abb., 498; *Cutter vs. Wright*, 22 N. Y., 472.

In *Freeman vs. Frank* (10 Abb., 370), however (a case of demurrer to answer), it was laid down that, where the allegations of the pleading demurred to are contradictory, a demurrer only admits such facts as the law adjudges to be true.

Demurrer is equally admissible in a proceeding under the mechanic's lien law, as in an ordinary action. *Doughty vs. Devlin*, 1 E. D. Smith, 625.

When the objection is patent, it must be raised by demurrer. If not, and if it falls under any of the foregoing classes, except No. 1 or No. 6, it will be waived. It cannot, under these circumstances, be raised by answer, as under section 145; that course is only allowed when it is not apparent upon the face of the complaint. *Zabriskie vs. Smith*, 3 Kern., 322; *Baggot vs. Boulger*, 2 Duer, 160; *Higgins vs. Rockwell*, 2 Duer, 650; *Hoxie vs. Cushman*, 7 L. O., 149; *Gassett vs. Crocker*, 10 Abb., 133; *Struver vs. Ocean Insurance Company*, 16 How., 422; *Dennison vs. Dennison*, 9 How., 246.

Where parties are sued jointly, but the complaint is upon its face defective as to one of them, a separate demurrer by that party will be both admissible and proper. *Arnold vs. Ringold*, 16 How., 158.

A joint demurrer will, under these circumstances, be inadmissible. See cases cited in next section.

When demurrer is taken to a separate cause of action, other portions of the complaint, not connected with the statement of that cause, cannot be invoked to support it. *Ehle vs. Haller*, 10 Abb., 287; 6 Bosw., 661. See also, as to demurrer to answer, *Ritchie vs. Garrison*, 10 Abb., 246.

A demurrer must be sustained or fail, to the whole extent to which it is applied. See *Peabody vs. Washington County Mutual Insurance Company*, 20 Barb., 339 (342).

If any portion of the demurrer be sustainable, the insertion of redundant or immaterial matter will not render it impeachable as a pleading; nor, it would seem, will such matter be even stricken out. *Smith vs. Brown*, 6 How., 383.

By demurring to the complaint the defendant waives all formal objections, and cannot afterwards maintain a motion on that ground. See *Campbell vs. Wright*, 21 How., 9.

§ 169. *Grounds of Demurrer.*

It is proposed to consider in the present section the essentials of the six different categories in which this course of pleading is admissible, reserving for the next the necessary consideration as to the mode of

statement of an objection, when taken, for the purpose of bringing it within one or more of the categories so prescribed.

(a.) 1. WANT OF JURISDICTION.

The objection to the jurisdiction of the court must be substantial, not formal, and must arise upon the pleading itself demurred to, and not under facts extrinsic to that pleading. The imperfect service of summons cannot be impeached in this manner. The defendant's remedy is by motion. *Nones vs. The Hope Mutual Insurance Company*, 8 Barb., 541; 5 How., 96; 3 C. R., 161.

Where the objection to the jurisdiction of a court of limited powers, is made on a purely personal ground, not impeaching the general powers of the court, it will be waived by a general appearance and answer, even though the protest be made on the face of the latter. See *Mahaney vs. Penman*, 4 Duer, 603; 1 Abb., 34. But, where the objection to the jurisdiction is essential and not personal, and is apparent upon the face of the record itself, it will be fatal and incapable of waiver. See *Burckle vs. Eckhart*, 3 Comst., 132, there cited.

As a general rule the objection to the jurisdiction of the court though incapable of waiver, cannot be raised upon the hearing of a mere general demurrer for insufficiency, under subdivision 6, merely assigning that specific ground. See *Cook vs. Chase*, 3 Duer, 643; *Wilson vs. Mayor of New York*, 4 E. D. Smith, 675 (685); 1 Abb., (12). See also *Hobart vs. Frost*, 5 Duer, 672; 3 Abb., 119.

In the last case, however, the question was entertained and passed upon, the point having been fully argued upon the hearing, and conceded to be properly raised, and it was decided that, sitting as a court of equity, the court had no jurisdiction of proceedings to impeach the validity of an assessment, the remedy of the plaintiff being by special proceeding at common law.

Every reasonable intendment will be made in favor of jurisdiction when impeached by this form of procedure; nor will any assumption of fact be made, or presumption be indulged in to oust such jurisdiction, when enough is shown to bring the case within the general powers of the court, or the language of the statute which confers it, when limited by its nature. *Foster vs. Hazen*, 12 Barb., 547. Nor, where the powers of a court, when acquired, are general, and service within its limits is itself sufficient to confer jurisdiction, is it ground of demurrer that such jurisdiction does not affirmatively appear upon the face of the complaint. *Kœnig vs. Mott*, 2 Hilt., 323; 8 Abb., 384.

Where, however, the jurisdiction is limited in its nature as to local residence of the parties, as in the case of the ordinary county court, it is essential to the validity of the complaint that the facts conferri

it should be affirmatively alleged. *Frees vs. Ford*, 2 Seld., 176. See also *Kundolf vs. Thalheimer*, 2 Kern., 593; reversing *same case*, 17 Barb., 506.

A demurrer on the above ground is, doubtless, the better course to be adopted, in taking objections on the ground of personal privilege, as in the case of ambassadors, consuls, &c., exempted from suit in the state courts, in cases where that privilege is apparent on the plaintiff's own showing. If otherwise, demurrer by answer will be the proper course to pursue. See this subject heretofore considered, in book II., under the head of *Parties*.

A demurrer will not lie, for want of jurisdiction, in a suit against foreign executors, in respect of their misapplication of trust funds. *Montalvan vs. Clover*, 32 Barb., 190.

The question that the court has no jurisdiction over a foreign state cannot be collaterally raised by demurrer taken by another party joined as a co-defendant. *Manning vs. The State of Nicaragua*, 14 How., 517.

Where the jurisdiction of a court or judge, in a special proceeding, is general in its nature, an objection to its exercise, on the ground of mere irregularity, will be waived if not taken in its proper season, and cannot be made the subject of a demurrer in subsequent proceedings. *Hobart vs. Frost*, 3 Abb., 119; 5 Duer, 672.

(b.) 2. WANT OF LEGAL CAPACITY TO SUE.

The essential considerations arising out of this branch of the subject have been anticipated at an earlier stage of the work. See chapter I. of book II., under the head of *Parties*.

A demurrer on this ground was sustained in *Fitzhugh vs. Wilcox*, 12 Barb., 235, in relation to the contracts of a lunatic, and an attempt of his committee to sue thereon, without the special direction of the court; and likewise in *Hall vs. Taylor*, 8 How., 428, in relation to a legal action, brought, in like manner, by the creditor of an habitual drunkard against his committee.

So likewise where the complaint of an infant, by his guardian, omitted to allege any facts as to the appointment of the latter, it was held demurrable on this ground, and that the objection was sufficiently raised by simply stating it in the words of the subdivision. *Hulbert vs. Young*, 13 How., 413. See likewise, as to the objection of a suit being commenced by a married woman, without a guardian or next friend, in a case before the recent amendment of the Code in that respect. *Hastings vs. McKinley*, 1 E. D. Smith, 273.

In *Stryker vs. Lynch*, 11 L. O., 116, it was held that the plaintiff in partition must be in actual or constructive possession of his share of the

subject-matter of the suit; and that, where the complaint is legal title to be in a third person as trustee, the defect will be

A complaint which, showing on its face that the plaintiff promissory note sued upon as trustee, showed likewise that, on express terms of his trust, he had no authority to collect it by himself, is held demurrable, in *Nelson vs. Eaton*, 7 Abb., 305; reversed in *case*, 15 How., 305.

As to the general nature and office of a demurrer on this ground, see *Bank of Havana vs. Magee*, 20 N. Y., 355 (359), deciding that the description of an individual banker by using a corporate name is a demurrable objection. By this decision, that in *Bank of Havana vs. Wickham*, 7 Abb., 134; 16 How., 97, also noticed p. 268, would be reversed.

See also, as to a general allegation of the appointment of the plaintiff as receiver not being demurrable on this ground. If defective for want of certainty, the defect could only be reached by motion. *Chesapeake Fisk*, 22 How., 236.

To be sustainable, the objection, on this ground, must be separately raised under the subdivision now in question, and the grounds specified. It cannot be taken under a general impeachment of insufficiency under subdivision 6. *Bank of Lowville vs. Edwards*, 11 How., 119; *Viburt vs. Frost*, 3 Abb., 119, reported as *Hobart vs. Frost*, 672.

(c.) 3. PENDENCY OF ANOTHER ACTION.

To bring the case within this subdivision, the action in question must be pending between the same parties, and for the same cause. If both these conditions be not satisfied demurrer will not lie, and a defence, if a defence exist, can only be raised by answer. And no objection will not lie at all, where the parties are not the same in the proceedings. See *Auburn City Bank vs. Leonard*, 20 How., 193.

Demurrer on this ground, when admissible, is equivalent to the former plea of *autre action pendant*. It rarely happens, however, that demurrer pure is the proper remedy in this case. Unless the fact of such other action pending appear by the complaint, a specific averment will be requisite, and demurrer by answer will then be the proper form. See *Hornfager vs. Hornfager*, 6 How., 279; 1 C. R. (N. Y.), 412; *Ward vs. Dewey*, 12 How., 193.

To be pleadable by way of defence, in either of these modes, the action set up must be brought in some other court of the same state. Its pendency in those of another will not be available by way of defence. *Burrowes vs. Miller*, 5 How., 51; 2 C. R., 101. The remedy of the defendant, in such a case, will be to apply to the court

motion, to compel the plaintiff to elect in which case he will proceed, and to suspend his proceeding until he has effectually done so. See *Hammond vs. Baker*, 3 Sandf., 704; 1 C. R. (N. S.), 105.

The jurisdiction of the courts of the United States being general in its nature, it may probably be held, on the contrary, that the defence of the pendency of an action in those courts will be sufficient.

The pendency of an arbitration, in respect of the same controversy, is no defence, the submission being revocable by either party before actual determination. *Smith vs. Compton*, 20 Barb., 262.

To enable its pendency to constitute a defence, the bringing of a second action must appear to be vexatious; and the demands in both cases must be coincident. The mere fact that the plaintiff had, in another action, brought in a justice's court, by the assignee of one of the defendants, interposed his claim by way of set-off only, such action not appearing to have been determined, was held to constitute no defence, in *Compton vs. Green*, 9 How., 228. See likewise *Welch vs. Hazleton*, 14 How., 97.

The pendency of other proceedings by the plaintiff to enforce a mechanic's lien for the same debt as against the property of the same party, was held to constitute a defence in *Ogden vs. Bodle*, 2 Duer, 611. But such pendency, as against the owner, is no bar to the bringing of a separate action, as against the contractor, for the same debt. *Gridley vs. Rowland*, 1 E. D. Smith, 670. Nor is the mere fact that subcontractors have filed a bond in an action by the contractor against the owner to recover a balance due on the contract. The defendant should seek relief either by instituting a cross action or paying the money into court.

In *Ward vs. Dewey*, 12 How., 193, it was held sufficient for a defendant, in pleading this defence, to state it in general terms, according to the phraseology of the subdivision.

(d.) 4. DEFECT OF PARTIES.

So far as the joinder or misjoinder of parties to an action is a matter of right or of necessity, the questions which present themselves under this head have been anticipated in a former portion of this work (chapter I. of book II.), where the question of parties is generally considered. The present subdivision will only treat, therefore, of the mode in which an objection on this ground is presented, and the extent to which, when so presented, it may be tenable.

It is a matter of comparative rarity for this objection, especially when it lies on the ground of misjoinder, to be patent upon the face of the complaint, so as to enable it to be taken by special demurrer. If any statement of fact, however trivial or formal, be necessary, in order

to make that objection apparent, the question can only be raised in answer under the enabling power in section 147. Even the mere fact that it does not appear upon the complaint that the person, whose joinder is requisite, is living, may be sufficient to impose that necessity. *Brainard vs. Jones*, 11 How., 569; *Scofield vs. Van Syckle*, 11 How., 97. See cases cited on this point at the commencement of the previous section.

Another reason why this course will usually be the proper one, is the necessity imposed upon a defendant who raises this objection to give the plaintiff a better writ, by naming who the parties are who he requires to be joined, and communicating the necessary information to enable their joinder. An omission to do this may suffice to render his objection untenable. See *Fowler vs. Kennedy*, 2 Abb., 347; *Cox vs. Beckwith*, 31 Barb., 339; 19 How., 398; 10 Abb., 296.

But where the defect is patent on the face of the complaint, and requires no extraneous statement of facts to make it apparent, or to establish the right of the defendant to impeach the pleading on that ground, the objection must be taken by special demurrer, and not in answer. *Higgins vs. Rockwell*, 2 Duer, 650.

The introduction of a superfluous party is no ground of demurrer, any other than the party improperly joined. The Code only gives this objection on the ground of deficiency, not on that of superfluity. See *Stryker vs. Lynch*, 11 L. O., 116; *Peabody vs. The Washington County Mutual Insurance Company*, 20 Barb., 339 (342); *Gregory vs. O'Smith*, 12 How., 134; *Eldridge vs. Bell*, 12 How., 547; *Phillips vs. Hagaden*, 12 How., 17; *Pinckney vs. Wallace*, 1 Abb., 82; *Browns vs. Gifford*, 8 How., 389; *Giraud vs. Beach*, 3 E. D. Smith, 337 (344); *Churchill vs. Trapp*, 3 Abb., 306 (and *Voorhies vs. Baxter*, 18 Barb., 592; 1 Abb., 43; affirmed, 17 N. Y., 354; and *Ricart vs. Townsend*, 6 How., 460, there referred to); *The People vs. The Mayor of New York*, 28 Barb., 240; 17 How., 56; 8 Abb., 7 (15); *New York and New Haven Railroad Company vs. Schuyler*, 17 N. Y., 592; 7 Abb., 41; reversing same case, 1 Abb., 417. See however *Leavitt vs. Fish*, 4 Duer, 1 (23).

But a defendant joined without necessity or improperly, may maintain a separate demurrer on that ground. *Chapman vs. West*, 17 N. Y., 125; affirming same case, 10 How., 367; *Eldridge vs. Bell*, 12 How., 547.

Where the demands of coplaintiffs are several, or of such a nature that, on the trial, several judgments can be entered as between such of them as are or are not entitled to sue, and the defendants, the Code does not permit a demurrer for the misjoinder. *Dunderdale vs. Gorguas*, 16 How., 195 (198). But where, owing to the relations of

those parties, a judgment of that nature cannot be rendered, as in the case of a husband and wife joined as coplaintiffs in an action relating to the separate estate of the latter, or for recovery of a debt or damages wholly due to the former, the rule will not apply, and a demurrer will be sustainable in respect of the misjoinder. *Dunderdale vs. Gorguas*, *supra*; *Brownson vs. Gifford*, 8 How., 389. See likewise, as to the objection generally considered, *Barton vs. Draper*, 5 Duer, 130; *Avogadro vs. Bull*, 4 E. D. Smith, 384; *Mann vs. Marsh*, 35 Barb., 68; 21 How., 372.

Where the demurrer is on the ground of non-joinder, the first clause of section 122 will be held to control. Where the court cannot determine the controversy before it, without prejudice to the rights of others, or by saving those rights, demurrer will lie, and the court must cause those parties to be brought in. If the contrary be the case, and the controversy can be decided as above, the demurrer will not be well taken. *Wallace vs. Eaton*, 5 How., 99; 3 C. R., 161.

To sustain a demurrer on this ground, it must appear that the party demurring has an interest in having such other party made a defendant. As a general rule, the plaintiff may choose for himself what parties he will make defendants. So far as it can, without prejudice to the rights of others, the court will determine the controversy between the parties before it, but, when this cannot be done, it will take measures to have the necessary parties brought in. *Hillman vs. Hillman*, 14 How., 456 (460). See also *Newbould vs. Warren*, 14 Abb., 80; *Van Wart vs. Price*, 14 Abb., 4, note. See, however, the demurrer of the party himself, allowed upon this ground, *Spicer vs. Hunter*, 14 Abb., 4.

A complaint brought by the head of an unincorporated association on behalf of its members, was held to be demurrable, it not appearing that it would have been impracticable to make those members plaintiffs by their individual and real names. *Kirk vs. Young*, 2 Abb., 453.

As to the necessity of bringing in all parties jointly interested in the subject-matter of the suit, either as plaintiffs or defendants, see *Bowers vs. Tallmadge*, 16 How., 325.

See also, as to the necessity of joining all parties interested in the same recovery as co-plaintiffs, or showing a sufficient excuse for their non-joinder in that capacity, and their joinder as defendants, under section 119. *Bishop vs. Edmiston*, 13 Abb., 346.

See likewise, as to the necessity of joining all parties interested in the application of a common fund, but not a mere ministerial officer of the court, where the parties, whose interests he represents, appear in person, *Skinner vs. Stuart*, 13 Abb., 442.

As to the waiver of this ground of objection, if not taken by demurrer or answer, see *Purchase vs. Mattison*, 6 Duer, 587; *Savage vs.*

Corn Exchange Fire and Inland Navigation Insurance Company, 4 Bosw., 1 (15); *Hawkins vs. Avery*, 32 Barb., 551, and other cases cited below, section 171, under head of *Omission to Demur*.

(e.) 5. MISJOINDER.

The questions arising under this subdivision have also, in a great measure, been anticipated in a former chapter (chapter II., book VII., section 140, under the head of *Joinder* as connected with the subject of complaint). So far as the law of the case is concerned, the reader is referred to that section. The present will be confined to the mode of presentation of the objection on that ground when tenable.

See also, section 133, chapter IV. of Book VI., and decision there cited, establishing that a demurrer, on that ground, will not lie on account of neglect, on the part of the plaintiff, to separate distinct causes of action as prescribed by section 167, or for confusion in his mode of statement, but that the remedy of a defendant, in such cases, lies by motion. Demurrer is only appropriate when the misjoinder affects the character and substance of such causes of action, irrespective of the mode of their statement.

It is obvious that with reference to the considerations arising upon a demurrer of this nature, the section last referred to (167), by which the cases in which joinder is admissible, or the reverse, are defined, will be the controlling provision.

In *Redmond vs. Dana*, 3 Bosw., 615, it was considered that a demurrer under this subdivision is the proper mode of testing the question as to whether the demand of inconsistent relief, in respect of the facts alleged, may, or may not, constitute a misjoinder.

Where the objection was equally sustainable by both of two defendants, sued jointly for several causes of action, it was held that it might be raised by way of joint demurrer. *Hess vs. Buffalo and Niagara Falls Railroad Company*, 29 Barb., 391.

A demurrer, in this form, will not suffice to raise the question of want of jurisdiction as to one of two causes joined in the same complaint, but the objection must be specifically taken. *Cook vs. Chase*, 2 Duer, 643.

Where apparent on the face of the complaint, the objection of misjoinder will be waived by omission to demur, and cannot be subsequently taken. *Colegrove vs. New York and New Haven Railroad Company*, 6 Duer, 382 (402).

On the allowance of a demurrer on this ground, special authority is given to the court by section 172, to order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned, in its discretion, and upon such terms as may be just.

(f.) 6. INSUFFICIENCY.

In this, as in the preceding subdivisions, the treatment of the subject-matter, so far as regards the essential conditions of sufficiency or insufficiency, has been substantially anticipated. See chapter II. of book VII., where the subject of complaint is treated in detail. The present remarks will be confined to the manner in which an objection on this ground is to be presented, when tenable. The mode of statement appropriate for that purpose will be considered in the succeeding section.

When duly taken, a demurrer on this ground puts in issue the validity of the whole complaint, so that, if the case thereby alleged is deficient by the non-statement of any fact necessary for the plaintiff to prove to make out his action, the demurrer must be sustained. See *White vs. Brown*, 14 How., 282.

But, when taken, it must cover the whole ground of the complaint, and the defects presented must be so substantial in their nature and so fatal in their character, as to authorize the court to say, taking all the facts to be admitted, they furnish no cause of action whatever. Those defects must be such as would render the complaint bad on a general demurrer at law, or bad for want of equity in chancery. *Richards vs. Edick*, 17 Barb., 260; *Woodbury vs. Sackrider*, 2 Abb., 402; *Graham vs. Camman*, 5 Duer, 697; 13 How., 360.

And, on demurrer, the old rule that a pleading is to be construed most unfavorably to the party making it, is essentially qualified. Every reasonable intendment and presumption will lie, on the contrary, in favor of the complaint. *Herkimer County Bank vs. Furman*, 17 Barb., 116.; *Allen vs. Patterson*, 3 Seld., 476 (480); *Wesley vs. Bennett*, 5 Abb., 498; 6 Duer, 688; *The People vs. Ryder*, 2 Kern., 433; affirming *same case*, 16 Barb., 370.

And, in accordance with this rule, a complaint to be overthrown by demurrer, must be wholly insufficient. If, in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand, however inartificially those facts may be presented, or however defective, uncertain, or redundant may be the mode of their statement. The remedy of the defendant for defects of this nature is by motion. See *The People vs. Ravenswood, &c., Turnpike and Bridge Company*, 20 Barb., 518; *Hillman vs. Hillman*, 14 How., 456; *Richards vs. Edick*, 17 Barb., 260; *Hammond vs. Hudson River Iron and Machine Company*, 20 Barb., 378; *Winterson vs. Eighth Avenue Railroad Company*, 2 Hilt., 389.

The above rule, that pleading under the Code must be construed most favorably to the pleader, must not, however, be carried to too

great an extent. Though admissible on points of form, it cannot be held applicable with regard to the fundamental requisites of a cause of action. If they are absent, the pleading will be demurrable, as being defective in substance. *Spear vs. Downing*, 34 Barb., 522; 22 How., 30; 12 Abb., 437.

And the objection that two or more plaintiffs unite in bringing what is in fact a several cause of action, is of this nature, and may be reached by general demurrer. *Mann vs. Marsh*, 35 Barb., 68; 21 How., 372.

In presenting objections of this nature, the defendant must take especial care to confine them to such portions of the pleading as are open to legitimate impeachment. If the question be presented by general demurrer to the whole complaint, and any portion of that complaint, or any cause of action thereby presented be sufficient, the demurrer will fail, as being too broad, although other portions be really defective. *Cooper vs. Clason*, 1 C. R. (N. S.), 347; *Newman vs. Otto*, 4 Sandf., 668; 10 L. O., 14; *Butler vs. Wood*, 10 How., 313; *Sheldon vs. Hoy*, 11 How., 11 (16); *Jaques vs. Morris*, 2 E. D. Smith, 639; *Martin vs. Mattison*, 8 Abb., 3; *Mabey vs. Adams*, 3 Bosw., 346 (351). See also generally, *Cook vs. Chase*, 3 Duer, 643.

In like manner a demurrer may be too broad as to parties. A joint demurrer must be fully sustained as to all who participate in it, and if the case fail as to any one of them, the demurrer will be bad. Unless, therefore, the case be, indisputably, one of joint interest, the precaution of taking the objection by separate demurrers should never be omitted. *Vide Phillips vs. Hagaden*, 12 How., 17; *Eldridge vs. Bell*, 12 How., 547; *Woodbury vs. Sackrider*, 2 Abb., 402; *The People vs. The Mayor of New York*, 28 Barb., 240; 17 How., 56; 8 Abb., 7 (15). So, likewise, if, on a demurrer to the whole complaint, any one of several co-plaintiffs may have judgment, the demurrer will be bad. *Peabody vs. Washington County Mutual Insurance Company*, 20 Barb., 339.

Where, however, a demurrer is too broadly stated in its general terms, it may be so limited by the specification as to render it available as a demurrer to portions of the complaint only. See *Matthews vs. Beach*, 4 Seld., 173. Nor, it seems, will surplusage be an objection, where, in fact, a demurrer is sufficient. *Smith vs. Brown*, 6 How., 383.

Where both defendants have a similar interest in the objection to the plaintiff's recovery, their joint demurrer may be available, though the interests, in respect of which it is taken, may be several. See *Hess vs. Buffalo and Niagara Falls Railroad Company*, 29 Barb., 391. See also, as to a demurrer by husband and wife in an action

against the wife's separate estate, *Goodall vs. McAdam*, 14 How., 385; *Goelet vs. Gore*, 31 Barb., 314.

Demurrer will not lie in respect of the relief demanded, or the amount claimed by the complaint. *Moran vs. Anderson*, 1 Abb., 288; *Beale vs. Hayes*, 5 Sandf., 640; 10 L. O., 246; *The People vs. The Mayor of New York*, 28 Barb., 240; 17 How., 56; 8 Abb., 7 (15); *Andrews vs. Shaffer*, 12 How., 441 (443); *Hecker vs. De Groot*, 15 How., 314; *Moses vs. Walker*, 2 Hilt., 536; *Meyer vs. Van Collem*, 28 Barb., 230; 7 Abb., 222 (224); *Woodgate vs. Fleet*, 9 Abb., 222 (236).

See as to the power of a defendant to put in separate demurrers to each of several allegations, in a complaint amounting to the statement of a separate cause of action, *Ogdensburgh Bank vs. Paige*, 2 C. R., 75.

As regards this ground of objection it is, by express provision, in section 148, optional for the defendant either to submit it preliminarily in this form, or to defer taking it until the trial. See this subject considered below, under the head of *Waiver of Objections*.

But if, instead of taking his objection to a pleading in a preliminary form, the party defers it until the trial, he will be presumed to have been satisfied with it as it stood, and it will be taken most strongly against him. See collaterally, on the subject of an indefinite answer, *Wall vs. The Buffalo Water Works Company*, 18 N. Y., 119.

§ 170. *Form and Mode of Demurrer.*

This pleading consists simply of a short and succinct statement of the grounds of objection to the complaint.

Distinctness in such statement is, as will be seen, made an essential requisite by section 145.

Being specially grounded on section 144, the precise phraseology of that section should be used in all cases, either as preliminary to, or part of the statement of the ground of objection. An omission to comply with this requisite will render the pleading bad. See *Harper vs. Chamberlain*, 11 Abb., 234.

Each ground must be separately stated, and it must appear upon its face on which subdivision of the section it is founded.

And, when separately stated, the grounds taken should be also plainly numbered, according to the requisitions of rule 19.

When complete, the pleading requires no verification. It must, however, be subscribed by the defendant's attorney, or it will be irregular. See *Ehle vs. Haller*, 6 Bosw., 661; 10 Abb., 287. And a copy must be served, in due course, upon the adverse party.

It seems that a demurrer to part of a complaint does not lose its distinctive character, though made out on one paper, and connected in

form with an answer in the same pleading. *Howard vs. Michigan Southern Railroad Company*, 5 How., 206 ; 3 Q. R., 213.

As to the expediency of serving an affidavit of merits in connection with a demurrer, where the grounds on which the latter is taken are not clearly tenable, see *Appleby vs. Elkins*, 2 Sandf., 673 ; 2 C. R., 80 ; *Bank of Lowville vs. Edwards*, 11 How., 216.

(a.) STATEMENT OF GROUNDS.

It is essential to the efficiency of this pleading that every ground on which the complaint is impeached should be distinctly alleged ; and, if an objection is tenable in more than one shape, that it should be presented in every phase which it may assume. On the argument, counsel will be strictly confined to the grounds actually assigned, and no other objection, however tenable, can then be raised. See *Hobart vs. Frost*, 5 Duer, 672 ; reported, 3 Abb., 119, as *Viburt vs. Frost* ; *Eldridge vs. Bell*, 12 How., 547 ; *Wilson vs. The Mayor of New York*, 15 How., 500 ; 6 Abb., 6 ; reversing *same case*, 4 E. D. Smith, 675 ; 1 Abb., 4 ; *Moore vs. Smith*, 10 How., 361 ; *Bank of Lowville vs. Edwards*, 11 How., 216 ; *Cook vs. Chase*, 3 Duer, 643. See, however, disregard of this defect, when arising from a clerical error, *Connecticut Bank vs. Smith*, 9 Abb., 168.

The cause of demurrer must be assigned in the words of the section, or, possibly, in words closely equivalent. A mere detailed specification of grounds of objection, not assigning any of the grounds there stated as grounds of demurrer, will be wholly unavailing. *Harper vs. Chamberlain*, 11 Abb., 234.

And when the error of insufficiency is assigned in the words of the section, a detailed statement of the grounds of assignment may operate to confine the pleader to those grounds, so as to exclude him from all others. See *Nellis vs. De Forest*, 16 Barb., 61 (65).

A specification may, however, have the effect of curing an accidental omission to make a specific assignment. See *Connecticut Bank vs. Smith*, 9 Abb., 168.

And it may possibly operate to sustain a demurrer otherwise too broad, by limiting its extent. *Matthews vs. Beach*, 4 Seld., 173.

A demurrer, on the ground of insufficiency, may properly be raised by an objection, in the precise words of subdivision 6, without stating any grounds whatever on which such objection is based. This is now abundantly settled by the following decisions: *Haire vs. Baker*, 1 Seld., 357 ; *Paine vs. Smith*, 2 Duer, 298 ; *Durkee vs. Saratoga and Washington Railroad Company*, 4 How., 226 ; *Johnson vs. Wetmore*, 12 Barb., 433 ; *Dauchy vs. Bennett*, 7 How., 375 ; *Hoagland vs.*

Hudson, 8 How., 343; *Getty vs. Hudson River Railroad Company*, 8 How., 177. See also *dictum* in *Swift vs. De Witt*, 3 How., 280; 1 C. R., 25; 6 L. O., 314. See likewise, in relation to demurrer by answer, *Hyde vs. Conrad*, 5 How., 112; 3 C. R., 162; *Anibal vs. Hunter*, 6 How., 255; 1 C. R. (N. S.), 403; *Arthur vs. Brooks*, 14 Barb., 533, and *Noxon vs. Bentley*, 7 How., 316.

By these decisions the following, holding to the contrary, and that a specification of the alleged errors is necessary, are clearly overruled: *Grant vs. Lasher*, 2 C. R., 2; *Hunter vs. Frisbee*, 2 C. R., 59; 7 L. O., 319; *White vs. Low*, 7 Barb., 204; *Glenny vs. Hitchins*, 4 How., 98; 2 C. R., 56; *Swift vs. Dewitt*, 3 How., 280; 1 C. R., 25; 6 L. O., 314; *Purdy vs. Carpenter*, 6 How., 361, and *Hinds vs. Tweddle*, 7 How., 278, the last being, however, a case of demurrer for misjoinder.

The objection of want of legal capacity to sue is, in like manner, raisable by a specification, in the mere words of subdivision 2, when apparent on the face of the complaint. *Hulbert vs. Young*, 13 How., 413. See, as to a specification in an answer, in substantially the words of the section, being sufficient to raise the objection of the pendency of another action, without going into matters of detail, *Ward vs. Dewey*, 12 How., 193.

In *Getty vs. The Hudson River Railroad Company*, 8 How., 177, above cited, it is laid down that such is the case, as to any of the causes of demurrer given by the 144th section, when the ground of objection is apparent upon the face of complaint. The specification may then be made in the precise words of the section, but it must state distinctly upon which ground or grounds the party relies. Where, however, the impeachment is for want of jurisdiction, or defect of parties, it should appear whether it is the want of jurisdiction of the person of the defendant, or of the subject-matter of the suit; and as to parties, whether it is a defect of parties, plaintiff or defendant.

In the same manner it will be always expedient to show upon the face of the specification any particulars necessary or expedient, for the purpose of making the objection taken appear distinctly, such as the names and interest of parties not brought in, the nature and incongruity of causes of action, improperly joined, and such like matters, tending to show the existence of a valid objection.

In relation to a demurrer for defect of parties, it was held in *Skinner vs. Stuart*, 13 Abb., 442, that a mere statement of the objection in the words of the subdivision was insufficient. The particular defect should have been specified.

Care must be taken, however, to confine such specifications to matters apparent on the face of the complaint, as any allegation of, or allusion to extraneous matter may render the pleading itself defective.

(b.) DEMURRER AND ANSWER, HOW FAR COMPATIBLE.

Under section 151 of the Code, forming part of the chapter on answer, it is provided that "the defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue."

It is obvious, from the terms of the section, that, where the plaintiff, in pursuance of the provisions of section 167, has separately stated several causes of action, the defendant may put in a demurrer to any one or more of such causes, and an answer to others; pursuing, of course, the same system of separating his own defences.

And even where two distinct causes of action arose under the same instrument, and were combined in one statement, it was held competent for the defendant himself to make the separation, and to put in a demurrer to such portions of the pleading as stated one of such causes, whilst answering such as related to the other. *Clarkson vs. Mitchell*, 3 E. D. Smith, 269.

And in the same case it was decided that both modes of defence might be combined in one and the same pleading, without losing their distinctive character. See also, *Howard vs. Michigan Southern Railroad Company*, 5 How., 206; 3 C. R., 213.

But, in adopting this course, the pleader must take care that the two modes of defence are not inconsistent. See, as to demurrer to reply, *Burr vs. Wright*, 9 How., 542.

Demurrer and answer are, however, wholly incapable of joinder, when taken to the complaint as a whole, or to the same cause of action. If attempted, the pleading will be bad, though not a nullity; the plaintiff's remedy is by motion to compel the defendant to elect between those forms of defence as inconsistent, and in default of election to strike out one of them. See *Howard vs. Michigan Southern Railroad Company*, *supra*; *Spellman vs. Weider*, 5 How., 5; *Slocum vs. Wheeler*, 4 How., 373; *Cobb vs. Frazee*, 4 How., 413; 3 C. R., 43; *Clark vs. Van Deusen*, 3 C. R., 219; *Ingraham vs. Baldwin*, 12 Barb., 9; affirmed, 5 Seld., 45; *Struver vs. Ocean Insurance Company*, 16 How., 422; *Gassett vs. Crocker*, 10 Abb., 133; *Slack vs. Heath*, *infra*; *Munn vs. Barnum*, 1 Abb., 281; 12 How., 563. This series of decisions overrules *The People vs. Meyer*, 2 C. R., 49, and *Gilbert vs. Davies*, 2 C. R., 50.

Nor in a case where demurrer pure will lie, can an objection apparent on the face of the complaint be taken by answer. If attempted, the pleading will be bad. *Slack vs. Heath*, 4 E. D. Smith, 95; 1 Abb., 331; *Struver vs. Ocean Insurance Company*, and *Gassett vs. Crocker*, *supra*; *Zabriskie vs. Smith*, 3 Kern., 322, and *Dennison vs. Dennison*, 9 How., 246.

The above provision was first inserted on the amendment of 1849.

Before its insertion, it had been held in *Manchester vs. Storrs*, 3 How., 410, that a demurrer could only be interposed to the entire complaint. This doctrine has, of course, ceased to be applicable.

§ 171. *Omission to Demur.*

The effect of such omission is defined by section 148, providing that

“If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.”

The question will, in the present section, be considered in its general aspect, as applicable to an omission to take the objections defined by section 144, without regard to the form in which such objection may be presented. Of those objections, Nos. 2, 3, 4 and 5 will be positively waived by such omission. Nos. 1 and 6 may, on the contrary, be taken at any time, and need not be raised in abatement at the outset. But not, it seems, after trial and judgment, on appeal from that judgment. See *Mosselman vs. Caen*, 34 Barb., 66; 21 How., 248.

The meaning of the section is thus defined in *Zabriskie vs. Smith*, 3 Kern., 322 (336). If the objection “be not taken by demurrer, where that mode is proper, or by answer in cases where that is the appropriate method, it is waived.” See also *Fosgate vs. Herkimer Manufacturing and Hydraulic Company*, 2 Kern., 580; *Winterson vs. Eighth Avenue Railroad Company*, 2 Hilt., 389. As to the right of a defendant to claim that the complaint is defective on the hearing of a demurrer, to answer, being restricted to the ground of want of jurisdiction or insufficiency, *vide People vs. Banker*, 8 How., 258; *Fry vs. Bennett*, 1 C. R., (N. S.), 238 (256); 5 Sandf., 54; *Rayner vs. Clark*, 7 Barb., 581; 3 C. R., 230; *Schwab vs. Furniss*, 4 Sandf., 704; 1 C. R. (N. S.), 342.

See generally, as to the waiver of a plea in abatement by answering to the merits, *Tripp vs. Riley*, 15 Barb., 333; *Freeman vs. Newton*, 3 E. D. Smith, 246; *Brown vs. Jones*, 1 Hilt., 204; 3 Abb., 80; *Lewin vs. Stewart*, 10 How., 509. See, however, in the succeeding chapter, as to the possibility of joining defences of both natures in the same answer, when separately pleaded.

The following decisions carry out the principles of section 148, by decreeing the waiver of specific objections when not presented in proper season, either by demurrer when apparent on the face of the complaint, or when not so apparent by answer, stating the objection in connection with such matters of fact as may be necessary to establish its existence.

As to the objection of the want of capacity to sue, see *Hastings vs.*

McKinley, 1 E. D. Smith, 273; *Mosselman vs. Caen*, 34 Barb., 66; 21 How., 248.

As to the objection of a defect or other misjoinder of parties, *Leavitt vs. Fisher*, 4 Duer, 1 (23); *Loomis vs. Tift*, 16 Barb., 541; *Eldridge vs. Bell*, 12 How., 547; *King vs. Vanderbilt*, 7 How., 385; *Ingraham vs. Baldwin*, 12 Barb., 9; affirmed, 5 Seld., 45; *Bidwell vs. The Astor Mutual Insurance Company*, 16 N. Y., 263 (266); *Fosgate vs. Herkimer Manufacturing and Hydraulic Company*, 2 Kern., 580 (584); *Zabriskie vs. Smith*, 3 Kern., 322 (336); *Bates vs. James*, 3 Duer, 45; *Jackson vs. Whedon*, 1 E. D. Smith, 141; 3 C. R., 186; *Tallman vs. Franklin*, 3 Duer, 395 (400).—(N. B. Not affected by reversal, 4 Kern., 584.) *Baggot vs. Boulger*, 2 Duer, 160; *General Mutual Insurance Company vs. Benson*, 5 Duer, 168; *Bowdoin vs. Coleman*, 6 Duer, 182; 3 Abb., 431; *Purchase vs. Mattison*, 6 Duer, 587; *Lewis vs. Graham*, 4 Abb., 106; *Sheldon vs. Wood*, 2 Bosw., 267; *Van Deusen vs. Young*, 29 Barb., 9; *Abbe vs. Clark*, 31 Barb., 238; *Gasset vs. Crocker*, 10 Abb., 133; *Montgomery County Bank vs. Albany City Bank*, 8 Barb., 396 (401); *Savage vs. Corn Exchange Fire and Inland Navigation Insurance Company*, 4 Bosw., 1 (15); *Scranton vs. Farmers' and Mechanics' Bank of Rochester*, 33 Barb., 527; *Hawkins vs. Avery*, 32 Barb., 551; *Donnell vs. Walsh*, 6 Bosw., 621. See also, as to the waiver of the defence of coverture, if not pleaded in abatement, *Castree vs. Gavelle*, 4 E. D. Smith, 425. But the objection of a total misnomer of the defendant is one of substance, and, where the party does not waive it by appearance, may be taken even after judgment. See *Farnham vs. Hildreth*, 32 Barb., 277.

This rule is, however, subject to this modification, *i. e.*, that where it appears that a complete determination of the controversy cannot be had without the presence of other parties, the court has the power, and it is its duty, under section 122, to order them to be brought in, even although those before the court may have omitted to raise the objection in due season, and waived it, therefore, so far as they are concerned. See *Shaver vs. Brainard*, 29 Barb., 25; *Leavitt vs. Fisher*, 4 Duer, 1 (23); and *Davis vs. The Mayor of New York*, 2 Duer, 663 (665, 666).

Where too the objection as to defect or misjoinder of parties, is not formal in its nature, but goes directly to the merits, as affecting the rights of the plaintiff to maintain the action, it will fall under subdivision 6, and become one for want of sufficiency, and, as such, will not be waived. See *Giraud vs. Beach*, 3 E. D. Smith, 337; *Higgins vs. Rockwell*, 2 Duer, 650; *Gould vs. Glass*, 19 Barb., 179; *Thurman vs. Wells*, 18 Barb., 500 (518); *Spencer vs. Wheelock*, 11 L. O., 329; *Mann vs. Marsh*, 35 Barb., 68; 21 How., 372.

As to the waiver of an objection on the ground of multifariousness or

misjoinder of causes of action, being waived by an omission to take it in due season, see *Youngs vs. Seeley*, 12 How., 395; *Colegrove vs. Harlem and New Haven Railroad Company*, 6 Duer, 382 (402); *Winterson vs. Eighth Avenue Railroad Company*, 2 Hilt., 389; *Wright vs. Storrs*, 6 Bosw., 600.

That neither the objection on the ground of want of jurisdiction nor of insufficiency is waived by an omission to plead it, is clear from the terms of the section itself. It may be even sustainable after trial, and on appeal, where the defect is essential and fatal to the cause of action. *Cole vs. Blunt*, 2 Bosw., 116. But not so as a general rule. See *Moselman vs. Caen*, 34 Barb., 66, above cited.

See, as to the right of a party to raise such an objection on the trial or on motion, notwithstanding an omission to demur, *Montgomery County Bank vs. Albany City Bank*, 3 Seld., 459 (464); *Budd vs. Bingham*, 18 Barb., 494; *Burnham vs. De Bevoise*, 8 How., 159.

An insufficiency of allegation will, however, be cured by verdict, and the objection cannot afterwards be raised. *Brown vs. Harmon*, 21 Barb., 508. So also a defect, otherwise impeachable, but supplied by the pleading of the adverse party, cannot be impeached. *White vs. Joy*, 3 Kern., 83 (86). And a technical defence, or the impeachment of an evident defect in the complaint, will be waived by an omission to raise it at the outset, or take it at the trial. *Castree vs. Gavelle*, 4 E. D. Smith, 425; *Carley vs. Wilkins*, 6 Barb., 557.

An objection to the jurisdiction, personal in its nature, is also capable of waiver, even by the act of appearance. See *Mahaney vs. Penman*, 4 Duer, 603; 1 Abb., 34.

Although an objection to sufficiency may be even tenable on appeal, yet a defendant omitting to raise it in the previous stages of the suit, cannot then take an affirmative judgment in his own favor; he can only obtain a reversal of that obtained by the plaintiff. *Raynor vs. Clark*, 7 Barb., 581 (584); 3 C. R., 230.

And, if he defers the objection to the trial, the extent to which it will be available will be comparatively limited; the question will then be not whether the complaint is perfect, and embraces all necessary matters, but only whether there are facts enough set forth to show a cause of action. *Ludington vs. Taft*, 10 Barb., 447.

See likewise, as to a pleading being taken most strongly against the adverse party, who goes to trial, without availing himself of the right to take a preliminary objection, *Wall vs. Buffalo Water Works Company*, 18 N. Y., 119.

§ 172. *Frivolous Demurrer.*

In cases where a demurrer is taken on grounds which, on its face, are wholly untenable, the defendant incurs the risk, not merely of its being overruled on the argument, but also of its being stricken out as frivolous on motion on the part of the plaintiff for judgment under section 247; and, in such cases, on its becoming clearly apparent that such demurrer has been interposed in bad faith, and for the purpose of delay only, leave to answer over may very possibly be refused. It is therefore a proceeding attended with some risk, unless there exist some substantial objection, on which the preliminary decision of the court as to the plaintiff's right to recover may fairly be taken.

It is only, however, in gross cases, and where the demurrer is palpably groundless and untenable, that the courts will feel disposed to exercise their summary powers in this respect. *Necfus vs. Kloppenburgh*, 2 C. R., 76. To warrant an application of this nature "the case should be entirely clear, palpable on the statement of the facts, and requiring no argument to make it apparent." *Rae vs. Washington Mutual Insurance Company*, 6 How., 21; 1 C. R. (N. S.), 185. "The rule is that the court will not strike out a demurrer as frivolous, unless it clearly appear to be taken merely for the purpose of delay, or unless the grounds stated in it are clearly untenable. Its insufficiency, as a pleading, must be so apparent that the court can determine it on bare inspection without argument." *Sixpenny Savings Bank vs. Sloan*, 15 How., 543; 2 Abb., 414. See likewise *Shearman vs. New York Central Mills*, 1 Abb., 187 (190).

The fact that a demurrer is taken on slight grounds will not render it frivolous, if they are such that any argument can fairly be raised upon them. *Niblo vs. Harrison*, 7 Abb., 447; *Accome vs. American Mineral Company*, 11 How., 24. See also *dictum* and head-note in *Bank of Wilmington vs. Barnes*, 4 Abb., 226, though the actual decision was adverse. Nor will a demurrer be properly adjudged frivolous by one justice of the court, when founded upon the decision of another, whether that decision be correct or not. *Lattimer vs. New York Metallic Spring Company*, 9 Abb., 207, note.

A demurrer to a form of complaint already decided to be sufficient, will, on the contrary, be clearly frivolous, and will be so adjudged upon motion. *Phelps vs. Ferguson*, 19 How., 143; 9 Abb., 206. See likewise actual decision in *Bank of Wilmington vs. Barnes*, above cited.

Inasmuch as a demurrer admits the facts stated in the complaint, it admits also the conclusions which clearly flow from them. And if, on the facts stated, the legal conclusion be unquestionable, a demurrer, seeking

to make it a question, may be adjudged frivolous. See *Glenny vs. Hitchins*, 4 How., 98; 2 C. R., 56; *Appleby vs. Elkins*, 2 Sandf., 673; 2 C. R., 80; *Taylor vs. Corbiere*, 8 How., 385; *Greenbury vs. Wilkins*, 9 Abb., 206, note; *Lee vs. Ainslie*, 1 Hilt., 277; 4 Abb., 463; *Milliken vs. Byerly*, 6 How., 214; *Holstein vs. Rice*, 15 How., 1.

A clearly untenable objection as to parties will be frivolous if taken by demurrer. *Conde vs. Shepard*, 4 How., 75; 2 C. R., 58; *Camden Bank vs. Rogers*, 4 How., 63; 2 C. R., 45. Or such an objection as to jurisdiction. *Jacot vs. Boyle*, 18 How., 106.

So also a demurrer on a point which forms actually no ground of defence. *Bright vs. Currie*, 5 Sandf., 433; 10 L. O., 104; *Welles vs. Webster*, 9 How., 251. Or where the objection only goes to the amount of the plaintiff's claim. *Moran vs. Anderson*, 1 Abb., 288.

Or one on the ground that details are not stated, when the allegations of the complaint are sufficient to raise an issue. *Union Mutual Insurance Company vs. Osgood*, 1 Duer, 707; 12 L. O., 85. Or where the objection taken is one properly raisable by motion and not by demurrer. *Radway vs. Mather*, 5 Sandf., 654.

Whenever a real defence exists to the action, leave to answer over will, doubtless, be given. Where, however, the demurrer is so clearly untenable, as to render it questionable whether it has been put in in good faith, and no affidavit of merits has been served or produced, leave to answer may be refused. See *Appleby vs. Elkins*, 2 Sandf., 673; 2 C. R., 80; *Osgood vs. Whittlesey*, 10 Abb., 134; 20 How., 72; *Bank of Lowville vs. Edwards*, 11 How., 216. See also Code, section 172, as to good faith being a necessary condition, on leave being allowed to plead over.

Nor will the defendant be allowed to put in a manifestly insufficient answer. *Brown vs. Ward*, 3 Duer, 660. Or an unconscientious defence, as the statute of limitations. *Osgood vs. Whittlesey*, *supra*.

A decision of this nature will not be interfered with on appeal, unless the court be of opinion that the demurrer was clearly good. *Wesley vs. Bennett*, 6 Duer, 688; 5 Abb., 498.

A demurrer to the Code itself, as unconstitutional, inasmuch as it abolished the distinction between law and equity, has been, as might have been expected, overruled as frivolous. *Anon.*, 1 C. R., 49.

§ 173. *Course on Service of Decision on Demurrer.*

On the service of a demurrer the plaintiff is at liberty to amend his complaint, as in case of answer. On the decision the court may also allow the party to plead over on such terms as may be just. Code, section 172. This may either be by allowing an amendment of the

complaint where the demurrer is sustained, or by granting leave to put in an answer where it is either overruled or declared to be frivolous. If, too, the demurrer is allowed on the ground of misjoinder of causes of action, the court may allow the action to be divided into as many as may be necessary to the proper determination of the controversies brought in question.

In this latter case the proper division of the complaint into as many as may be necessary, will of course be imposed, and, when so divided, service must be made in the usual manner, with all the usual incidents consequent upon such service, as to the defendant's time to answer in each divided action and otherwise, unless the court make any different provision.

If, on a decision in the defendant's favor, the plaintiff have leave to amend, he must, of course, do so within the time allowed to him by the order; or if no time be so allowed, then within the usual twenty days, or he will forfeit his privilege, and the defendant will then be entitled to enter up and perfect judgment on the decision, as if no such leave had been given. See *Ford vs. David*, 1 Bosw., 569 (595). And if, on such decision, the leave to amend be, as is usual, made conditional on payment of the costs of the demurrer, such costs must be paid at or before the service of the pleading, or the adverse party may refuse to receive it, and then the same consequences will follow as if it had not been served at all.

The converse of this proposition is equally true where a demurrer is overruled, but leave given to answer over. That answer must be served, and costs, if imposed, paid in due time as above, or the leave will be forfeited, and the plaintiff entitled to his judgment.

Where, by the terms of the decision, leave is given to withdraw the demurrer on terms, it is essential to the further conduct of the action that such order should be fully complied with, and the demurrer withdrawn accordingly. If neglected, the adverse party will be entitled to read the pleading demurred to as an admission of the facts alleged upon it. *Cutter vs. Wright*, 22 N. Y., 472.

Special provision is made by section 146, for the case of an answer to the complaint when amended, either as of course, on the service, or by leave consequent upon the decision of a demurrer when interposed. A copy of the amended pleading must, in either case, be served on the defendant, who must answer it within twenty days. If omitted, the plaintiff may take judgment by default in a similar manner to the usual entry of default in service of answer, under section 246, on filing with the clerk due proof of the service of such amended pleading, and of the defendant's omission to answer it; giving eight days' notice of his application to the court for judgment, as prescribed in the same section, in

those cases when such application is necessary. See hereafter on these points, under the head of *Entry of Judgment by Default*.

On an amendment of this nature after decision, a copy of the amended pleading must be served upon every defendant, and even upon one who has not joined in the demurrer, but suffered a previous judgment against him by default. *People vs. Woods*, 2 Sandf., 652; 2 C. R., 18.

(a.) DEMURRER BY ANSWER.

The subject of demurrer by answer, so far as relates to any independent considerations in relation thereto, will be treated of in the next chapter.

CHAPTER III.

ANSWER.

§ 174. *Its Office and Requisites.*

THE office of this most important pleading is, to present the case of the defendant, in opposition to that attempted to be made out by the plaintiff, upon the facts of the case alone, or upon the law and the facts conjointly, according to the circumstances. It is, accordingly, the form of defence most usually adopted.

Its requisites are prescribed by section 149 of the Code, already cited, but which it will be convenient to repeat :

§ 149. The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;
2. A statement of any new matter constituting a defence or counter-claim, in ordinary and concise language, without repetition.

By section 150, the meaning and extent of the term counter-claim, and the cases in which a defence of that nature may be put in, are prescribed and defined. That branch of the provision will be considered in a subsequent portion of this chapter.

The section, however, proceeds thus :

The defendant may set forth by answer, as many defences and counter-claims as he may have, whether they be such as have been heretofore denomi-

nated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

The above provisions are so clear, that no explanation seems requisite to make their general purport apparent. In their details, they will be hereafter considered.

The defendant has four courses open to him by means of an answer, when put in, any one or more of which he may adopt at his election, or all, if the circumstances admit.

1. He may demur to the complaint, for defects in law, latent in that pleading itself, but made patent by statements contained in the answer.

2. He may put the plaintiff to full proof of his case, by denying the facts alleged.

3. He may present new matter, wholly or partially defeating or avoiding the plaintiff's claim.

4. He may seek to establish a counter-claim, wholly or partially extinguishing the plaintiff's demand, and may, by that means, seek for counter-relief in his own favor.

The above considerations will, accordingly, be treated in the order thus prescribed, such portions of the subject as are applicable to answer in general, without regard to the particular form of defence set up, being preliminarily considered.

(a.) MATTERS OF FORM.

An answer cannot properly be made, before the complaint is made out and served, or, at the least, filed in the clerk's office. One made and sworn to, without knowledge of the complaint, was held to be wholly irregular, and a fraud upon the court, in *Phillips vs. Prescott*, 9 How., 430. The defendant is, on the contrary, entitled to treat the copy complaint served upon him as that which he is required to answer, though manifestly incorrect, and to join issue and go to trial accordingly. See *Trowbridge vs. Didier*, 4 Duer, 448.

It is obvious that the decision in *Didier vs. Warner*, 1 C. R., 42, that a mere memorandum indorsed upon the complaint might be held to be an answer, is wholly exceptional.

The defendant, at the time of putting in such answer, must not be in default, either actually or by imputation. Thus, where two defendants put in a joint answer, after the time of one had expired, the plaintiff was held entitled to return such answer, and to take judgment, though, had he answered alone, the other defendant was still in time. *Jaques vs. Greenwood*, 1 Abb., 320.

The different questions as to the verification, or omission to verify an

answer, when made, and those in relation to its formal preparation and service, have been considered in earlier portions of this work.

The provision of rule 19, prescribing the separate statement and numbering of defences, must also be strictly complied with.

(b.) RELIEF AS BETWEEN CO-DEFENDANTS.

The answer must be directed to meet the plaintiff's case only; and any extraneous matter is redundant, and may be stricken out on application. Thus, where the answer stated no facts amounting to a defence, but was solely directed to the adjudication of equities as between co-defendants, the whole was stricken out, and judgment ordered for the plaintiff. *Woodworth vs. Bellows*, 4 How., 24; 1 C. R., 129.

But, where the adjustment of such equities is germane to the object of the suit itself, as in partition or interpleader, the rule will not, of course, apply. See *Bogardus vs. Parker*, 7 How., 305; *Leavitt vs. Fisher*, 4 Duer, 1.

(c.) RESTRICTIONS ON ANSWER.

In the following instances, a defendant is restricted as to the nature of the answer to be put in by him:

In a suit removed from a justice's court, on the ground of title to real estate being in question, the defendant can only make the same defence as that made by him before the justice. Code, section 60. Though so limited, he is at liberty, however, to vary its wording, or to abandon it in part. See, heretofore, under the head of *Justices' Courts*, book I., chapter VI., section 24, and sundry cases, especially *Wiggins vs. Tallmadge*, 7 How., 404, there cited.

When the defendant is a joint-debtor, and has been served with a summons to show cause why he should not be bound by a previous judgment. under chapter II., title XII. of the Code, he is precluded from raising the defence of the statute of limitations. Section 379.

And in cases where an analogous proceeding is taken against parties interested in the real estate of a deceased judgment-debtor, under section 376, the power of defence is still more restricted. Nothing can be interposed by such parties, beyond a denial of the judgment, or any defence which may have arisen subsequently. Section 379.

(d.) GENERAL OBSERVATIONS.

A *feme covert*, sued jointly with her husband, need no longer apply for leave to answer separately, as under the former practice. *Harlay vs. Ritter*, 18 How., 147. Nor, since the last amendment of section 114, is it any longer necessary for her to be represented by her guardian or

next friend. See, as to the practice previous to that amendment, *Phillips vs. Burr*, 4 Duer, 113.

Although, as a general rule, no formal defence that is not pleaded, will be allowed, still, where persons not *sui juris* are concerned, that rule will not be strictly applied. Thus, in *Fleet vs. Dorland*, 11 How., 489, it was held, that where infants were defendants, the court was bound to notice the objection, that a suit in partition was not brought by any person actually or constructively in possession, whether pleaded or not.

Answer, and demurrer proper, are two separate pleadings, and, though they may be made out on one paper, and in connected form, they do not lose their distinctive character. *Howard vs. The Michigan Southern Railroad Company*, 5 How., 206 ; 3 C. R., 213.

An answer, drawn according to the old chancery forms, admitting the facts, but stating legal propositions in defence, cannot be sustained under the Code. An answer, now, must either deny the allegations of the complaint, or state new matter by way of avoidance. *Gould vs. Williams*, 9 How., 51.

An answer must be directed to the complaint, and not to the bill of particulars of the plaintiff's demand, if previously delivered. *Scovill vs. Howell*, 2 C. R., 33 ; *Kreiss vs. Seligman*, 8 Barb., 439 ; 5 How., 425 ; *Yates vs. Bigelow*, 9 How., 186.

§ 175. *Demurrer by Answer.*

This subject presents itself in natural order, as the first of the four courses open to a defendant who answers the plaintiff's complaint.

This defence is one of a comparatively limited nature. To render it admissible, two requisites must concur.

1. The objection must fall within one of the six classes prescribed by section 144.

2. That objection must not be patent upon the face of the complaint.

If the first of these requisites be absent, the objection cannot be raised at all by way of demurrer.

If the objection be patent on the plaintiff's own showing, it cannot be raised in this manner.

To render demurrer by answer admissible, some statement of facts must be necessary, and must be made, for the purpose of sustaining the objection. If no such statement be necessary, the objection, if existent, is necessarily one apparent on the face of the complaint ; as such, it cannot be taken otherwise than by demurrer proper, and, unless so taken, will be waived.

If not so apparent, the objection, standing alone and without any

avement to sustain it, will be necessarily untenable. *Zabriskie vs. Smith*, 3 Kern., 322; *Struver vs. Ocean Insurance Company*, 16 How., 422; *Baggott vs. Boulger*, 2 Duer, 160; *Hornfager vs. Hornfager*, 6 How., 279; 1 C. R. (N. S.), 412; *Hoxie vs. Cushman*, 7 L. O., 149; *Gassett vs. Crocker*, 10 Abb., 133; *Dennison vs. Dennison*, 9 How., 246. See also, as to the objection of insufficiency, though the waiver in such case is not absolute, *Higgins vs. Rockwell*, 2 Duer, 650; *Slack vs. Heath*, 4 E. D. Smith, 95; 1 Abb., 331. Nor will a mere protest against the jurisdiction, upon the face of an answer, avail, or have the effect of a demurrer, where the objection is one merely of a personal nature. *Mahaney vs. Penman*, 4 Duer, 603; 1 Abb., 34. See also last chapter, section 171, and cases there cited.

But where, on the contrary, any statement of fact is necessary, for the purpose of making the existence of a demurrable objection apparent, demurrer by answer, is the only proper form, and demurrer pure will not lie. Any statement of fact, however slight or unimportant, is inadmissible upon the face of the latter pleading, which must not tender any issue of fact, however trifling. See last chapter, and numerous cases cited in section 168, near the commencement.

In raising an objection in this form, especial care must be taken to state it separately, and to include no more allegations of fact in the collateral statement than such as are necessary to make it clearly apparent. Being emphatically a separate defence, it must be separately stated; and its operation, whether going to the whole complaint, or to any one or more of separate causes of action stated by the complaint, must be clearly defined.

Demurrer by answer effects the object, and, in a great measure, supplies the place of the former plea in abatement. The point as to whether, when taken, it is compatible with the assertion of a separate defence to the merits in the same pleading, has undergone considerable discussion.

The stricter view of the question is taken, and the former common-law principle, that a plea in abatement is incompatible with, and is, in fact, waived by answering to the merits, is maintained in the following cases: *Gardiner vs. Clark*, 6 How., 449; *Van Buskirk vs. Roberts*, 14 How., 61; *King vs. Vanderbilt*, 7 How., 385. See also *Zabriskie vs. Smith*, 3 Kern., 322 (337), per Denio, J.

The more liberal principle, *i. e.*, that, when an answer is put in, any number of defences, of whatever nature, may, under the power conferred by section 150, be combined in it, provided only they be separately stated, has prevailed, and may be looked upon as settled by the following series of decisions: *Gardner vs. Clark*, 21 N. Y., 399; *Sweet vs. Tuttle*, 4 Kern., 465; affirming *same case*, 10 How., 40; *Mayhew*

vs. *Robinson*, 10 How., 162; *Bridge vs. Payson*, 5 Sandf., 210; *Same case*, 1 Duer, 614.

But, although this be the case as regards the assertion of separate defences by allegation or traverse, in other portions of the answer, there is a manifest propriety in not combining with the clause by which the objection is actually taken, any traverse of the allegations of the complaint, or any other allegations of fact, beyond those which are strictly necessary to sustain it. The issue joined by that division of the answer should be in the nature of an issue of law, and capable of being separately disposed of.

The law on the subject of demurrable objections, has been already considered in the last chapter. So has also the subject of the waiver of objections of that nature, if not pleaded either by demurrer or answer.

Apart from the preliminary matter necessary to evidence its existence, there is no essential difference between this proceeding and demurrer pure, in the mode of stating the actual ground of objection. It will, therefore, be sufficient to refer to section 170, in the preceding chapter, devoted to that subject.

The collateral matter necessary to make that objection apparent, must, however, be stated with sufficiency. A denial of the jurisdiction of the court must, accordingly, show a want of such jurisdiction when the suit was commenced, or it will not be sustainable. *Bridge vs. Payson*, 1 Duer, 614.

§ 176. *Denial of Plaintiff's Case.*

This line of defence, the next which presents itself in the order above described, is one of high importance, and demands a more detailed consideration than the preceding.

The denial allowed by the Code may, under the first clause of section 149, be either general or specific.

It must be directed to each material allegation of the complaint, save only those which the defendant either cannot or does not design to controvert.

It may either be couched in direct terms, or it may negative “any knowledge or information sufficient to form a belief” of the allegation sought to be controverted.

Previous to 1852, the rule in this respect was continually fluctuating, a fact which it may be expedient to bear in mind, in considering the earlier decisions.

Under the Code of 1848, a specific denial of the allegation, or of any knowledge sufficient to form a belief, was prescribed.

Under that of 1849, the denial might be either general or specific

and might be made according to information or belief, or to any knowledge sufficient to form a belief.

In 1851, the power of making a general denial was taken away, and a specific one was prescribed in all cases. That specific denial was to be according to the defendant's knowledge, information, or belief, or any knowledge or information sufficient to form a belief.

In the succeeding year, 1852, the section was framed as it now stands, restoring the power of general denial, and in effect prescribing that the denial, when made, must be either direct in its terms, or according to the single alternative formula allowed by the section.

As to the inconvenience of the rule of 1851, whilst in operation, see *Rosenthal vs. Brush*, 1 C. R. (N. S.), 228; *Seward vs. Miller*, 6 How., 312, and *Keteltas vs. Maybee*, 1 C. R. (N. S.), 363.

In relation to forms of denial, held to be sufficient, under previous phases of the section, and prior to the last amendment, as above, see *Davis vs. Potter*, 4 How., 155; 2 C. R., 99; *Fry vs. Bennett*, 5 Sandf., 54; 1 C. R. (N. S.), 238; 9 L. O., 330.

It will be sufficient to advert to the provision in section 168, that "every material allegation of the complaint, not controverted by the answer, as prescribed in section 149," "shall, for the purposes of the action, be taken as true," to demonstrate the imperative necessity of never omitting this line of defence, by way of precaution, even in those cases in which the chief reliance of the defendant may be upon new matter affirmatively set up, save only in those comparatively rare instances, where he is either unable or unwilling to controvert any portion of the case as stated by the plaintiff. See, as to the effect of such an omission, *Whitlock vs. McKechnie*, 1 Bosw., 427; *Pardee vs. Schenck*, 11 How., 500; *Archer vs. Boudinett*, 1 C. R. (N. S.), 372; *Corwin vs. Corwin*, 9 Barb., 219; *Reilly vs. Cook*, 22 How., 93; 13 Abb., 255. See likewise, as to the effect of an express admission, as estopping a defendant from introducing evidence which may contradict it, *Crosbie vs. Leary*, 6 Bosw., 312.

It is also of equal importance that the denial, when made, should be so framed as to cover the whole ground, either of the complaint itself, or of that portion of it to which it is intended to apply. It is impossible to be too cautious upon this point, as an unobserved or negligent omission, may very possibly be productive of serious results on the hearing. See *Loosey vs. Orser*, 4 Bosw., 391. See collaterally, as to the effect of an omission to reply, *Walrod vs. Bennett*, 6 Barb., 144. See also *Harbeck vs. Craft*, 4 Duer, 122.

Where the complaint contains several claims, and one or more are not denied by the answer, the plaintiff is entitled to enforce their immediate settlement, on motion for that purpose, leaving the action to pro-

ceed as to such portions as are controverted. See section 244, last clause. See also *Tracy vs. Humphrey*, 5 How., 155 ; 3 C. R., 190.

When an answer contains other matters of defence, that portion of it which consists of a denial or denials, should be separately stated, as a distinct clause. If mixed up with allegations of new matter in the same statement, the pleading will be objectionable, and those allegations liable to be stricken out, on a motion for that purpose. *Benedict vs. Seymour*, 6 How., 298.

The same case is authority, that matter which goes in mere disproof or rebuttal of the plaintiff's allegations, or of the conclusions he seeks to draw from his case as stated, need not and ought not to be specially pleaded ; evidence of that nature being already admissible, under the issue joined by a simple denial. See also *Radde vs. Ruckgaber*, 3 Duer, 684 ; *Davis vs. Hoppock*, 6 Duer, 254 ; *Hull vs. Wheeler*, 7 Abb., 411 ; *Livingston vs. Smith*, 14 How., 490 (492) ; *Andrews vs. Bond*, 16 Barb., 633 ; *Schermerhorn vs. Van Alen*, 18 Barb., 29 ; *Bellinger vs. Craigue*, 31 Barb., 534 ; *Robinson vs. Frost*, 14 Barb., 536.

But any defence whatever, which is not strictly responsive in its nature, but requires the allegation of new matter to make its existence apparent, cannot be given in evidence under a general or other denial, but must, on the contrary, be specially pleaded. *Vide Ely vs. Ehle*, 3 Comst., 506 ; *Brazill vs. Isham*, 1 E. D. Smith, 437 ; affirmed, 2 Kern., 9 ; *Texier vs. Gouin*, 5 Duer, 389 ; *McKyring vs. Bull*, 16 N. Y., 297 ; *Ford vs. Sampson*, 30 Barb., 183 ; 17 How., 447 ; 8 Abb., 332 ; *Rathbone vs. McConnell*, 21 N. Y., 466 ; *Bellinger vs. Craigue*, 31 Barb., 534 (539) ; *Dillaye vs. Parks*, 31 Barb., 132 ; *Beatty vs. Swarthout*, 32 Barb., 293 ; *Loosey vs. Orser*, 4 Bosw., 391 ; *Hendricks vs. Decker*, 35 Barb., 298.

A general denial of the allegations of the complaint puts in issue, not merely every fact alleged, but also all implications and conclusions of law, arising out of those facts as stated by the plaintiff. *Prindle vs. Carruthers*, 15 N. Y., 425 (429) ; *Bellinger vs. Craigue*, 31 Barb., 534 ; *Academy of Music vs. Hackett*, 2 Hilt., 217. As to its office, and sufficiency in preventing a default from being taken without evidence, see *Patten vs. Hazewell*, 34 Barb., 421.

If a general denial be made, it has been held that a subsequent partial concession of facts in a special defence, for the purpose of avoidance, will not be available on the trial as a general admission. *Troy and Rutland Railroad Company vs. Kerr*, 17 Barb., 581. See also *Townsend vs. Platt*, 3 Abb., 323, as to the preceding denial not being irrelevant under similar circumstances. A general denial, rendered inconsistent by subsequent admissions, was, however, decided to be bad pleading, and directed to be stricken out, unless the defendant should

make proper amendments. *Willett vs. Metropolitan Insurance Company*, 2 Bosw., 678.

As to a general denial of the amount claimed by the plaintiff, and subsequent admissions of a certain portion of it being due, all properly going to constitute one defence, see *Spencer vs. Tooker*, 21 How., 333; 12 Abb., 353.

As to the form in which a general denial will be admissible, see *Kellogg vs. Church*, 4 How., 339; *Robinson vs. Frost*, 14 Barb., 536; *Gassett vs. Crocker*, 9 Abb., 39.

Inasmuch as a denial in this form puts in issue the whole of the complaint, it has been held that any special denials of facts superadded to it, will be redundant. *Dennison vs. Dennison*, 9 How., 246. A general, and also a specific denial, is not permitted to be put in to the same part of the complaint. *Blake vs. Eldred*, 18 How., 240.

The instances in which an unqualified general denial can be properly put in are, of course, comparatively rare. In the more numerous class of cases, some at least of the facts alleged by the plaintiff are known to the defendant to be true, in whole or in part. Under these circumstances, the proper course will be not to contest, but, on the contrary, to admit that portion of the complaint, putting in a denial of the remainder, either absolutely, or in the qualified form allowed by the section, as the case may require. As to the admissibility of this course of pleading, see *Parshall vs. Tillou*, 13 How., 7; *Genesee Mutual Insurance Company vs. Moynihan*, 5 How., 321; *Smith vs. Wells*, 20 How., 158.

The more usual mode of putting in a defence of this nature, will be by means of special denials of those allegations of the complaint which are controverted, omitting to notice any which the defendant does not seek to contest.

In traversing the plaintiff's case, it is not necessary to separate the different denials. The provision in section 150, requiring several defences to be separately stated, applies only to affirmative defences. *Otis vs. Ross*, 8 How., 193; 11 L. O., 343.

An answer may contain a specific denial of parts of the complaint, and a general denial of the remainder. *Blake vs. Eldred*, 18 How., 240.

As to the inexpediency of qualifying a denial in general terms, where feasible, by subsequent specification, which may have the effect of limiting the proofs upon the trial, see *Brown vs. Colie*, 1 E. D. Smith, 265.

A denial, when made, must be made in one or the other of the forms prescribed by the Code, or it will be insufficient. A mere allegation of ignorance of the facts alleged, will be insufficient to raise an issue, and the facts so attempted to be controverted will be held admitted. *Wood vs. Daniels*, 3 C. R., 152; *Elton vs. Markham*, 20 Barb., 343; *Sayre*

vs. *Cushing*, 7 Abb., 371. See likewise *Chapman vs. Palmer*, 12 How., 37, and cases below cited, as to a denial evasive on its face.

As to the power of a defendant to make a denial on information and belief, see *Hackett vs. Richards*, 3 E. D. Smith, 13 (29), per Ingraham, J., controverting the opinion of Daly, J., at special term, 3 E. D. Smith, 19; 11 L. O., 315; followed in *Therasson vs. McSpeddon*, 2 Hilt., 1. That a traverse is no longer admissible, except in one of the two modes prescribed in the Code, and that a denial, if made under the first branch of the subdivision, must now be made positively, and without reservation, is there laid down. See likewise, as to the power to make a specific denial, on information, *Edwards vs. Lent*, 8 How., 28.

A denial of the allegations of the complaint, made in the form prescribed by the last division of subdivision 1, *i. e.*, of any knowledge or information thereof sufficient to form a belief, being allowed by the Code, raises, when interposed, a sufficient issue. *Duncan vs. Lawrence*, 3 Bosw., 103; 6 Abb., 304; *Metropolitan Bank vs. Lord*, 4 Duer, 630; 1 Abb., 185; *Leach vs. Boynton*, 3 Abb., 1; *Townsend vs. Platt*, 3 Abb., 323; *Wesson vs. Judd*, 1 Abb., 254; *Temple vs. Murray*, 6 How., 329; *Snyder vs. White*, 6 How., 321; *Genesee Mutual Insurance Company vs. Moynihen*, 5 How., 321; *Sherman vs. Bushnell*, 7 How., 171. Also in *Caswell vs. Bushnell*, 14 Barb., 393; *De Santes vs. Searle*, 11 How., 477 (478); *Brown vs. Ryckman*, 12 How., 313; *Chadwick vs. Booth*, 22 How., 23; 13 Abb., 249.

Nor is it necessary for a defendant, traversing an allegation of the complaint in this form, to add a formal denial to such traverse. *Flood vs. Reynolds*, 13 How., 112. See, however, *Fales vs. Hicks*, 12 How., 153, and numerous other cases below cited, as to the possibility of impeaching such a denial for falsity.

A denial in this, or any other form, which traverses any one material allegation of the complaint, without proof of which the plaintiff cannot recover, is sufficient to raise an issue, which must be tried in the ordinary form. *Hallett vs. Harrower*, 33 Barb., 537. See also cases above cited, and *Dickerson vs. Kimball*, 1 C. R., 49; *Smith vs. Shufelt*, 3 C. R., 175, under the former system. In *Lord vs. Cheeseborough*, 4 Sandf., 696; 1 C. R. (N. S.), 322, it was also held competent for a defendant to raise an issue, upon a fact essential to the plaintiff's recovery, though such fact be not averred in the complaint.

In *Sawyer vs. Warner*, 15 Barb., 282, an allegation that the defendant never gave the plaintiff the note declared on, with a denial of indebtedness, was held sufficient to raise a complete issue, as to its making and delivery.

In making such a denial as above, of a fact presumptively within the defendant's knowledge, it may possibly be prudent for him to add to it

an averment of any circumstances, such as lapse of time or otherwise, which warrant him in the adoption of that form. *Vide Richardson vs. Wilton*, 4 Sandf., 708; *Ketchum vs. Zerega*, 1 E. D. Smith, 553; *Shearman vs. New York Central Mills*, 1 Abb., 187; *Fales vs. Hicks*, 12 How., 153. If omitted, the answer may possibly be open to impeachment as false. See cases below cited.

In making a denial in the qualified form allowed as above, that form must be strictly followed. An attempt to substitute any other for it will be at once unnecessary and unadvisable, and may render the denial itself bad. So held, as to a denial of knowledge sufficient, &c., without mentioning information, *Edwards vs. Lent*, 8 How., 28. As to a denial, not of any, but of sufficient knowledge, &c., *vide Walker vs. Hewitt*, 11 How., 395. As to a denial, on information and belief, of all facts in the complaint inconsistent with the answer, *Blake vs. Eldred*, 18 How., 240. As to a mere allegation of ignorance, *Sayre vs. Cushing*, 7 Abb., 371. As to a denial, on information and belief, *Therasson vs. McSpeddon*, 2 Hilt., 1. See also *Hackett vs. Richards*, 3 E. D. Smith, 13; 11 L. O., 315; but controverted by *Ingraham, J.*, 3 E. D. Smith, 29.

A bare denial of a conclusion of law, without controverting the facts from which that conclusion legitimately flows, will, as of course, be a nullity. See heretofore, book VI., section 122; and *Witherspoon vs. Van Dolar*, 15 How., 266; *De Santes vs. Searle*, 11 How., 477; *Higgins vs. Rockwell*, 2 Duer, 650; *Brown vs. Ryckman*, 12 How., 313; *Bentley vs. Jones*, 4 How., 202; *Drake vs. Cockroft*, 4 E. D. Smith, 34; 10 How., 377; 1 Abb., 203; *Mullen vs. Kearney*, 2 C. R., 18; *Fosdick vs. Groff*, 22 How., 158; and other decisions there cited.

Where, however, the allegation of the plaintiff is itself couched in the form of a conclusion of law, a denial of it in the same form, will be both admissible and efficient for all purposes. So held, as to an allegation of indebtedness, as a fact, *Anon.*, 2 C. R., 67; *Morrow vs. Cougan*, 3 Abb., 328. So also, as to a similar allegation of ownership of a note, indorsed by the defendant, indorsement or delivery to the plaintiff not being averred. *McKnight vs. Hunt*, 3 Duer, 615. See also *Metropolitan Bank vs. Lord*, 4 Duer, 630; 1 Abb., 185; and *Hull vs. Wheeler*, 7 Abb., 411. As to an allegation of the ownership of chattels, *Davis vs. Hoppock*, 6 Duer, 254. See also *Walrod vs. Bennett*, 6 Barb., 144.

The denial of immaterial allegations in the complaint will be wholly unnecessary. *Sands vs. St. John*, 23 How., 140; *Fry vs. Bennett*, 5 Sandf., 54; 9 L. O., 330; 1 C. R. (N. S.), 238; *Parshall vs. Tillou*, 13 How., 7 (8). See likewise, *Isham vs. Williamson*, 7 L. O., 340; *Newman vs. Otto*, 4 Sandf., 668; 10 L. O., 14; and *Barton vs. Sackett*, 3 How., 358; 1 C. R., 96, with reference to reply to an immaterial defence. It is only material allegations which, if not controverted, will

be taken as true. A traverse of such allegations, however, if made, cannot be objected to as immaterial in itself, by the party whose original mispleader has caused the defect. *King vs. Utica Insurance Company*, 4 How., 485. And, where there is any, even the slightest doubt, as to whether the matter in question is material or not, it will be inexpedient to omit this precaution. See *Dovan vs. Dinsmore*, 33 Barb., 86 ; 20 How., 503.

Neither is it necessary to interpose a denial, to allegations which the plaintiff must prove under any circumstances, as, for instance, the amount of damages. *Connors vs. Mier*, 2 E. D. Smith, 314 ; *Gilbert vs. Rounds*, 14 How., 46 ; *Molony vs. Dows*, 15 How., 261 (265) ; *McKenzie vs. Farrell*, 4 Bosw., 192 (202). The proper course in such a case is to deny the liability, not the amount, which last is not traversable. *Hackett vs. Richards*, 3 E. D. Smith, 13 ; 11 L. O., 315. In replevin, however, the value of the property, as alleged by the plaintiff, is a traversable fact. See *Archer vs. Boudenett*, 1 C. R. (N. S.), 372.

Nor is it necessary, for a defendant to assert in his answer the converse of a proposition, which, if true, the plaintiff must prove before he can recover. *Wies vs. Fanning*, 9 How., 543.

A traverse of non-issuable matter will be irrelevant, and unavailable. *Harbeck vs. Craft*, 4 Duer, 122 (128). See also *Edgerton vs. Smith*, 3 Duer, 614. But, if it have any materiality whatever, it will not be stricken out as irrelevant, however inartificial the statement may be. *Dovan vs. Dinsmore*, 33 Barb., 86 ; 20 How., 503.

A counter-allegation of matter, inconsistent with the case as made by the complaint, is, of course, inadmissible as a defence ; but it will not have the effect of a denial, or prevent the allegation of the complaint from being treated as admitted. *Elton vs. Markham*, 20 Barb., 343 ; *Wood vs. Whiting*, 21 Barb., 190 ; *Levy vs. Bend*, 1 E. D. Smith, 169 ; *Whitlock vs. McKechnie*, 1 Bosw., 427 ; *Corwin vs. Corwin*, 9 Barb., 219. See, as to the effect of a partial denial, in connection with matter of this nature, *Cotheal vs. Talmage*, 1 E. D. Smith, 573.

Such an allegation, if covering the whole ground of the plaintiff's claim to recover in the action, may, however, be available, as constituting a special denial. See *Gilbert vs. Cram*, 12 How., 455.

A defendant, entitled to omit verification of his answer, must interpose a positive denial. If, on the contrary, he declines to answer any allegation, on the ground that it might subject him to a criminal prosecution, he admits it, for the purposes of the trial. *Scovell vs. New*, 12 How., 319.

A denial, when made, should present a clear and complete issue, in substance as well as form. See *Dimon vs. Dunn*, 15 N. Y., 498.

A denial of fraud imputed by the complaint, will be wholly unavailing, when coupled with the admission or non-denial of facts, from which fraud will be inferred. *Robinson vs. Stewart*, 6 Seld., 189; *Dykens vs. Woodward*, 7 How., 313; *Churchill vs. Bennett*, 8 How., 309.

So also, where a denial is otherwise manifestly inconsistent with statements of fact contained in other portions of the same pleading, it may be held bad. See *Livingston vs. Harrison*, 2 E. D. Smith, 197; and also, with reference to similar denial in a reply, *Lewis vs. Acker*, 11 How., 163.

An answer, admitting the existence of a cause of action for assault, but merely denying its nature and extent, was held to raise no issue to be tried, and that the plaintiff was entitled at once to take judgment, with a writ of inquiry. *Schnaderbeck vs. Werth*, 8 Abb., 37.

The subject of a hypothetical denial has been already considered, and the cases in point cited, in book VI., section 123. See, especially, as to the extent of the rule, forbidding it under ordinary circumstances, *Ketchum vs. Zerega*, 1 E. D. Smith, 553, there fully referred to. See also *Dovan vs. Dinsmore*, 33 Barb., 86; 20 How., 503.

A conjunctive denial of separate allegations, has been held bad in the following cases, as involving a negative pregnant: *Hopkins vs. Everett*, 6 How., 159; 3 C. R., 150; *Salinger vs. Lusck*, 7 How., 430; *Young vs. Catlett*, 6 Duer, 437. See also, as to a denial, *modo et formâ*, *Shearman vs. New York Central Mills*, 1 Abb., 187; *Baker vs. Bailey*, 16 Barb., 54; *Elton vs. Markham*, 20 Barb., 343; *Dennison vs. Powell*, 16 How., 467. So also, as to a statement that the defendant "says he denies." *Blake vs. Eldred*, 18 How., 240.

The strict doctrine on this subject is, however, greatly qualified by a more recent decision, in *Wall vs. Buffalo Water Works Company*, 18 N. Y., 119 (122), which holds that, under these circumstances, the plaintiff's remedy is by motion for uncertainty; and that, if that precaution be omitted, he will be presumed to have been satisfied with the pleading as it stood, especially as, under the present system, it is made "the duty of the court to construe pleadings liberally."

See, likewise, as to the waiver of defects in a pleading, otherwise impeachable, by going to trial, without preliminarily raising the question, *Elton vs. Markham*, 20 Barb., 343; *Seeley vs. Engell*, 3 Kern., 542 (548); *White vs. Spencer*, 4 Kern., 247.

A mere denial of interest, or ownership, in the plaintiff, whose title appears in the adverse pleading, will be insufficient, where no statement of facts is made to sustain it. See *Russell vs. Clapp*, 7 Barb., 482; 4 How., 347; 3 C. R., 64; *Catlin vs. Gunter*, 1 Duer, 253; 11 L. O., 201. (N. B. Not affected on this point by the reversal, reported 1 Kern., 368; 10 How., 315.)

The courts have also, in numerous instances, interfered to prevent the defendant's right of denial from being grossly abused, and have stricken out as sham, or held to be frivolous, answers, denying facts clearly within the knowledge or means of knowledge of the party pleading. *Mott vs. Burnett*, 1 C. R. (N. S.), 225; affirmed on this point, 2 E. D. Smith, 50; *Hance vs. Remming*, 2 E. D. Smith, 48; 1 C. R. (N. S.), 204; *Nichols vs. Jones*, 6 How., 355; *Edwards vs. Lent*, 8 How., 28; *Richardson vs. Wilton*, 4 Sandf., 708; *Ketchum vs. Zerega*, 1 E. D. Smith, 553; *Shearman vs. New York Central Mills*, 1 Abb., 187; *Thorn vs. The Same*, 10 How., 19; *Wesson vs. Judd*, 1 Abb., 254; *Chapman vs. Palmer*, 12 How., 37; *Fales vs. Hicks*, 12 How., 153. See, however, the view taken, that an answer framed in this manner, though it may be stricken out as false, on proper proof, is not frivolous, in *Leach vs. Boynton*, 3 Abb., 1, and *Wesson vs. Judd*, 1 Abb., 254, *supra*.

But, where a denial merely raises a wholly insufficient issue, the answer, if it contain no other defence, will be frivolous, and impeachable accordingly. See *Fleury vs. Roget*, 5 Sandf., 646; 9 How., 215; *Flammer vs. Kline*, 9 How., 216; *Fleury vs. Brown*, 9 How., 217. See also, as to a disregard of the denial of a non-issuable fact, *Harbeck vs. Craft*, 4 Duer, 122 (128, note).

An answer, consisting of denials only, is not amendable, as of course, inasmuch as it requires no reply. *Plumb vs. Whipples*, 7 How., 411; *Farrand vs. Herbeson*, 3 Duer, 655.

§ 177. *Statement of New Matter.*

(a.) GENERAL CONSIDERATIONS.

The third line open to the party pleading, consists of the statement of new matter constituting a defence. It must, as prescribed by section 149, be made in ordinary and concise language, without repetition.

Section 150 allows the statement of any number of defences, whether legal or equitable, or both. Each must, however, be separately stated, and must refer to the cause of action which it is intended to answer, in such manner as that it may be intelligibly distinguished. See, as to this last requisition, *Kneedler vs. Sternburgh*, 10 How., 67. Under rule 19, each separate defence so stated, should also be plainly numbered. See, as to the necessity of such separation, *Spencer vs. Babcock*, 22 Barb., 326 (335); *Bridge vs. Payson*, 5 Sandf., 210; *Lynch vs. Murray*, 21 How., 154; and, as to the mode in which it should be made, *Benedict vs. Seymour*, 6 How., 298; *Lippincott vs. Goodwin*, 8 How., 242.

In effecting such division, each separate plea or ground of defence

should, as stated, be complete in itself, without any necessity to refer to other portions of the answer to sustain it. It is, however, admissible to depart from this rule, so far as regards the allegation of new matter applicable to one or more in common.

An averment of this nature may be made in a preliminary form, reference being made to it in each subsequent branch of defence as pleaded. See *Spencer vs. Babcock*, and *Bridge vs. Payson*, above cited. See also *Xenia Branch of State Bank of Ohio vs. Lee*, 2 Bosw., 694; 7 Abb., 372; *Ayrault vs. Chamberlain*, 33 Barb., 229. See also collaterally, as to statements in a complaint, *Sinclair vs. Fitch*, 3 E. D. Smith, 677; *Loosey vs. Orser*, 4 Bosw., 391.

On the other hand, a separate objection, taken by the plaintiff to one of several separate defences or answers, must stand by itself, and he cannot sustain his case, by admissions or averments to be found in another. *Ayres vs. Covell*, 18 Barb., 260; *Swift vs. Kingsley*, 24 Barb., 541.

In section 149, the word *defence* is used, it seems, in a restricted, and not in a popular, sense, and is confined to the statement of new matter thereby authorized. *Houghton vs. Townsend*, 8 How., 441. And such new matter must consist, it has been held, of facts going in avoidance, and not in denial, of the plaintiff's cause of action, as alleged. See *Radde vs. Ruckgaber*, 3 Duer, 684; *Gilbert vs. Cram*, 12 How., 455; *Bellinger vs. Crague*, 31 Barb., 534 (537); *Bell vs. Yates*, 33 Barb., 627. See also *Carter vs. Koezeley*, 14 Abb., 147.

This definition seems, however, to be a little too restricted, inasmuch as new matter may be pleadable, which amounts in its operation to a direct denial, though alleged as in avoidance. See, as to a statement of facts impeaching the plaintiff's right to sue, *Walrod vs. Bennett*, 6 Barb., 144.

To be available as a pleading, the answer must of course show some defence. *Drake vs. Cockroft*, 4 E. D. Smith, 34; 10 How., 377; 1 Abb., 203. A partial one is however pleadable, and will be good *pro tanto*. And it should, in such case, be pleaded as actually existent, the former general issue being abolished. *Houghton vs. Townsend*, 8 How., 441; *Willis vs. Taggard*, 6 How., 433; *Blair vs. Claxton*, 18 N. Y., 529; *Allen vs. Haskins*, 5 Duer, 332; *Loosey vs. Orser*, 4 Bosw., 391; overruling the stricter doctrine held in *Kneedler vs. Sternburgh*, 10 How., 67, and *Herr vs. Bamberg*, 10 How., 128. The remedy of the plaintiff in such cases, lies in a motion to satisfy, or by taking judgment, as provided for under section 246, in the case of an admissible counter-claim falling short of the plaintiff's demand.

The answer, as above shown, may contain any number of defences, provided only they be separately stated. See *Mott vs. Burnett*, 2 E.

D. Smith, 50; 1 C. R. (N. S.), 225; *Lansingh vs. Parker*, 9 How., 288; *Hollenbeck vs. Clow*, 9 How., 289; *Hackley vs. Ogman*, 10 How., 44; *Stiles vs. Comstock*, 9 How., 48; *Ormsby vs. Douglas*, 5 Duer, 665. See also decisions cited in book VI., section 123, under the head of *Hypothetical and Alternative Pleading*. These cases seem to overrule the stricter doctrine held in *Roe vs. Rogers*, 8 How., 356; *Schneider vs. Schultz*, 4 Sandf., 664; *Meyer vs. Schultz*, *ibid.*; *Arnold vs. Dimon*, 4 Sandf., 680; *Ormsby vs. Douglas*, 2 Abb., 407.

As to its being no longer incompatible to combine defences by way of abatement and of bar, in the same pleading, see above, section 174, under the head of *Demurrer by Answer*, and decisions there referred to.

But defences positively inconsistent in their nature, cannot, it has been held, be properly combined. See *Brown vs. Gilman*, 16 How., 527; *Willett vs. Metropolitan Insurance Company*, 2 Bosw., 678; *Livingston vs. Harrison*, 2 E. D. Smith, 197. See also *Ryle vs. Harrington*, 14 How., 59; 4 Abb., 421, as to an answer being, in this view, to be taken as a whole.

The above general principle, empowering any number of defences to be pleaded, if separately stated, would seem to abrogate the former principle, that matter in avoidance could not be pleaded, except in connection with a confession of the plaintiff's case, and to overrule the following cases, holding to the contrary: *Arthur vs. Brooks*, 14 Barb., 533; *Boyce vs. Brown*, 7 Barb., 80; affirming *same case*, 3 How., 391 (so far as it holds the answer in that case bad for duplicity); *McMurray vs. Gifford*, 5 How., 14; *Lewis vs. Kendall*, 6 How., 59; *Anibal vs. Hunter*, 6 How., 255; 1 C. R. (N. S.), 403; *Buddington vs. Davis*, 6 How., 401.

As to the propriety of couching the averments of fact in an answer in positive terms, whenever admissible, see heretofore, book VI., section 123, and decisions there cited.

The statement of facts constituting a defence, need not be accompanied with the reasons why it should operate as a bar; the intent to rely upon it is a necessary inference. *Bridge vs. Payson*, 5 Sandf., 210.

A portion of an answer, professing to be a defence to the whole of the complaint, but being, in fact, an answer to part only of the cause of action, was held to be bad in *Thumb vs. Walrath*, 6 How., 196; 1 C. R. (N. S.), 316.

Boyce vs. Brown, 7 Barb., 80; affirming *same case*, 3 How., 391, will afford an illustration of most of the principal faults which can be committed in framing the allegations of a defence.

The principle of *secundum allegata*, is equally applicable to the allegation of defences as to that of grounds of action, and any matter

omitted, or imperfectly pleaded by the defendant, cannot be given by him in evidence. See this subject heretofore fully considered, and the decisions in point cited, in book VI., section 122.

The principles that facts, as such, and not conclusions of law or matters of evidence, form the proper subject of allegation, and that, if a defence be alleged, it must be alleged sufficiently, and with certainty, are equally and universally true, as regards defensive, as well as aggressive pleading. These subjects have been already fully discussed in their general aspect, in book VI., section 122.

It is therefore indispensable, whenever the defendant sets up a special defence, depending in any respect upon the proof of new matter, that such new matter should be specially pleaded. If not, the defence will be waived, and wholly unavailable.

So held, as to cause of justification or excuse, in trover. *Ely vs Ehle*, 3 Comst., 506; *Jacobs vs. Remsen*, 35 Barb., 384; 12 Abb., 390; *Buckman vs. Brett*, 35 Barb., 596; 22 How., 233; 13 Abb., 119. As to a claim of adverse lien, as against the demand of the plaintiff, in the same form of action. *Heine vs. Anderson*, 2 Duer, 318.

As to a claim of title, adverse to that of the plaintiff. *Ford vs. Sampson*, 30 Barb., 183; 17 How., 447; 8 Abb., 332; *Rathbone vs. McConnell*, 21 N. Y., 466; *Kissam vs. Roberts*, 6 Bosw., 154. Or of leave and license. *Same case*. Or of license as a defence to an action in trespass. *Haight vs. Badgeley*, 15 Barb., 499.

As to the defence of coverture. *Castree vs. Gavelle*, 4 E. D. Smith, 425; *Dillaye vs. Parks*, 31 Barb., 132. Or that of infancy. *Treadwell vs. Bruder*, 3 E. D. Smith, 596.

Or the defence of payment, in whole or in part. *McKyring vs. Bull*, 16 N. Y., 297; *Calkins vs. Packer*, 21 Barb., 275 (282); *Texier vs. Gouin*, 5 Duer, 389; *Grosvenor vs. Atlantic Fire Insurance Company of Brooklyn*, 1 Bosw., 469. Or that of set-off or counter-claim. *Sheldon vs. Wood*, 2 Bosw., 267. Or that of recoupment. *Crane vs. Hardman*, 4 E. D. Smith, 339. Or that of unskilfulness, in an action for work, labor, and services. *Raymond vs. Richardson*, 4 E. D. Smith, 171. Or that of an escape. *Loosey vs. Orser*, 4 Bosw., 391.

Or the defence of usury. *Fay vs. Grimsted*, 10 Barb., 321; *Gould vs. Segee*, 5 Duer, 260. Or that of an award in bar. *Brazill vs. Isham*, 2 Kern., 9 (17); affirming *same case*, 1 E. D. Smith, 437.

Or, generally, any defence which does not rest entirely in negation, or in matter going strictly in disproof of the plaintiff's case, but which depends, on the contrary, on the proof, in whole or in part, of affirmative matter in avoidance. See, as to the principle in general, *Drake vs. Cockroft*, 4 E. D. Smith, 34 (37); 10 How., 377; 1 Abb., 203; *Brazill vs. Isham*, 2 Kern., 9 (17); *Ogden vs. Raymond*, 5 Bosw., 16.

Every defence of this nature, to be available, must be pleaded. *New York Central Insurance Company vs. National Protection Insurance Company*, 20 Barb., 468. N. B.—The reversal, at 4 Kern., 85, does not affect the general, but only the special application of this principle to that particular case. And it must be so pleaded fully, correctly, and sufficiently, in all respects, and with all necessary incidents. *Van De Sande vs. Hall*, 13 How., 458; *Sheldon vs. Wood*, 2 Bosw., 267; *Brazill vs. Isham*, 2 Kern., 9 (17); *Devendorf vs. Beardsley*, 23 Barb., 656; *Welch vs. Hazelton*, 14 How., 97; *Graham vs. Harrower*, 18 How., 144; *Gasper vs. Adams*, 28 Barb., 441.

Several defences may be put in, to several items of charge made by the complaint, though all included in one count. *Longworthy vs. Knapp*, 4 Abb., 115.

(b.) FURTHER DIVISION OF SUBJECT.

It may be convenient to divide the further treatment of the subject of affirmative defences, into two general heads, considering, in their order:

1. Defences, in which the new matter alleged is special, and of such a nature that, if substantiated, it disposes of the whole question, and shuts out further or general evidence, or general discussion upon the merits.

2. Ordinary defences, under which the whole case goes to the court or jury, on the general merits, as established by the allegations and proofs of both parties.

§ 178. *Statement of New Matter Continued.—Special Defences.*

(a.) ESTOPPEL.

This line of defence presents itself, as one of the most extended and important of those constituting the class treated of in this section. The objection is one, however, of a general nature, and not exclusively confined in its assertion to a defendant as against a plaintiff. The former may, on the contrary, be as fully estopped from setting up a defence, as the latter from establishing a cause of action. It is likewise an objection, that is not of necessity total, but may be partial in its nature, excluding, not the whole case sought to be brought forward, but only some particular branch or division of that case. Still, as the objection is one which is more frequently found in the mouth of the defendant, and more frequently urged by way of total preclusion, it will be more convenient to consider it in its general bearings, in the present section, rather than to treat it in its partial aspects on different occasions.

Estoppel may be shortly defined, as the establishment of a state of

circumstances, under which the adverse party is precluded, by his own acts, or by the relation in which he stands, from setting up or introducing evidence of a defence, or of a claim, which, but for the existence of those circumstances, might have been tenable. An estoppel may be either of record, or *in pais*, *i. e.*, it may arise in respect of unrecorded acts or declarations of the parties. The former, when established, is conclusive, and cannot be countervailed by argument. See *Mersereau vs. Pearsall*, 19 N. Y., 108. Its consideration will be entered upon in the next subdivision of the section. The present will be devoted to that of the latter.

Estoppel *in pais* is purely a defence of fact, and not of law—a rule of evidence, and not a mode of enforcing contracts. “Its use is to preclude a party from maintaining by evidence, what he has before denied: or disproving that which he has before admitted; when the other party has acted upon the faith of the admission or denial, in such a manner that he will be injured, unless the same be held conclusive.”

It is essential, therefore, to every estoppel *in pais*, that it relate to some matter of fact, previously admitted or denied by the party sought to be estopped. An admission as to the law, or the legal effect of a contract, is never held to work one. It is also necessary that the fact should be one, of which the party claiming the benefit of the estoppel was ignorant. The basis of an estoppel *in pais* is fraud. It is not, it is true, essential that there should have been an intention to deceive. But, there must have been a confidence reposed, which would be betrayed to the injury of one party, if the other is permitted to retract his admission or denial. See *Crawford vs. Lockwood*, 9 How., 547 (550, 551), per Selden, J.

The general nature of estoppel is thus further defined by Hogeboom, J., in *Lounsbury vs. Depew*, 28 Barb., 44 (48, 49): “The whole doctrine of estoppel rests upon this foundation, that a party has refused to speak when he ought to have done so, and has omitted to make known important facts, the knowledge of which would have induced a different course of action, from what would have taken place, if all the facts had been disclosed. Although the doctrine of estoppel is not always carefully expressed, the cases all go upon the assumption that the party estopped is guilty of a false statement or of a concealment of material facts, at a time when he has an opportunity, and is called upon to speak, which representation or concealment has had a material influence upon the conduct of a third party, who would now suffer injury, without fault on his part, if the real truth were disclosed and allowed to have its legitimate effect” (a number of decisions being then referred to).

To work an estoppel *in pais*, therefore, the admission or conduct

relied on must be in respect of matter of fact, and not of law or of contract; it must have been designed by the one party to influence the conduct of the other, or that of his privy in blood or estate, under whom he claims; and it must actually have had that effect, and been actually relied on. *Carpenter vs. Stilwell*, 1 Kern., 61 (73, 74); *Griffith vs. Beecher*, 10 Barb., 432; *Hunt vs. Moultrie*, 1 Bosw., 531; *De Lancey vs. Ganong*, 5 Seld., 9 (25); *Ackley vs. Dygert*, 33 Barb., 176; *Van Ness vs. Bush*, 22 How., 481; 14 Abb., 33; *Blivin vs. Bleakley*, 23 How., 124. And, to work an equitable estoppel, there must also be an intention to mislead, as well as a misleading. See *Jewett vs. Miller*, 6 Seld., 402.

As to the doctrine of equitable estoppel in general, and as to the principle that ignorance of law constitutes no excuse, and that, to create one, actual fraud is not absolutely essential, but that, on the contrary, a person acting in ignorance or mistake may, by his conduct, estop himself or his privies in blood or estate, if such conduct cause injury to the other party, see *Tilton vs. Nelson*, 27 Barb., 595. See, as to the giving erroneous information, inducing action working an estoppel, though honestly given, *Kingsley vs. Vernon*, 4 Sandf., 361.

Being a defence which tends to exclude the truth, estoppel is not favored, and a strict construction will be applied. *Lounsbury vs. Depew*, 28 Barb., 44, *supra*. See especially, as to this defence not being favored in equity, unless there is a strict estoppel at law; and that, to be available, an estoppel must be both certain and direct, and also mutual, *Dempsey vs. Tylee*, 3 Duer, 73 (100). See likewise generally, *Catlin vs. Grote*, 4 E. D. Smith, 296; *Andrews vs. Bond*, 16 Barb., 633 (641); *Mechanics' Bank vs. New York and New Haven Railroad Company*, 3 Kern., 599 (638); *Campbell vs. Hall*, 16 N. Y., 575.

Where statements have been made, in relation to part only of a cause of action, they are binding, only to the extent to which they have been acted upon, by the party setting up the estoppel. *Merrill vs. Tylee*, C. A. Seld., Notes, April 12th, 1853, p. 47.

The rules to be adopted in pleading a defence of this description flow naturally from the principles above laid down, and are simple in their nature.

The act or omission relied on as constituting an estoppel, must of course be clearly and distinctly averred, according to the ordinary principles governing the averment of facts; and its connection with the cause, or with the portion of the cause of action sought to be estopped, must be clearly shown. That act or omission must be charged to have been meant to influence, and to have actually influenced the conduct of the party setting up the defence, and his ignorance of the real truth

must be stated. His reliance on it, and action based on that reliance, and consequent loss and injury, must be also distinctly pleaded, and, fraud being the virtual basis of the defence, fraud, wherever the facts admit of it, should be directly charged.

Where the transaction was not between the actual parties, but between their or one of their privies in blood or estate, the connection of the party pleading, with the actual parties to the transaction, should be distinctly shown, and a claim that the adverse party is estopped had better always be made in terms, so as to give clear notice that the defence is relied on; the more so, as, not being a favored one, that defence may the more easily be held to have been waived.

It would be idle to attempt to give a digest of all the cases bearing upon this complicated subject. It may be convenient, however, to give, as on former occasions, a short synopsis of the more recent decisions relating to the principle in question, without going into minor details, but arranging them in broad and general classes.

A party who has received the benefit of a contract, will, as a general rule, be estopped, in an action brought upon that contract, from controverting its validity, whilst he retains, or when he has appropriated that benefit to his own use. *Palmer vs. Laurence*, 3 Sandf., 161; *Steam Navigation Company vs. Weed*, 17 Barb., 378; *Eagle Works vs. Churchill*, 2 Bosw., 166.

On similar principles, it was held that a party who, in one proceeding, had elected to annul and disaffirm a note as void, on the ground of usury, could not afterward claim the benefit of the same note, in another action, as constituting a payment. *Central City Bank vs. Dana*, 32 Barb., 296.

And especially is this the case, when the dealing is with a company, disqualified from a peculiar course of dealing by the terms of its incorporation. *Same cases*. A party dealing with such a body or its officers, admits, by such dealing, its legal incorporation and its capacity to contract, and cannot afterward question either. *White vs. Coventry*, 29 Barb., 305; *Leavitt vs. Pell*, 27 Barb., 322; *Mott vs. United States Trust Company*, 19 Barb., 568; *Palmer vs. Smith*, 6 Seld., 303; *Eagle Works vs. Churchill*, 2 Bosw., 166; *Ogden vs. Raymond*, 5 Bosw., 16. So also a stockholder, participating in the management of such a body, cannot question the regularity of its proceedings for incorporation, in an action against him by a creditor. *Eaton vs. Aspinwall*, 6 Duer, 176; 13 How., 184; 3 Abb., 417; affirmed, 19 N. Y., 119; *Abbott vs. The Same*, 26 Barb., 202; *Mead vs. Keeler*, 24 Barb., 20. Nor can a surety for such a body question its existence. *People vs. McCumber*, 27 Barb., 632. Nor can a stockholder or member of a corporation *de facto*, when sued for calls or dues, avail himself of a similar objection,

that it is not a corporation *de jure*. *Mechanics' Building Association vs. Stevens*, 5 Duer, 676; *Brouwer vs. Appleby*, 1 Sandf., 157; *Schenectady and Saratoga Plank Road Company vs. Thatcher*, 1 Kern., 102. See however *Macedon and Bristol Plank Road Company vs. Lapham*, 18 Barb., 312.

Nor can an individual, assuming the name, and exercising the functions of such a body, question the legitimate consequences of his own acts or dealings in a corporate name. *Patchin vs. Ritter*, 27 Barb., 34.

And such an incorporation cannot deny or avoid its own acts or dealings in its corporate name, though in excess of its legitimate powers, as against a holder in good faith, without notice, or where its own representations, or those of its authorized officers, have induced the dealing. *Bridgeport City Bank vs. Empire Stone Dressing Company*, 30 Barb., 421; 19 How., 51; *Bank of Genesee vs. Patchin Bank*, 3 Kern., 309; *Same case*, 19 N. Y., 312; *City Bank of New Haven vs. Perkins*, 4 Bosw., 420; *Bissell vs. Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y., 258; *Parish vs. Wheeler*, 22 N. Y., 494. Nor can such a body, purchasing or selling property, deny its liability for the price, on the ground of want of power. See case last cited. See also *De Graff vs. American Linen Thread Company*, 24 Barb., 375 (379); *Steam Navigation Company vs. Weed*, *supra*; and cases, especially *Sackett's Harbor Bank vs. Lewis County Bank*, 11 Barb., 213, there cited.

And the same principle extends also to the officer of such a body, who cannot, when sued in his private capacity, deny the effect of his acts as such officer. See *Moss vs. Averill*, 6 Seld., 449. Nor can a privy of the dealings of such a body, as an accommodation indorser, set up a defence, from which the company itself would be precluded. *Hungerford's Bank vs. Potsdam and Watertown Railroad Company*, 9 Abb., 124.

The defence thus precluded was that of usury, which, under the act of the 6th of April, 1850, chapter 172, p. 344, cannot be set up by a corporation, or by its receiver. See *Curtis vs. Leavitt*, 15 N. Y., 9; *Same case*, 17 Barb., 309; *Butterworth vs. O'Brien*, 28 Barb., 187; 16 How., 503; 7 Abb., 456. And this, whether such corporation be foreign or domestic. *Southern Life Insurance and Trust Company vs. Packer*, 17 N. Y., 51.

As to whether a municipal corporation is or is not estopped from questioning the validity of its own legislative acts, see *Britton vs. The Mayor of New York*, 21 How., 251; 12 Abb., 367, note, maintaining the negative; and *Mayor of New York vs. Second Avenue Railroad Company*, 21 How., 257; 12 Abb., 364, holding the affirmative of the proposition.

A subsequent dealing, and receipt of consideration assuming the existence of a contract, may also be held as a waiver of a forfeiture previously incurred. *Viall vs. Genesee Mutual Insurance Company*, 19 Barb., 440.

And the receipt and retainer of consideration for an executed contract, may also be held to preclude even a disqualified person from denying that contract, whilst that retainer continues. *Bartholomew vs. Finne- more*, 17 Barb., 428.

Nor can a beneficiary under a partly executed contract, question that part of it for which he has received consideration, though, as to the residue, it may be void. *Dart vs. McAdam*, 27 Barb., 187.

A vendor, who has annulled a sale, by repossessing himself of the subject matter by process of replevin, cannot afterwards maintain an action for the purchase-money. *Morris vs. Rexford*, 18 N. Y., 552. But the fact that a defendant in replevin has given an undertaking to obtain or retain possession of the property, works no estoppel. See *Andrews vs. Shattuck*, 32 Barb., 396. See also, as to judgment for the value of property in the same form of action, and collection of the amount adjudged, effecting a transfer of title to the property itself, and estopping a subsequent denial of that title, *Russell vs. Gray*, 11 Barb., 541. See, as to a similar transfer of title to property purchased with money misapplied, by taking judgment for such money, as wrongfully converted, *Bank of Beloit vs. Beale*, 11 Abb., 375; 20 How., 331.

A party cannot impeach his own acts, or the legitimate consequences which flow from them.

But, to work an estoppel, the action of the party estopped must be complete, and not merely possible or inchoate. Thus, an agreement to submit all differences under a building contract to arbitration, was held to be no bar to a suit, where it appeared that both parties had waived their rights under the provision. *Sinclair vs. Tallmadge*, 35 Barb., 602.

An untechnical release of a debt, if acted upon by the releasee, will estop the releasor from subsequently maintaining an action for the amount. *Cornell vs. Masten*, 35 Barb., 157.

A grantor of property with warranty, will be estopped from setting up, as against his grantee, any other title to the premises, subsequently acquired by him from other parties. But such estoppel will not extend to a title acquired by him, as against such grantee, by adverse possession, commenced subsequent to the execution of his conveyance, and surrender of the property under it. *Kent vs. Harcourt*, 33 Barb., 491.

A public officer will be estopped from controverting his own return, or that of his authorized deputy. *Sheldon vs. Payne*, 3 Seld., 453; *Kuhlman vs. Orser*, 5 Duer, 242; *Bliven vs. Bleakley*, 23 How., 124. See also, as to his being estopped from denying the title to goods

actually taken by him under process, in an action against him for damage to them, whilst in his custody, under that process, *Moore vs. Westervelt*, 1 Bosw., 357. But, after a return has been cancelled by order of the court, it will be no longer available as an estoppel, against parties who did not act upon the faith of it. *Barker vs. Binniger*, 4 Kern., 270.

An insurer issuing a policy admits, *prima facie*, the title of the party insured. *Fowler vs. New York Indemnity Insurance Company*, 23 Barb., 143. Nor can the former take advantage of any default of the latter, if occasioned by his own act or negligence. *Ames vs. New York Union Insurance Company*, 4 Kern., 253; *Savage vs. Corn. Exchange Fire and Inland Navigation Insurance Company*, 4 Bosw., 1. See, as to omission to object in due time to proof when delivered, being construed as a waiver of formal objections, *Kernochan vs. New York Bowery Fire Insurance Company*, 17 N. Y., 428.

But an insurance company will not be estopped from availing itself of an express provision in its policy, by representations, inconsistent with the strict enforcement of that provision, contained in a prospectus issued by it. *Rusc vs. Mutual Benefit Life Insurance Company*, 23 N. Y. 516; reversing *same case*, 26 Barb., 556.

A party whose own acts prevent the performance of a condition precedent, cannot avail himself of such non-performance, as a defence in an action against him. *Young vs. Hunter*, 2 Seld., 203. See also *Stone vs. Sprague*, 20 Barb., 509.

A party who, for consideration at the time, suffers an irregular judgment to continue, or who confesses one, will be estopped from personally contesting it. See *Pendleton vs. Weed*, 1 Abb., 51; *Von Keller vs. Muller*, 3 Abb., 375, note.

But a former recovery against him, for services under a continuing contract, will not estop the defendant from showing, in a subsequent action, that such contract has been vacated by consent. *Van Alstyne vs. Indiana, Pittsburgh, and Cleveland Railroad Company*, 34 Barb., 28; 21 How., 175.

The indorser of commercial paper is, it seems, estopped, as to subsequent parties, from denying the genuineness of prior signatures, or the capacity of the parties signing. *Troy City Bank vs. Lauman*, 19 N. Y., 477. Nor can he deny the negotiability of such paper. *Hodges vs. Shuler*, 24 Barb., 68. Or the authority to make a transfer, to which he has consented. *Hartshorne vs. Brace*, 25 Barb., 126.

But the ordinary admission of value received, on the face of a bill or note, or its indorsement, will not estop the acceptor or indorser, from proving that it was accommodation paper, and was usurious in its inception. *Clark vs. Sisson*, 22 N. Y., 312.

Where the holder of a note agreed, for a valuable consideration,

to relinquish all claim upon it, as against an indorser, he was held estopped from subsequently suing upon it in his own name. *Eccleston vs. Ogden*, 34 Barb., 444.

In like manner, the acceptor of a bill is estopped from raising objections to its form. *Wheeler vs. Webster*, 1 E. D. Smith, 1. And an acceptor in blank, cannot even set up forgery or fraud in the subsequent filling in of the bill, as against a *bonâ fide* holder. *Van Duzer vs. Howe*, 21 N. Y., 531. So likewise, as to a party acknowledging that his acceptance, though a forgery, would be paid. *Power vs. Rinkerton*, 1 E. D. Smith, 30. So also, a bank has been held liable on a certified check, as amounting to an acceptance, though certified by their teller, without funds, and in actual violation of his duty. *Farmers' and Mechanics' Bank of Kent County vs. Butchers' and Drovers' Bank*, 16 N. Y., 125; affirming *same case*, 4 Duer, 219. See also opinion reported 4 Kern., 623. See likewise, as to liability of a corporation for the wrongful acts of its officer, if within the usual course of his duty, *City Bank of New Haven vs. Perkins*, 4 Bosw., 420.

As to the circumstances under which a party will be estopped from setting up the defence of usury, see next section, under that head.

The post-dated draft of a banking association, though illegal under the statutes as to banking, may nevertheless be available as against the drawers, in the hands of a *bonâ fide* holder. See *Oneida Bank vs. Ontario Bank*, 21 N. Y., 490; and *Tracy vs. Tallmage*, 14 N. Y., 162; *Curtis vs. Leavitt*, 15 N. Y., 9; and *Sackett's Harbor Bank vs. Codd*, 18 N. Y., 240, there referred to.

A town, signing informal bonds, is estopped from contesting their validity. *Gould vs. Town of Venice*, 29 Barb., 442.

Where representations of the defendant, as to the ownership of goods, had induced their purchase, he was held estopped from setting up title in himself, as against the purchaser. *Breidert vs. Vincent*, 1 E. D. Smith, 542.

Sureties signing a statutory undertaking cannot call in question the jurisdiction of the court over the proceeding in which it was taken, or the liability of their principal, nor can they impeach the document itself, for any irregularity rendering it merely voidable. *Loomis vs. Brown*, 16 Barb., 325 (330); *Kelly vs. McCormick*, 2 E. D. Smith, 503; *Gregory vs. Levy*, 12 Barb., 610; 7 How., 37; *Decker vs. Judson*, 16 N. Y., 439; *Coleman vs. Bean*, 14 Abb., 38. But not so as regards a defect rendering such undertaking, not merely voidable, but absolutely void. See *Morange vs. Edwards*, 1 E. D. Smith, 414.

The next general principle that may be laid down is that where a party, by acquiescence, either express, or implied from his silence when he has opportunity to object, suffers a proceeding to be carried out to

his prejudice, he cannot afterwards object to that proceeding, as against the rights of others, derived under it. So held, as to acquiescence on the part of the creditor, in an irregular sheriff's sale. *Richards vs. Allen*, 3 E. D. Smith, 399. As regards the debtor, however, mere acquiescence will not estop, unless there has been an actual misleading. *Vide Carpenter vs. Stilwell*, 1 Kern., 61. So likewise, as to acquiescence in an award, otherwise informal. *French vs. New*, 20 Barb., 481. So, further, where a party acquiesces in a conveyance of his property being made by another person, under color and claim of title, he, or his privies in blood or estate, cannot afterward bring claim to it. *Tilton vs. Nelson*, 27 Barb., 595. See also *Cheeney vs. Arnold*, 18 Barb., 434. Or a party may be estopped, by acceptance of a surplus arising out of a sale thus made. *Tilton vs. Nelson*, *supra*. So also, as to a party who knowingly suffers another to claim ownership, and to make an agreement or disposition of his personal property. *Edgerton vs. Thomas*, 5 Seld., 40; *Hibbard vs. Stewart*, 1 Hilt., 207; *Thompson vs. Blanchard*, 4 Comst., 335; *Brewster vs. Baker*, 16 Barb., 613. Or, if he stands by, and allows his property to be sold, and allows the purchaser to pay the price without objection. *Rider vs. Union India Rubber Company*, 4 Bosw., 169. A party who has concurred in, and received his share on a partition, will be estopped from subsequently denying a title under it. *Brewster vs. Striker*, 1 E. D. Smith, 321; *Mount vs. Morton*, 20 Barb., 123. So also, as to heirs of a deceased party, who, after decree for partition made, have come in, become parties, and acted in the subsequent proceedings. *Requa vs. Holmes*, 19 How., 430. Concurrence in the appointment of a receiver of a corporation, was also held to estop a creditor, from subsequently contesting the validity of that appointment. *Battershall vs. Davis*, 31 Barb., 323.

See also, as to waiver of a statute right, by acquiescence and substituted performance, *Tombs vs. Rochester and Syracuse Railroad Company*, 18 Barb., 583.

A creditor, acquiescing in an arrangement for facilitating a sale of real property by his debtor's assignee, by means of a release given by the wife of the latter, was held to be estopped from subsequently controverting her rights as a preferred creditor, in *American Exchange Bank vs. Webb*, 15 How., 193.

A lessee, acquiescing in a partial delivery of possession, and paying rent, cannot, on a subsequent action for another quarterly payment, set up such failure to deliver, in bar of the action. *Hurlburt vs. Post*, 1 Bosw., 28.

Acquiescence in alterations in a building may, in an action for trespass, be construed to operate as a parol license, by way of estoppel. *Walter vs. Post*, 4 Abb., 382; 6 Duer, 363.

But, in ejectment, a revocable parol license will constitute no defence, nor will it estop the licensor. *Eggleston vs. New York and Harlem Railroad Company*, 35 Barb., 162.

Acts of acquiescence, which may so operate, by way of justification in an action for trespass, will not, however, necessarily have that effect, in a controversy where the title to the freehold is at issue. *Miller vs. Platt*, 5 Duer, 272. See, as to when acquiescence in a boundary line will or will not be held conclusive, and on what grounds, *Terry vs. Chandler*, 16 N. Y., 354; *Baldwin vs. Brown*, 16 N. Y., 359; also *Clark vs. Baird*, 5 Seld., 183; *Laverty vs. Moore*, 32 Barb., 347.

See, as to acquiescence in an allotment of a similar nature, not being governed by the strict rules of an estoppel, but being pleadable generally in bar, *O'Donnell vs. Kelsey*, 6 Seld., 412.

Acquiescence in a valuable improvement, constituting an encroachment in fact, made by his lessees, was held not to estop the lessor from objecting to its continuance, after the expiration of their term. Also that a subsequent grantee of such lessor, was not estopped from objecting on the same ground, when such encroachment took place before he acquired title. *Corning vs. Troy Iron and Nail Factory*, 34 Barb., 485; 22 How., 217.

As to what will or will not be sufficient acquiescence on the part of the owner of land, to constitute a dedication to the public, see *Carpenter vs. Gwynn*, 35 Barb., 395.

A party deriving and retaining title through another, cannot impeach the title of that other, or the transaction through which he has derived it.

A tenant is, accordingly, estopped from denying the title of his landlord, or a vendee that of his vendor. *Ingraham vs. Baldwin*, 5 Seld., 45; *Vernam vs. Smith*, 15 N. Y., 327; *Dodge vs. Lambert*, 2 Bosw., 570; *Jackson vs. Whedon*, 1 E. D. Smith, 141; 3 C. R., 186. As to a covenant running with the land, and binding the landlord, working an estoppel as against the tenants, see *Duffy vs. The New York and Harlem Railroad Company*, 2 Hilt., 496.

See also, as to a tenant being estopped from controverting an arrangement made with his assent, between his lessor and a mortgagee of the premises, amounting in law to a surrender of his tenancy. *People vs. Culver*, 21 How., 108.

But this rule does not estop a tenant, from showing matter outside the original contract between him and his landlord. A party is only estopped from denying what he has once admitted. *Despard vs. Walbridge*, 15 N. Y., 374. Nor will he be estopped from asserting an adverse claim, in respect of an occupation after the expiration of his term. *Child vs. Chappell*, 5 Seld., 246.

A vendee, under foreclosure, who has purchased the property, expressly subject to a prior encumbrance, is estopped from denying its validity. *Brinsmade vs. Hurst*, 3 Duer, 206.

As to a vendee being estopped from denying the title of his vendor, see *Rockwell vs. Saunders*, 19 Barb., 473 (480); *Fitzpatrick vs. Caplin*, 4 E. D. Smith, 365. Nor can a purchaser from trustees, question the regularity of the sale to him. *Small vs. Ludlow*, 20 N. Y., 155. As to the extent to which a vendee is bound by the recitals in his conveyance, see *Demeyer vs. Legg*, 18 Barb., 14 (29).

The assignee of a judgment, cannot subsequently impeach the validity of a collateral agreement under which it was entered up, though in a case, in which relief of that nature might have been granted to his assignor. *Borst vs. Baldwin*, 17 How., 285; 8 Abb., 351.

Nor can a trustee call in question the validity of the trust under which his title is derived. *Jones vs. Butler*, 30 Barb., 641; 20 How., 189; *The People vs. Norton*, 5 Seld., 176. Or an agent that of his principals. *Crosbie vs. Leary*, 6 Bosw., 312.

A vendor or grantor is equally estopped from questioning the validity of his own title, or of any conveyance or instrument which he may have executed. Nor, as a general rule, will a party, under any circumstances, be allowed to question the validity, or the terms of an instrument executed by him. See, on this point, *Cornell vs. Masten*, 35 Barb., 157; *Kent vs. Harcourt*, 33 Barb., 491, above cited.

But the mere fact of causing a conveyance to be recorded in anticipation, has been held not to estop the grantor from contesting the fact of its actual delivery: see *Van Valen vs. Schermerhorn*, 22 How., 416.

A mortgagor is estopped from questioning the regularity of the proceedings in relation to the advance made to him. *New York Life Insurance and Trust Company vs. Staats*, 21 Barb., 570. Nor, as against his own mortgagee, will he be allowed to set up a claim of paramount title. *Griswold vs. Atlantic Dock Company*, 21 Barb., 225. Nor, where a grantor with warranty takes, subsequently, an assignment of an encumbrance on the same property, can he, or any party deriving title under him, claim to set up that encumbrance against the original grantee; as regards him it is extinguished. *Mickles vs. Townsend*, 18 N. Y., 575.

A mortgagor for further advances, to be collaterally secured in a specific manner, is not, however, estopped from questioning a particular advance, as not falling within the condition of his security. *Walker vs. Paine*, 31 Barb., 213.

The grantor, in an absolute conveyance of land, will not, in the absence of fraud or mistake, be allowed to set up a parol trust in his own favor. *Sturtevant vs. Sturtevant*, 20 N. Y., 39. See also, as to a

fraudulent grantor being estopped by his own act, *Moore vs. Livingston*, 14 How., 1.

A vendee, who has resold the right transferred to him, cannot afterwards set up want of value, in an action against him for the purchase-money. *Thomas vs. Quintard*, 5 Duer, 80.

A chattel mortgagee, who had agreed to hold it as collateral security for a party who purchased a note, part of the consideration, was held estopped from setting up payment, by foreclosure of the security, as against such party. *Baker vs. Seely*, 17 How., 297.

A bill of lading estops the giver from questioning the title of the party to whom it is given, to the goods comprised in it. *McGaw vs. Adams*, 14 How., 461; *Dows vs. Rush*, 28 Barb., 157. A party who has given his note, in settlement of a claim asserted by action, cannot afterwards, in the absence of fraud, go behind it, and attack the original consideration. *Magee vs. Badger*, 30 Barb., 246.

Though a receipt be explainable, as regards the amount for which it is given (see *Renard vs. Fiedler*, 3 Duer, 318), yet, in its operation as a contract or as an admission, it cannot be contradicted by parol evidence. See *Coon vs. Knapp*, 4 Seld., 402; *Egleston vs. Knickerbacker*, 6 Barb., 458; *Wood vs. Whiting*, 21 Barb., 190.

See, however, as to a receipt in full of all demands, obtained with a view to cover up a claim for repayment of money lost at play, being unavailing, *Hendrickson vs. Beers*, 6 Bosw., 639.

And a settlement, in full of an account and demand sued upon in a specific action, does not embrace any matter not included in the controversy, as disclosed by the pleadings therein. *Bates vs. Cobb*, 5 Bosw., 29.

Accepting payment of the admitted portion of an entire claim, may, though under protest, estop the claimant from maintaining an action for the balance. See *Chase vs. County of Saratoga*, 33 Barb., 603.

In *Chegaray vs. Mayor of New York*, 2 Duer, 521, it was held that the defendant, having admitted the receipt of taxes, the liability to which was in question, could not raise a technical objection as to the plaintiff's right to sue. N. B.—This point is not questioned in the general reversal, 3 Kern., 220.

As to the effect of an admission on the face of the plaintiff's complaint, generally, or by way of estoppel, see *Salters vs. Genin*, 3 Bosw., 250; 7 Abb., 193; *Andrews vs. Chadbourne*, 19 Barb., 147. And a previous answer on oath, will estop a subsequent denial of the same matter. *Sheppard vs. Hamilton*, 29 Barb., 156. See also, as to the effect, by way of estoppel, of an actual admission in an answer, *Crosbie vs. Leary*, 6 Bosw., 312. But a petitioner's oath, in proceeding to obtain his discharge for insolvency, though untrue, was held not to

estop him from subsequently setting up a release, obtained from a creditor, though he had included such creditor in his schedule as unpaid. The parties were in *pari delicto*, and there was no reliance placed at the time.

In a proceeding to set aside the insolvency, however, the affidavit would have worked an absolute estoppel. *Maybee vs. Sniffin*, 2 E. D. Smith, 1.

A party, himself in fault, or chargeable with negligence in not making proper inquiries, will be estopped from taking advantage of his own fraud or default, and from setting up an objection which, with due diligence, he ought to have discovered, or which, but for his own default, might not have existed.

A judgment-debtor cannot set up part payment, as against an assignee, on his assurance that the whole amount was due. *Rae vs. Lawser*, 18 How., 23; 9 Abb., 380, note. A representation that property is unencumbered will not, however, prevent a defendant from setting up its exemption from sale on execution. *Robinson vs. Wiley*, 19 Barb., 157.

A clause in a promissory note, waiving such an exemption, does not operate by way of estoppel. It is a matter of contract in future, not a representation of fact at the time. *Crawford vs. Lockwood*, 9 How., 547; *Harper vs. Leal*, 10 How., 276. Nor do the words "value received" on a note, avail to exclude the defence of usury. *Clark vs. Loomis*, 5 Duer, 468.

A purchaser, who had wrongfully taken possession of work in an unfinished state, was held to be estopped from showing defects in its quality, in a subsequent proceeding for the price. *Kidd vs. Belden*, 19 Barb., 266. But, where a builder had failed in his performance of an entire contract, it was held that occupation of the finished portions by his employer, did not operate as a waiver of that performance, the question being one of intention. *Smith vs. Brady*, 17 N. Y., 173.

A defendant, himself in fault, cannot object on the ground of default of the plaintiff. *Bailey vs. Western Vermont Railroad Company*, 18 Barb., 112.

Where, for want of proper inquiry, a loss had been paid by insurers, in ignorance of grounds on which they might have resisted, they were held estopped in a subsequent action to recover back the amount. *Mutual Life Insurance Company of New York vs. Wäger*, 27 Barb., 354. See also, as to a purchaser being similarly estopped, where he has failed to make due inquiry, *White vs. Seaver*, 25 Barb., 235. Nor can he raise an objection, where he has not been, in fact, misled. *Jewett vs. Miller*, 6 Seld., 402.

A party who has misled another, and thereby induced his adoption of a particular form of action, will be precluded from changing his

ground on the trial, and setting up another. *Walrath vs. Redfield*, 18 N. Y., 457.

A party may also be estopped, by proceedings inconsistent with a right he might otherwise have claimed. Thus, a judgment for the value of property converted, was held to transfer the title, and to estop a claim to the property itself. *Bank of Beloit vs. Beale*, 11 Abb., 375; 20 How., 331; 19 How., 91.

Voluntary proof of debt, and receipt of a dividend from the estate of the acceptor, under a foreign insolvency, was held, by discharging him, to estop proceedings against the drawer, in *Gardner vs. Oliver Lee's Bank*, 11 Barb., 558.

The subject as to who will, or will not, be considered as privies in blood or estate, so as to be bound by an estoppel, will be found very fully considered in *Campbell vs. Hall*, 16 N. Y., 575. It was there held, that a second encumbrancer was not affected by the result of a subsequent controversy, between his mortgagor and a prior mortgagee, but might still litigate the amount of the latter's security. Nor will a bond of indemnity, formerly given to a remote grantor, preclude a defendant from asserting his legal title in ejectment. *Dwight vs. Peart*, 24 Barb., 55. A defendant, in a suit of that description, cannot impeach a deed from which the plaintiff's title is derived, as fraudulent, unless he stands in the position of a creditor, or party otherwise entitled to attack it on that ground. *Mosely vs. Mosely*, 15 N. Y., 334.

A principal will be estopped by the acts or representations of his agent, when acting within the scope of his authority. *Plumb vs. Cataugus County Mutual Insurance Company*, 18 N. Y., 392; *City Bank of New Haven vs. Perkins*, 4 Bosw., 420. See also *Anderson vs. Broad*, 12 L. O., 187, as to whether the declarations of a subagent, whose action has been adopted by the principal, may not have the same effect. As to such being the case, where a contract, made in terms with the agent, is, in fact, performed by the principal, see *St. John vs. Griffith*, 13 How., 59; 2 Abb., 198.

But, where the acts or representations of an agent are not within the scope of his authority, the principal will not be affected. *New York Life Insurance and Trust Company vs. Beebe*, 3 Seld., 364; *New York Car Oil Company vs. Richmond*, 19 How., 505; 10 Abb., 185; *Mechanics' Bank vs. New York and New Haven Railroad Company*, 3 Kern., 599.

An agent, on the other hand, will be estopped from denying the title of his principals. *Crosbie vs. Leary*, 6 Bosw., 312.

In *Thomas vs. Hubbell*, 15 N. Y., 405, it was held that the general sureties of a deputy sheriff were not estopped from setting up a defence to the original liability, by a judgment against the sheriff in respect of

their principal's misconduct, no opportunity of defending the suit having been afforded to them.

Where, however, by the terms of the security, the surety agrees to be bound by the event of a suit between third parties, or that his principal shall obey all orders of a court or officer, he will be estopped from questioning the validity of a judgment or order against that principal. See *Baggott vs. Boulger*, 2 Duer, 160; *Westervelt vs. Smith*, 2 Duer, 449. This last case is, however, questioned, in *Thomas vs. Hubbell*, *supra*.

An account delivered, will not necessarily estop the plaintiff from subsequently altering the amount of his demand. *Williams vs. Glenny*, 16 N. Y., 389. See also, as to the omission to object at once to an account stated, not being an estoppel or necessarily conclusive, *Lockwood vs. Thorne*, 18 N. Y., 285.

The doctrine of estoppel is not applicable to an infant, under any circumstances, not even where he has obtained goods by a fraudulent representation that he was of age at the time of obtaining them. *Brown vs. McCune*, 5 Sandf., 224. See also *Ackley vs. Dygert*, 33 Barb., 176.

He cannot, however, disaffirm an executed contract, without first restoring the consideration. *Bartholomew vs. Finnemore*, 17 Barb., 428. See also, as to ratification by him, after majority, *Taft vs. Sergeant*, 18 Barb., 320; *Jones vs. Phoenix Bank*, 4 Seld., 228; *Forman vs. Marsh*, 1 Kern., 544.

Nor will a widow be estopped, in an ejectment for dower, even though she have actually received one-third of the rents of the property in question. In order to bar her claim, under these circumstances, it must be proved that the rent assigned to her will endure for her life. *Ellicott vs. Mosier*, 11 Barb., 574; affirmed, 3 Seld., 201.

The whole of the above decisions are, it may be said, universally predicated on the absence of fraud in the party setting up the estoppel. If he be himself in fault, he can no longer invoke the principle as against his adversary.

(b.) FORMER ADJUDICATION.

This description of estoppel presents itself, in the next place, for consideration. It differs from the former, in that, once established, the defence is absolute, and admits of no question. "An estoppel by record cannot be countervailed by argument, however conclusive." *Mersereau vs. Pearsall*, 19 N. Y., 108.

However erroneous it may appear to be, even on its face, the judgment of another court, having jurisdiction of the question, is, therefore, whilst unreversed, conclusive, as regards the same controversy. It cannot be collaterally impeached, save only for want of jurisdiction,

apparent on the record, or by some matter *dehors* that record, which can be shown, without contradicting it. *Buell vs. Trustees of Lockport*, 11 Barb., 602; affirmed, 4 Seld., 55; *Wheeler vs. New York and Harlem Railroad Company*, 24 Barb., 414; *Harriott vs. New Jersey Railroad and Transportation Company*, 2 Hilt., 262; 8 Abb., 284.

See, as to the conclusiveness of judgment, on an accounting between partners, and the impossibility of reopening that account, by means of another suit, the only remedy being by a bill in the nature of a bill of review, *Hayes vs. Reese*, 34 Barb., 151.

Thus, the decree of a surrogate admitting a will to probate is, in a collateral action, conclusive evidence of its execution, even though that execution be manifestly defective. *Vanderpoel vs. Van Valkenburgh*, 2 Seld., 190. See also, as to conclusiveness of a surrogate's decree on other points, *Ball vs. Miller*, 17 How., 300; *Morrill vs. Dennison*, 8 Abb., 401; *Hill vs. Burger*, 10 How., 264; *Bolton vs. Brewster*, 32 Barb., 389; *Rigney vs. Coles*, 6 Bosw., 479.

The trial of an issue on the validity of a will of personal estate, on its admission to probate, will bar any contest on the same point, in a subsequent proceeding between the same parties. *Nichols vs. Romaine*, 3 Abb., 122. A will of real estate stands on a different footing, probate not being essential to the validity or carrying into effect of the devises or provisions contained in it.

See, generally, as to the operation of a former judgment, by way of positive estoppel, on issues embraced within the record, *Bates vs. Stanton*, 1 Duer, 79; *Birckhead vs. Brown*, 5 Sandf., 134. And this, although the determination of the court may have been given on an issue of law. *Same cases*.

See further, as to the same principles, *Potter vs. Rowland*, 4 Seld., 448; *Davis vs. Talcott*, 2 Kern., 184; *Clark vs. Downing*, 1 E. D. Smith, 406; *Wilkening vs. Schmale*, 1 Hilt., 263; *Harris vs. Hammond*, 18 How., 123; *Gallarati vs. Orser*, 4 Bosw., 94; *White' vs. Merritt*, 3 Seld., 352; *St. John vs. St. John's Church*, 15 Barb., 346; *Embury vs. Conner*, 3 Comst, 511 (522). The same rule holds good also, as to a judgment entered on confession. *Woodworth vs. Woodworth*, 21 Barb., 343.

And, whilst unreversed, the judgment of an inferior court is equally a bar, even when rendered in a suit commenced subsequently to that in which it is pleaded. *Higgins vs. Mayer*, 10 How., 363. See also *Tyler vs. Willis*, 35 Barb., 213; 13 Abb., 369. And even a verdict rendered in such a court, is pleadable, though, by omission of the justice, judgment cannot be entered thereon. *Kane vs. Dulex*, 3 E. D. Smith, 127.

And the reversal of a judgment will be equally conclusive, even

though irregular in itself, by the omission to order a new trial. *Nones vs. Horner*, 12 Abb., 247.

Nor is it necessary, in order to its creating an estoppel, that a prior adjudication should have been rendered in a regularly constituted action. The decision of a competent court or officer, in a special proceeding, will, whilst unreversed, be equally conclusive, as a bar to the subsequent raising of the same question.

Thus, a valid and complete award of arbitrators will be conclusive. *Coleman vs. Wade*, 2 Seld., 44. And this, even though it may have not been performed. *Brazill vs. Isham*, 2 Kern., 9; affirming *same case*, 1 E. D. Smith, 437. See also *Backus vs. Fobes*, 20 N. Y., 204; *Owen vs. Boerum*, 23 Barb., 187. And even an informal award will, if consented to, have the same effect. *French vs. New*, 20 Barb., 481.

So also, as to the award of a board of supervisors, on a question agreed to be submitted to them. *Prentiss vs. Farnham*, 22 Barb., 519. So likewise, as to the decision of the board of state auditors, on a claim against a state. *People of State of Michigan vs. Phoenix Bank of New York*, 4 Bosw., 363.

So likewise, as to the verdict of a jury, summoned under the powers of the highway statutes. *Hyatt vs. Bates*, 35 Barb., 308. As to a decision in summary proceedings. *Seebach vs. McDonald*, 21 How., 224; 11 Abb., 95. As to proceedings on a *habeas corpus* to obtain discharge from enlistment. *People vs. Burtnett*, 13 Abb., 8.

A referee's decision, on a point duly submitted to him, and reviewable on appeal, is, in like manner, conclusive, whilst unreversed. *Demarest vs. Daig*, 11 Abb., 9. On a reference after judgment, questions on which issues were originally raised by the pleadings, cannot be brought forward. *McCrackan vs. Valentine's Executors*, 5 Seld., 42.

The verdict of a jury on summary proceedings, finding no rent due, was held conclusive, in subsequent proceedings in replevin. *White vs. Coatsworth*, 2 Seld., 137. Judgment for the value of property in replevin, in like manner, transfers the title, and estops its being questioned in another proceeding. *Russell vs. Gray*, 11 Barb., 541.

The validity of supplementary proceedings cannot either be collaterally questioned. *Richards vs. Allen*, 3 E. D. Smith, 399. Nor, in such proceedings, can the merits of the original action be inquired into. *O'Neil vs. Martin*, 1 E. D. Smith, 404.

A proceeding by petition, bars an action for the same cause, or for matter involved therein. *Groshon vs. Lyons*, 16 Barb., 461; *Mechanics' Fire Insurance Company vs. People*, 7 Abb., 367. See also *in re, Empire City Bank*, 18 N. Y., 199; *Bangs vs. Duckinfield*, 18 N. Y., 592.

But, to render this principle applicable, jurisdiction must have been

acquired, and inquiry on that point will be open. *Bangs vs. McIntosh*, 23 Barb., 591.

Nor can the validity of proceedings in bankruptcy be collaterally inquired into. A discharge under the act of Congress of 1841 will be a good defence, even to a liability contingent at the time. *Tobias vs. Rogers*, 3 Kern., 59; *Chemung Canal Bank vs. Judson*, 6 Seld., 254; *Campbell vs. Perkins*, 4 Seld., 430; *Ruckman vs. Cowell*, 1 Comst., 505. See also *McCormick vs. Pickering*, 4 Comst., 276.

When pleading such a discharge, the facts on which jurisdiction depends must be averred. When averred, however, that jurisdiction will be presumed, until the contrary appears. *Morse vs. Cloyes*, 11 Barb., 100.

A discharge of this nature is, however, impeachable for fraud. *Caryl vs. Russell*, 3 Kern., 194; reversing *same case*, 18 Barb., 429; and overruling, *pro tanto*, *North American Fire Insurance Company vs. Graham*, 5 Sandf., 197. See also *Ruckman vs. Cowell*, *supra*. Nor, it would seem, is it pleadable as against a subsequent award of costs, though arising out of a liability previous to the discharge. *Ward vs. Barber*, 1 E. D. Smith, 423.

Where the debt was contracted in, and the parties were subjects of a foreign country, discharge under the bankrupt laws of that country, and the receipt of a dividend under such bankruptcy, will extinguish it. *In re Coates*, 12 How., 344; reversing *same case*, 13 Barb., 452. The same was also held, though the bill on which the action was brought was owned by a citizen of the United States, in *Olyphant vs. Atwood*, 4 Bosw., 459.

An insolvent's discharge, according to the laws of this state, is conclusive, and cannot be impeached, save only as to such facts as are necessary to confer jurisdiction. *Stanton vs. Ellis*, 2 Kern., 575; affirming, but on other grounds, *same case*, 16 Barb., 319. But, for grounds of that nature, it is impeachable. *Same case*. See also *Small vs. Wheaton*, 2 Abb., 175. As to its conclusiveness, when no such grounds are stated, see *Rusher vs. Sherman*, 28 Barb., 416; *People vs. Stryker*, 24 Barb., 649. Nor can such a question be raised collaterally upon motion. *Rich vs. Salinger*, 11 Abb., 344.

The insolvent laws of another state are not however pleadable, nor is a discharge under them a bar to a suit on a contract arising, or as against a creditor resident elsewhere. *Russell vs. Harding*, 12 L. O., 216; *Donnelly vs. Corbett*, 3 Seld., 500; *Ballard vs. Webster*, 9 Abb., 404; *Smith vs. Gardner*, 4 Bosw., 54.

Even an interlocutory proceeding, such as an attachment, cannot be attacked collaterally, save only on the ground of want of jurisdiction. *Skinnion vs. Kelley*, 18 N. Y., 355; *Van Alstyne vs. Erwin*, 1 Kern.,

331; *Whitaker vs. Merrill*, 28 Barb., 526; *Same case*, 30 Barb., 389. See likewise, as to the conclusiveness of a judge's allowance of substituted service, *Collins vs. Ryan*, 32 Barb., 647. And generally, as to that of an order. *Peet vs. Cowenhoven*, 14 Abb., 56. See, however, *Staples vs. Fairchild*, 3 Comst., 41, as to the power of impeachment of such a proceeding, for want of jurisdiction. An attachment, issued by the courts of another state, constitutes no defence. *Hecker vs. Mitchell*, 5 Abb., 453; 6 Duer, 687.

But, to constitute a defence in one suit, the granting of an injunction in another, must be in a proceeding between the same parties. See *Bowen vs. Irish Presbyterian Congregation of City of New York*, 6 Bosw., 245.

Nor can an appointment of guardian by a surrogate, be collaterally attacked in a separate action, even though fraud be shown. *Dutten vs. Dutten*, 8 How., 99.

An order appealed from and affirmed, is conclusive, and cannot be subsequently attacked for error or defect in the proceedings. *Baggott vs. Boulger*, 2 Duer, 160.

An assessment by assessors is a judicial act, and no action will lie against them for mere error in its performance. *Vail vs. Owen*, 19 Barb., 22.

As to the conclusiveness of a certificate, issued by commissioners, appointed by special act, for the purpose of effecting an exchange of corporation bonds for railroad stock, see *Bank of Rome vs. Village of Rome*, 27 Barb., 65; affirmed, 19 N. Y., 20.

An ordinary nonsuit, by election of the plaintiff, or on motion during the trial, or a dismissal of the complaint by default, or on motion for want of due prosecution, is no bar to the institution of a fresh action. *Peters vs. Diossy*, 3 E. D. Smith, 115; *Morrell vs. Whitehead*, 4 E. D. Smith, 239; *Seaman vs. Ward*, 1 Hilt., 52; *Tattershall vs. Hass*, 1 Hilt., 56; *Salter vs. Malcolm*, 1 Duer, 596; *Harrison vs. Wood*, 2 Duer, 50; *Coit vs. Beard*, 33 Barb., 357; 22 How., 2; 12 Abb., 462; *Dexter vs. Clark*, 35 Barb., 271; 22 How., 289. Or a dismissal for defect of title at the time. *Mitchell vs. Cook*, 29 Barb., 243. So also, as to a reversal of a judgment on a technical point, and not on the merits. *Hunt vs. Hoboken Land and Improvement Company*, 1 Hilt., 161; *Ellert vs. Kelly*, 4 E. D. Smith, 12; 10 How., 392. So likewise, as to a discontinuance before judgment. *Cashman vs. Bean*, 2 Hilt., 340; *Carlisle vs. McCall*, 1 Hilt., 399. Or a claim, withdrawn by the plaintiff upon the trial. *Thompson vs. Wood*, 1 Hilt., 93. And this, even although, after the abandonment of his claim by the plaintiff, the defendant took judgment in his favor, on a counter-claim. *Jones vs. Underwood*, 35 Barb., 211; 13 Abb., 393. Held otherwise, however,

as to a claim for recoupment, interposed by a defendant, *Davis vs. Talcott*, 2 Kern., 184.

But where, on the contrary, a case has once been submitted on the merits, a dismissal of the complaint will be a bar to any future proceeding in respect of the same controversy. *Burhaus vs. Van Zandt*, 3 Seld., 523. See also *Peters vs. Diossy*, above cited; *Hamilton Building Association vs. Reynolds*, 5 Duer, 671.

A decision in the courts of another state, as to the right of parties to real estate situate in this, is not controlling authority. In such cases, the *lex loci rei sitæ* governs. *Boyce vs. City of St. Louis*, 29 Barb., 650; 18 How., 125; *Nicholson vs. Leavitt*, 4 Sandf., 252 (276). See likewise, as to the controlling operation of the *lex loci contractus*, in a controversy, relative to personal property, under a contract made in this state. *Van Buskirk vs. Warren*, 34 Barb., 457; 13 Abb., 145.

Nor has the judgment of a sister state, any greater authority than what belongs to it in the state where it is rendered. Where, therefore, a creditor sued one of several joint-debtors, it was held that his demand was not extinguished, as regards the others, the contrary being provided by a statute of the state in which the suit was brought, though, in this state, it would have been otherwise. *Suydam vs. Barber*, 18 N. Y., 468; reversing *same case*, 6 Duer., 34. See also *Brown vs. Birdsall*, 29 Barb., 549; *Reed vs. Girty*, 6 Bosw., 567.

But, in a matter where the courts of a sister state had full jurisdiction of both the person of the defendant and the subject-matter of the action, their decision, however seemingly erroneous, will be conclusive. *Rocco vs. Hackett*, 2 Bosw., 579. See also *Dobson vs. Pearce*, 2 Kern., 156; 1 Abb., 97; affirming *same case*, 1. Duer, 142; 10 L. O., 170. Nor will the courts of this state, interfere with proceedings pending in another, so long as they are not attempted to be enforced here. *Williams vs. Ayrault*, 31 Barb., 364; *Hill vs. Hill*, 28 Barb., 23.

See, as to the conclusiveness of the judgments of the federal courts, *Chemung Canal Company vs. Judson*, 4 Seld., 254; *Ruckman vs. Cowell*, 1 Comst., 505.

Where the contract or demand on which a suit is brought is entire and indivisible in its nature, a recovery or judicial determination in a suit, as to part of it, will be conclusive, and will bar any other proceeding as to the residue. *Waterbury vs. Graham*, 4 Sandf., 215; *Staples vs. Goodrich*, 21 Barb., 317; *Coggins vs. Bulwinkle*, 1 E. D. Smith, 434. See also, as to liability, *Baker vs. Higgins*, 21 N. Y., 397; *Gardner vs. Clark*, 21 N. Y., 399.

But, where transactions between the same parties are in any manner severable, as where distinct parcels of goods have been sold at different times, the rule will not be applied. *Staples vs. Goodrich*, *supra*; *Cash-*

man vs. Bean, 2 Hilt., 340 ; *Secor vs. Sturgis*, 16 N. Y., 548 ; affirming *same case*, 2 Abb., 69.

Nor, when a demand, originally joint, has been severed in fact, will the principle prevail : thus, a judgment recovered by one assignee of part of an entire demand, was held no bar to a suit by another to recover his proportion. *Cook vs. Genesee Mutual Insurance Company*, 8 How., 514.

Where the indebtedness is clearly joint, a separate recovery against one of several joint-debtors, will in like manner, bar a suit against the others. *Benson vs. Paine*, 2 Hilt., 552 ; 17 How., 407 ; 9 Abb., 28 ; *McMaster vs. Vernon*, 3 Duer, 249. Nor will a subsequent formal vacating of the judgment annul its previous operation. See *Olmstead vs. Webster*, 4 Seld., 413.

But this rule will not be applied, where such debtors reside in different states ; they may then be sued separately, and a judgment against one in one state, will not bar a suit against others in another. *Brown vs. Birdsall*, 29 Barb., 549. See also *Suydam vs. Barber*, 18 N. Y., 468, before referred to. Nor will it prevail, where the debt or obligation is joint and several, or severable in its nature. *Vide Benson vs. Paine, supra*.

Nor will judgment against the plaintiff, in favor of defendants sought to be charged as joint contractors, or partners, bar a subsequent action against one of them, as sole contractor. *O'Connor vs. Bagley*, 3 E. D. Smith, 149.

As regards the relations of parties, the following decisions may be noticed :

Judgment against the sheriff for misconduct of his deputy, is evidence against the latter and his sureties, in an action brought on his official bond. *Thomas vs. Hubbell*, 18 Barb., 9 ; *Westervelt vs. Smith*, 2 Duer, 449.

A decision, as between the parties to a suit, is a complete estoppel, as against their representatives, or those claiming under them. *Burhaus vs. Van Zandt*, 3 Seld., 523 ; *Cook vs. Travis*, 22 Barb., 338.

So also, in partition, a decree concludes, not merely the parties, but all purchasers under the title thereby derived. *Blakely vs. Calder*, 15 N. Y., 617 ; affirming *same case*, 13 How., 476. Nor will a mere amendable irregularity prevent the application of the principle. *Croghan vs. Livingston*, 17 N. Y., 218 ; 6 Abb., 350 ; affirming *same case*, 25 Barb., 336. But not so, as regards parties, who have not been properly brought in. *Requa vs. Holmes*, 16 N. Y., 193.

Judgment in a controversy as to land, runs with the land, and concludes all who subsequently derive title from either of the parties. But not so, as to a person deriving title, by a deed executed prior to the

commencement of the action in which such judgment was recovered. *Wilson vs. Davol*, 5 Bosw., 619. See also *Campbell vs. Hall*, 16 N. Y., 575 (580).

Judgment against the agent may estop the principal, where the former sued with authority, or there has been a ratification, or approval of his proceedings by the latter. *Kent vs. Hudson River Railroad Company*, 22 Barb., 278.

Assessment of damages under an injunction bond, as between the principals in the suit in which it was given, will be conclusive on the sureties, even though not notified of the assessment. *Methodist Churches of New York vs. Barker*, 18 N. Y., 463. But judgment in favor of a portion of the sureties under a replevin bond, as against the parties to the suit, will not conclude a co-surety from litigating with them a question of contribution. *Decker vs. Judson*, 16 N. Y., 439.

Judgment against the overseers of a town, concludes the supervisors of the county. *People vs. Supervisors of Delaware*, 12 How., 50. As to the existence of a double liability on the part of a county treasurer, both to the people, and also to the county, see *Supervisors of Livingston vs. White*, 30 Barb., 72.

Although, in a case of conversion of property, it was competent for either owner or bailee to have sued, judgment on the merits against the former will estop the latter. *Green vs. Clarke*, 2 Kern., 343. See, however, *Bates vs. Stanton*, 1 Duer, 79. as to the right of a bailee to plead title in a third person, as against the claim of a fraudulent bailor, and to set up a judgment against him at the suit of the true owners.

Judgment against a corporation for the amount of a debt, is evidence against a stockholder, in an action founded on his individual liability. *Belmont vs. Coleman*, 21 N. Y., 96; *Peckham vs. Smith*, 9 How., 436.

But a judgment will not be conclusive, as against parties not directly privies to the adjudication. Thus, a surrogate's decree will not be conclusive, as against creditors of the estate, who do not come in and prove before him. *Bank of Poughkeepsie vs. Hasbrouck*, 2 Seld., 216. Nor will it bar executors from enforcing payment of a debt due to the estate, from their coexecutor, not embraced in a prior accounting. *Wurts vs. Jenkins*, 11 Barb., 546.

A merely inchoate proceeding, such as a mere submission to arbitration, where that proceeding has failed without fault of either party, will be no bar to a fresh action. *Haggart vs. Morgan*, 1 Seld., 422; affirming 4 Sandf., 198. See also *Sinclair vs. Tallmadge*, 35 Barb., 602.

The judgment of a court of competent jurisdiction, on the question involved in a suit, is conclusive, in a second suit between the same parties, depending on the same question, though the subject-matter of the two actions be different; and parol proof will be admissible, to

show what was really in controversy. *Doty vs. Brown*, 4 Comst., 71; *Castle vs. Noyes*, 4 Kern., 329; *Birckhead vs. Brown*, 5 Sandf., 134.

And, where several causes of action were embraced in one complaint, such proof may be given, to show upon which of such causes judgment was, in fact, rendered. Such proof is not inconsistent with the record. *Stedman vs. Patchin*, 34 Barb., 218.

But matter inconsistent with, or contradictory to the record, cannot be so proved. *Campbell vs. Butts*, 3 Comst., 173.

The record of a former judgment is also, as a general rule, conclusive, not only as to the matter actually determined, but also as to every other matter which the parties might have litigated in the cause, and might have had determined in such litigation. *Embury vs. Conner*, 3 Comst., 511 (522). And the same is the case, in a collateral action, brought for a different species of relief, but where the same facts were actually in issue. *Bellinger vs. Craigue*, 31 Barb., 534; *Edwards vs. Stewart*, 15 Barb., 67; *Davis vs. Talcott*, 2 Kern., 184; *Hamilton Building Association vs. Reynolds*, 5 Duer, 671; *Wiseman vs. Panama Railroad Company*, 1 Hilt., 300; *Monroe vs. Delavan*, 26 Barb., 16. See also *Treadwell vs. Stebbins*, 6 Bosw., 538.

And not only so, but a recovery against another person for the same cause of action, may be a bar to a suit for damages. See *Dexter vs. Broat*, 16 Barb., 337. And a judgment, when given, estops not merely all parties to the record, but all who have a right to appear and control the action, and appeal from the judgment, though not parties. *Castle vs. Noyes*, 4 Kern., 329 (332); *Bates vs. Stanton*, 1 Duer, 79 (87).

The above principle is, however, to be confined within strict limits. The defence is only applicable to matters directly adjudicated, or directly within the issues joined, and not to matters which might have arisen incidentally or collaterally, in the course of the controversy, but which did not so arise in fact.

A judgment or decree concludes the parties, only as to the grounds covered by it, and the facts necessary to uphold it, and no further. It forms no bar to a subsequent suit, on facts not passed upon. *Jones vs. Alston*, Selden's Notes, Oct. 7th, 1853, p. 10; *Burdick vs. Post*, 12 Barb., 168; *Slawson vs. Engleheart*, 34 Barb., 198; *Knauth vs. Bassett*, 34 Barb., 31. See also *Van Alstyne vs. Indiana, Pittsburgh, and Cleveland Railroad Company*, 34 Barb., 28; 21 How., 175, cited in last subdivision.

A judgment between parties of the same name is, *prima facie*, a defence, but subject to explanation by parol evidence. *Agate vs. Richards*, 5 Bosw., 456.

See, as to the extent to which a judgment, taken against one defendant only, in a suit in which another was not served, will or will not be

conclusive on questions of fact, in a subsequent action against both, *New York and Harlem Railroad Company vs. Kyle*, 5 Bosw., 587.

Judgment by default for one cause of action, has been held not to extinguish a counter-credit which might have been set up as a defence. *Smith vs. Weeks*, 26 Barb., 463.

Nor, where a demand had been split into two promissory notes, will the taking of judgment by default on one, necessarily preclude the raising of a question as to the validity of the other, though that question was partially involved, and might have been litigated in the first action. *Hughes vs. Alexander*, 5 Duer, 488.

Where a party interested has not had an opportunity afforded him to litigate the question, as in the case of a mere surety, not having received notice, the judgment proves *rem ipsam*, and nothing more, and he will be at liberty to interpose any defence, originally available. *Thomas vs. Hubbell*, 15 N. Y., 405.

Judgment in trespass proves no more than its commission, and does not preclude a subsequent issue being raised, as to its having been committed in good or bad faith. *St. John vs. St. John's Church*, 15 Barb., 346.

Judgment for the amount due under a contract, is no bar to a separate action for deceit, inducing the plaintiffs to make it. *Wanzer vs. De Baum*, 1 E. D. Smith, 261; 1 C. R. (N. S.), 280. But, where the fraud of the defendant had induced a judgment against the plaintiff, it was held that such judgment could not be inquired into collaterally. *White vs. Merritt*, 3 Seld., 352. But, for deceit in other matters outside the record, a second action may be maintainable. *Same case*.

Judgment against the plaintiff, in an action on contract for sale of goods, on the ground of there being no contract between the parties, will form no bar to a subsequent action of trover for the same goods. *Ball vs. Larkin*, 3 E. D. Smith, 555.

Judgment for the plaintiff in trespass, on a plea of title to part of the property on which such trespass was committed, does not preclude the same issue from being again raised, as to the property in general. To avail himself of it as an estoppel, the party pleading it must show affirmatively that the same portion was in question in both suits. *Dunckel vs. Wiles*, 1 Kern., 420.

To operate as an estoppel, a prior judgment must be between the same parties or their privies. If it be not coincident in this respect, it will not bar a second proceeding. See *Sweet vs. Tuttle*, 4 Kern., 465; affirming *same case*, 10 How., 40; *Mersereau vs. Pearsall*, 19 N. Y., 108; *Campbell vs. Hall*, 16 N. Y., 575; *Brown vs. Brown*, 2 E. D. Smith, 153.

Nor will a judgment, negating title of defendants as derived from

the plaintiffs, estop their setting up title derived from another source, in a subsequent proceeding. *Rider vs. Union India Rubber Company*, 4 Bosw., 169.

Judgment by an indorsee, against maker and indorser, is no estoppel to a controversy by the latter as between themselves. *Kelsey vs. Bradbury*, 12 L. O., 222.

In pleading a prior adjudication, the same rules apply as in that of an estoppel *in pais*. The fact of such adjudication, and its identity, or connection with the controversy sought to be barred, must be distinctly shown, by all proper and sufficient averments. Where the adjudication has been made by a court of limited powers, or in a special or statutory proceeding, it will be further necessary to aver all matters, which are essential to establish the existence of jurisdiction in the court or officer by whom the adjudication relied upon was pronounced. See in this respect, as to pleading a discharge in bankruptcy, *McCormick vs. Pickering*, 4 Comst., 276.

If not pleaded, a former judgment will be wholly unavailable as a defence. It cannot be given in evidence under a general denial, or an allegation of pendency of the action in which it was rendered. *Hendricks vs. Decker*, 35 Barb., 298.

A judgment recovered against an assignor, after assignment made, cannot be used as against his assignee. See *Lowell vs. Lane*, 33 Barb., 292.

(c.) ACCORD AND SATISFACTION.

This defence, when established, is available, either in bar of the whole cause of action, or of such portion of it as may be embraced in the accord.

To render it so, both requisites must concur, *i. e.*, there must be shown an agreement to take a specific amount or specific benefit, in full discharge of the claim sought to be enforced, and satisfaction, or full tender of satisfaction of the consideration agreed to be paid or given. If either of these two essential elements are wanting, the defence will be incomplete. Proof of fraud, practised by the party setting up the defence, will also render it void. *Dolsen vs. Arnold*, 10 How., 528; *Warburg vs. Wilcox*, 2 Hilt., 118; 7 Abb., 336.

Where the relation of debtor and creditor exists, an accord, consisting of mutual promises, will be binding, and tender of performance by the creditor at the time and place specified, will discharge the debt. *Billings vs. Vanderbeck*, 23 Barb., 546.

It is competent for a party to withdraw from a simple unexecuted accord, at any time before actual satisfaction, where the facts are not

such as would give the other party a right to a specific performance. *Day vs. Roth*, 18 N. Y., 448.

Where both requisites concur, an agreement to take a less amount than that claimed, and acceptance of that amount, will constitute a perfect defence, and be available as a payment in full. *Webb vs. Goldsmith*, 2 Duer, 413; *Taylor vs. Missbaum*, 2 Duer, 302.

The giving of additional security by the debtor for the debt, or any portion of it, effects no change in or avoidance of his liability. If, however, any other and independent benefit be added, as, for instance, even the mere concurrence of the debtor's wife, to bar her dower, previously existent, such benefit will form a new consideration, and such additional security may be pleaded as accord and satisfaction, even though only given for a portion of the amount, but with intent to bar the whole. *Keeler vs. Salisbury*, 27 Barb., 485.

And a conditional compromise will be pleadable as an accord, pending the condition, where, so far as it has yet become obligatory, it has been performed. *Harvier vs. Guion*, 3 E. D. Smith, 76. And even if, after a condition is strictly forfeited, an actual performance be accepted, the condition will be waived, and a full satisfaction effected. *Conkling vs. King*, 6 Seld., 440.

Accord and satisfaction, after action brought, will be equally available as a defence, and may be set up in the answer. *Willis vs. Chipp*, 9 How., 568.

Accord and satisfaction, obtained by means of duress, will be void, and unavailable as a defence. *Rourke vs. Story*, 4 E. D. Smith, 54.

Accord and satisfaction of a claim, for injury by accident to the deceased in his lifetime, will bar an action by his representatives under the statute, for damages occasioned by his death. *Dibble vs. New York and Erie Railroad Company*, 25 Barb., 183. As to the conclusiveness of such an arrangement, see *Coon vs. Knap*, 4 Seld., 402.

As to satisfaction being effected, by acceptance of an amount offered in full of a disputed claim, see *Pierce vs. Pierce*, 25 Barb., 243.

As to the acceptance, even though under protest, of a sum awarded by the board of supervisors, working full satisfaction of a claim against the sheriff for a reward, see *Prentiss vs. Farnham*, 22 Barb., 519.

The presumption lies that a promissory note is given in settlement of all demands between the parties, and, unless rebutted, may prevail. *Treadwell's Executors vs. Abrams*, 15 How., 219; *Lake vs. Tyssen*, 2 Seld., 461.

A payment, part in cash and part in the debtor's own note, will not, in the absence of an express release, operate as a satisfaction, though received as such, in the event of non-payment of the latter. *Moss vs. Shannon*, 1 Hilt., 175.

The acceptance of a bill of exchange, in payment for goods sold, will operate as a bar against any proceeding to rescind the sale, and substitute for the original indebtedness, the liability on the paper so received. *Francia vs. Del Banco*, 2 Duer, 133.

The question as to when the taking of the note of a third party will, or will not operate as a satisfaction of the original indebtedness, will be considered at the close of the next subdivision.

A receipt given to one of two joint and several debtors, in full of his obligation, in consideration of a part payment, will not operate to discharge either. , *Buckingham vs. Oliver*, 3 E. D. Smith, 129.

(d.) PAYMENT.

Closely akin to the foregoing defence, is that of payment, when admissible. It should, of course, be averred clearly, and, if made in any special manner, the particulars should be stated.

To constitute a payment, money, or some other valuable thing, must be delivered by the debtor to the creditor, for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose. A defendant cannot deprive the plaintiff of his costs, after action is commenced, by an unaccepted payment. Even a remittance of the debt, if repudiated and offered to be returned, will be ineffectual. The defendant, if he wishes to obtain protection against further costs, must, under such circumstances, withdraw the amount, and make a regular tender. *Kingston Bank vs. Gay*, 19 Barb., 459. Nor will even the acceptance of such a payment, by an agent, unaware of the pendency of an action, avail to deprive the plaintiff of his right to costs, and to continue the action unless they are paid. *Bogardus vs. Richtmeyer*, 3 Abb., 179.

To render a payment available, it must be of actual value. Thus, one made in bank-bills, actually spurious, though supposed to be good, was held not to discharge the debt. *Baker vs. Bonesteel*, 2 Hilt., 397.

The giving of the debtor's own check is not payment, unless such check be honored, or be parted with for value. An answer pleading a payment of this nature must, therefore, allege other facts in addition, showing that such check is out of the possession or control of the plaintiffs. *Strong vs. Stevens*, 4 Duer, 668.

The giving of the debtor's own note is, in no respect, a satisfaction of the indebtedness, even though it be expressly given for that purpose. It is, at the best, but the substitution of one promise for another. *Moss vs. Shannon*, 1 Hilt., 175 ; and cases there cited. Its only effect may be, if negotiable, to suspend the remedy of the plaintiff until its maturity. *Geller vs. Seixas*, 4 Abb., 103. See also *Central City Bank vs. Dana*, 32 Barb., 296 ; *Bates vs. Rosekrans*, 23 How., 98.

As to the necessity of a payment to the sheriff, of moneys due to

an execution debtor, under the special authority for that purpose, conferred by section 293, being, in all cases, fully and specially pleaded, see *Calkins vs. Packer*, 21 Barb., 275. See also, as to the necessity of such a payment being compulsory, in order to be available as a defence, *Richardson vs. Ainsworth*, 20 How., 521.

Where a party relies on a presumption of payment, it has been held that the proper mode of pleading it is to aver payment, and give in evidence the facts raising the presumption. *Pattison vs. Taylor*, 8 Barb., 250; 1 C. R. (N. S.), 174; *Austin vs. Tompkins*, 3 Sandf., 22; *New York Life Insurance and Trust Company vs. Covert*, 29 Barb., 435; *Morey vs. Farmers' Loan and Trust Company*, 4 Kern., 302 (307). See also, in court below, *same case*, 18 Barb., 401 (406). See, generally, as to the presumption of payment, *Martin vs. Gage*, 5 Seld., 398.

As to a general plea of payment to a party specified being sufficient, without averring in detail the particular facts, see *Farmers' and Citizens' Bank of Long Island vs. Sherman*, 6 Bosw., 181.

Receipt of the amount due upon a note, by the holder, after maturity, even from a stranger, operates, in the absence of express stipulation to the contrary, as a payment, and not as a sale. *Burr vs. Smith*, 21 Barb., 262.

Payment by the maker of the note, at a bank, where it has been deposited by the payee for collection, extinguishes the debt. In the event of a subsequent misapplication by the bank, its liability is only as agents of the payee. *Smith vs. President, &c., of Essex County Bank*, 22 Barb., 627.

The erroneous stamping of a note as paid, by the teller of the bank where it was made payable, was held not to operate as a payment, where the mistake was at once discovered, and a request made to correct it. *Irving Bank vs. Wetherald*, 34 Barb., 323.

Payment to an agent authorized to sell goods, was sustained as a valid payment to his principal, in *Higgins vs. Moore*, 6 Bosw., 344.

The taking of a check of a third party will not, *per se*, operate as a satisfaction of a claim, unless in pursuance of an express agreement to that effect. *Jobbett vs. Goundry*, 29 Barb., 509.

Nor will the taking of the note of a third person have that effect, unless there be an agreement to take it in payment. *Davis vs. Allen*, 3 Comst., 168; *Vail vs. Foster*, 4 Comst., 312; *Noel vs. Murray*, 3 Kern., 167; affirming *same case*, 1 Duer, 385; *Higby vs. New York and Harlem Railroad Company*, 3 Bosw., 497; 7 Abb., 259. Nor will the conditional taking of such a note operate as payment. *Torry vs. Hadley*, 27 Barb., 192.

The presumptions which lie, in the absence of an express agreement,

are thus defined, in *Noel vs. Murray*, 3 Kern., 167, above cited: When such a note or bill is received on a precedent debt, the presumption is that it was not taken as payment, and the *onus* of establishing that it was so taken is upon the debtor. But, when it is received contemporaneously with the contracting of the debt, the presumption is that it was agreed to be taken in payment, and the burden of proving the contrary rests upon the creditor.

Where the note of a third party has been actually agreed to be taken in payment, the satisfaction will be complete. *Webb vs. Goldsmith*, 2 Duer, 413; *Purchase vs. Mattison*, 3 Bosw., 310. And, in such case, the seller of goods, on such an agreement, may be bound to perform it, even though the maker of the note, agreed to be taken, may become insolvent before the transaction is complete. *Sigler vs. Smith*, 4 E. D. Smith, 280. This is not, however, the case with regard to an executory agreement, where, before performance, the notes originally agreed to be taken, have been deteriorated in value by such an insolvency. *Benedict vs. Field*, 16 N. Y., 595; affirming *same case*, 4 Duer, 154.

Where a valid agreement has been made, under which the vendor of goods is bound to take the note of a third party, that note remains his, even though, at the time of a tender, he refuse to receive it. *Des Arts vs. Leggett*, 16 N. Y., 582.

And, when such a note has been taken conditionally, a subsequent performance will operate as a satisfaction, and waive a previous breach of the conditions. *Conkling vs. King*, 6 Seld., 440.

Nor, when such a note has been agreed to be taken for goods, will the fact of its being indorsed by the purchaser, prevent its operation as a payment of the vendor. The vendor will, under such circumstances, be bound to treat him as an ordinary indorser. *Soffe vs. Gallagher*, 3 E. D. Smith, 507.

Primâ facie, an express receipt is conclusive evidence of payment. *Lambert vs. Seeley*, 2 Hilt., 429. It is, however, always explainable, so far as regards the amount of consideration given. But not so in its operation as a contract, or as an admission collateral to the payment. See *Coon vs. Knapp*, 4 Seld., 402; *Egleston vs. Knickerbacker*, 6 Barb., 458; and cases there referred to. See, however, as to a receipt in full, obtained for the purpose of defeating a demand for repayment of money lost at play, *Hendrickson vs. Beers*, 6 Bosw., 639. As to a receipt to one of two joint-debtors only, not operating as a full discharge, see *Buckingham vs. Oliver*, 3 E. D. Smith, 129.

As to the effect of payment of the amount due upon a bond and mortgage, in extinguishing the security wholly, or *pro tanto*, as between the debtor and creditor, *vide Champney vs. Coope*, 34 Barb., 539.

As to the collection of collaterals operating as to a payment, *pro tanto*, of the debt which they were intended to secure, *vide Marine Bank of the City of New York vs. Vail*, 6 Bosw., 421.

(e.) TENDER.

This mode of defence has application, rather to the costs than to the right of recovery of the plaintiff in the action. It, in fact, admits the latter, and has been held, accordingly, to be inconsistent with a general denial. See *Livingston vs. Harrison*, 2 E. D. Smith, 197.

Tender may be made, either before or after action. The former is general in its nature, and in exercise of a common-law right. After action brought, the mode of making it is, on the contrary, a matter of special statutory regulation. *Vide* 2 R. S., 553, 554, sections 20 to 23, inclusive.

The common-law tender, before action, must, in order to be available, be made either on the day on which the amount is due, or, if subsequently, must include interest from that date, down to the day of the tender. *Livingston vs. Harrison, supra*.

It should include all that is due in respect of the same transaction. Thus, a tender of the amount due on a mortgage, without including an assessment paid by the mortgagee, and interest on that assessment, was held unavailing to extinguish his lien. *Brevoort vs. Randolph*, 7 How., 398.

See, however, a tender, deficient by a few cents only, practically supported in *Spencer vs. Tooker*, 21 How., 333; 12 Abb., 353.

A tender, when made, must be in current coin, unless the creditor waive that condition, and, where no special place is appointed for the purpose, the debtor is bound to seek the creditor, in order to make it. *Harris vs. Mulock*, 9 How., 402. As to evidence of waiver of the strict conditions of a tender being admissible, under a plea of tender made, see *Holmes vs. Holmes*, 5 Seld., 525; affirming *same case*, 12 Barb., 137.

In relation to the effect of tender of an insurance premium, when made in due time, and as to a tender on Monday being available, when the last day of a specified term falls on Sunday, see *Campbell vs. International Life Assurance Society of London*, 4 Bosw., 298.

To be available, a tender must be actual, and sufficient. See *Hauckins vs. Avery*, 32 Barb., 551 (556). A mere offer, even followed by payment into court, will be inefficient. *Hornby vs. Cramer*, 12 How., 490. Nor will a mere remittance in intended payment be effectual. If refused, it must be withdrawn, and actually tendered. *Kingston Bank vs. Gay*, 19 Barb., 459. A tender must also be unconditional, save only as regards negotiable paper, which the debtor is en-

titled to inspect, and to have delivered to him at the time. *Wilder vs. Seelye*, 8 Barb., 408.

Tender of the amount due on a mortgage, if made at any time before foreclosure, discharges the lien; and a refusal bars subsequent proceedings in equity. Nor, as, in this case, it does not discharge the debt, but only defeats a remedy, is it necessary that it should be kept good. The mortgagee, if he refuses, refuses at his peril. By accepting it he incurs no hazard, as, even if the sum be insufficient, the security remains. *Kortright vs. Cady*, 21 N. Y., 343; reversing *same case*, 23 Barb., 490; 5 Abb., 358; also, at special term, 12 How., 424.

In replevin, an unconditional offer to restore the goods claimed before the commencement of the action, is equivalent to a tender before suit brought, and will have the same effect. *Savage vs. Perkins*, 11 How., 17.

Where, however, the tender goes directly to the plaintiff's right to recover, and not merely to a collateral remedy, it must not only be made sufficiently, but must be kept good. The defendant, in such cases, must not simply aver tender and refusal, but also that he always has been, and still is ready with the amount, and should pay it into court, and the date should be stated. *Wilder vs. Seelye*, 8 Barb., 408; *Livingston vs. Harrison*, 2 E. D. Smith, 197. To this amount the plaintiff is entitled in any event, even if the judgment be against him. *Logen vs. Gilleck*, 1 E. D. Smith, 398; *Livingston vs. Harrison*, *supra*. See also, generally, *Warburg vs. Wilcox*, 7 Abb., 336; *Place vs. Union Express Company*, 2 Hilt., 19; *Stevens vs. Hyde*, 32 Barb., 171.

In *Hull vs. Peters*, 7 Barb., 331; 3 C. R., 255, tender made, before knowledge of the fact that a declaration had been filed, was held to be effective, as a tender before suit brought. Under the present practice the defendant will, of course, be entitled to the benefit of one, if made at any time before actual service of the process upon him.

As to the effect of tender of performance of a special contract, at the time and place, or in the manner appointed, see *Billings vs. Vanderbeck*, 23 Barb., 546; *Renard vs. Tuller*, 4 Bosw., 107.

The statutory tender, after action brought, is subject to several conditions, imposed by the provisions of the Revised Statutes, above referred to. 2 R. S., 553, 554, sections 20 to 23.

Those conditions, and the effect of such a tender, when made, are so closely analogous to the provisions of sections 385 to 387, as to an offer before judgment, that the latter may be fairly considered as superseding them in effect. It is, in fact, much more advantageous, relieving the defendant from the necessity of seeking the plaintiff, and making an actual tender of money, and giving to a mere written offer, the same practical effect. It seems, therefore, unnecessary to enter into any

detailed consideration of these provisions, save only to remark that they provide, in addition, for a tender, in some cases, even after trial, if before judgment; and that, even if accepted by the plaintiff, such tender does not prevent further litigation, the right of costs depending on the amount recovered by him for the residue of his claim. Section 23.

These provisions are, moreover, only applicable to actions at law, by the express provisions of section 20, and, therefore, that mode of procedure is, under any circumstances, inadmissible in equity cases. *Barlow vs. Cleveland*, 16 How., 364; 7 Abb., 339; *New York Life Insurance and Trust Company vs. Burrell*, 9 How., 398; *Thurston vs. Marsh*, 14 How., 572; 5 Abb., 389; *Pratt vs. Ramsdell*, 16 How., 59; 7 Abb., 340, note.

In a common-law action it may, however, avail to deprive the plaintiff of his power to ask for an allowance. *Pratt vs. Conkey*, 15 How., 27. If made, it must include all costs up to that time, or it will be fatally defective. *People vs. Banker*, 8 How., 258.

As to payment in bad faith to an uninformed agent of the plaintiff, being ineffectual to deprive him of his right to costs, see *Bogardus vs. Richtmeyer*, 3 Abb., 179.

Tender of a deed, *pendente lite*, may be pleaded, and the defendant will have the benefit of it, in answer to a bill for specific performance. It is, however, unnecessary, an offer in the answer to execute being all that is requisite. *Beebe vs. Dowd*, 22 Barb., 255. If made to one of two joint contractors for the purchase of land, it will be sufficient; and on his refusal, the vendor is under no obligation to make it to the other. *Carman vs. Pultz*, 21 N. Y., 547. A deed, when tendered, must, however, be complete in all its parts, and fully acknowledged and certified. *Smith vs. Smeltzer*, 4 Abb., 469.

If unaccepted, a tender becomes a nullity, and does not alter the rights of the parties, or confer others. *Williams vs. Christie*, 4 Duer, 29 (36); *Dodworth vs. Jones*, 4 Duer, 201.

(f.) STATUTORY DEFENCES.—GENERAL REMARKS.

In pleading a public statute, an express reference to it, by its title or otherwise, is not necessary. It is sufficient to set forth the facts which render its provisions applicable, leaving the court to determine whether they apply or not. *Goelet vs. Cowdrey*, 1 Duer, 132.

When a statute is pleaded in bar of a common-law right, the facts rendering it applicable must be distinctly proved. *Miller vs. Roessler*, 4 E. D. Smith, 234.

To be pleadable as a defence, a breach of law must be actual. A mere avowal or knowledge of an unlawful intent, on the part of a vendee or purchaser, will not avoid a transaction, as regards a vendor,

not himself a party to that intent. *O'Brien vs. Breitenbach*, 1 Hilt., 304; *Tracy vs. Tallmage*, 4 Kern., 162. But, if such a vendor do any thing beyond a mere sale, in aid or furtherance of an unlawful design, or it be made part of the contract for sale, he cannot recover.

(g.) STATUTE OF FRAUDS.

The provisions which represent the ancient statute of frauds, will be found in sections 2, 3, 4 of title II., chapter VII., part II., of the Revised Statutes, entitled, "Of Fraudulent Conveyances and Contracts, relative to Goods, Chattels, and Things in Action," 2 R. S., 135, 136. They run as follows :

§ 2. In the following cases, every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the person to be charged therewith :

1. Every agreement that, by its terms, is not to be performed within one year from the making thereof ;

2. Every special promise to answer for the debt, default, or miscarriage of another person ;

3. Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry.

§ 3. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless—

1. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby ; or,

2. Unless the buyer shall accept or receive part of such goods, or the evidences, or some of them, of such things in action ; or,

3. Unless the buyer shall, at the time, pay some part of the purchase-money.

§ 4. Whenever goods shall be sold at public auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum, specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made ; such memorandum shall be deemed a note of the contract of sale, within the meaning of the last section.

It is proposed to consider the recent decisions on these subjects, in the order of the sections, as above cited.

An oral agreement, providing for a permanent arrangement between a railroad company and an adjoining proprietor, by way of easement or servitude, was held void, as being, from its nature and terms, not to be performed within one year. *Day vs. New York Central Railroad Company*, 31 Barb., 548. So also, as to an agreement to waive the last half year's rent under a lease, in consideration of buildings being

left upon the premises at the expiration of the term. *Lawrence vs. Woods*, 4 Bosw., 354.

An agreement for a tenancy for one year, to commence *in futuro*, is not, however, within the statute. It is an interest in land, and, as such, not within the scope of that title of the Revised Statutes, which contains the above sections. *Young vs. Dake*, 1 Seld., 463; overruling *Croswell vs. Crane*, 7 Barb., 192. See also *Taggard vs. Roosevelt*, 2 E. D. Smith, 100. Nor is an agreement to pay a certain sum to another, to induce him to take such a lease, void. It is performed, when the lease is taken. *Gilsey vs. Wild*, 1 Hilt., 305.

Although a parol agreement to work for another for more than one year, is directly within the statute, and therefore void (see *Amburger vs. Marvin*, 4 E. D. Smith, 393), still it may be used in evidence, on an action for services so rendered, to show the *quantum meruit*. *McGluckey vs. Bitter*, 1 E. D. Smith, 618. But this latter conclusion does not hold good, as to an agreement to pay for services, in real and personal estate, after the death of the employer. *Lisk vs. Sherman*, 25 Barb., 433.

An agreement, for valuable consideration, to furnish an aged person with board, &c., during her life, was held not to be void by the statute. It was not *by its terms*, not to be performed within one year, but *depended on a contingency*. *Dresser vs. Dresser*, 35 Barb., 573. See also *Trustees of First Baptist Church vs. Brooklyn Fire Insurance Company*, 19 N. Y., 305.

The expression of consideration is essential to the validity of an agreement. If that element be absent, the document will be void under the statute, even though an attempt may have been made to give it the character of a promissory note. *Sackett vs. Palmer*, 25 Barb., 179. See also generally, *Wilson vs. Roberts*, 5 Bosw., 100. The question as to the invalidity of a guaranty of negotiable paper, not expressing consideration upon its face, has already been fully treated, and the cases in point cited, in book VII., chapter 2, section 146, subdivision of *Guarantor's Liability*.

The point as to when an agreement will or will not fall within the second clause of section 2, has given rise to considerable discussion, hinging upon the question as to whether the contract relied on in each particular case was independent or collateral. If the latter, the rule will clearly apply. If not, and if there exist any consideration whatever passing between the promisor and promisee, the agreement will be held independent, and taken out of the operation of the statute.

An undertaking to pay for goods delivered to another, if that other does not, must be wholly relied on, and credit given to the guarantor

only, or it will be held collateral. Nor will a subsequent parol promise avail to give it validity. *Allen vs. Scarff*, 1 Hilt., 209.

A promise to pay an indebtedness, existent previous to the promise, is collateral. So held, as to a promise to pay for goods previously delivered to another. *Darlington vs. McCunn*, 2 E. D. Smith, 411.

So also, as to a promise of the assignee of a lease to pay back rents due from his assignor, though inducing a continuance of the tenancy. *Fowler vs. Moller*, 4 Bosw., 149.

Or a promise to pay the judgment-debt of another, in consideration of forbearance shown to that other. *Stern vs. Drinker*, 2 E. D. Smith, 401.

Or a promise to pay off existent liens upon another's property. *Malory vs. Gillett*, 21 N. Y., 412; affirming *same case*, 23 Barb., 610.

In this last case, the general principle is most elaborately discussed, and the cases not within the statute, though the promise relates to an existing debt of a third party, are thus classified by Comstock, J., examples being given under each head:

1. Where there is no original debt, to which the promise is collateral.

2. Where the original debt is extinguished, and the creditor has no remedy but on the new promise.

3. Where, although the original debt remains, the new promise is founded upon a consideration which moves to the promisor. See 21 N. Y., 433.

In all others, where the promise has not attached to it the character of an original undertaking, the statute will be strictly applied.

As to a circuitous consideration, moving between the plaintiff and the defendants, by use being made by the latter of liabilities due to the former, in settlements with third parties, being sufficient to take the case out of the statute, and to support an action for moneys had and received, see *Beach vs. Hungerford*, 19 Barb., 258. The undertaking, in that case, was held new and original, and the consideration sufficient.

So also, a promise to pay an order in favor of a third party, but grounded on a previously existing liability, is an original undertaking. *O'Donnell vs. Smith*, 2 E. D. Smith, 124.

A parol promise to apply the consideration for a conveyance, in payment of specified debts of the grantor, was sustained, and held not to be within the statute, in *Seaman vs. Hasbrouck*, 35 Barb., 151.

A guaranty, inducing deliveries of goods to a third party, on the credit of the guarantor, will be valid, and consideration sufficiently expressed upon it, by reference to a collateral agreement for sale of such goods. *Church vs. Brown*, 21 N. Y., 315.

And, even without such expression, it would have been binding, as

inducing such delivery on the credit of the guarantor. See also generally, as to a guaranty, whether written or by parol, being sufficient to bind the guarantor, though no consideration be expressed, where goods are thereafter delivered, or work thereafter done, on the faith of such guaranty, *Gates vs. McKee*, 3 Kern., 232; *Union Bank vs. Coster's Executors*, 3 Comst., 203; *Dunning vs. Roberts*, 35 Barb., 463 (469); *Quintard vs. De Wolf*, 34 Barb., 97; *Devlin vs. Woodgate*, 34 Barb., 252.

See also, as to when an agreement of this nature will or will not be held continuing, *Dixon vs. Frazee*, 1 E. D. Smith, 32. See likewise, as to a parol warranty of the goodness of a chattel note of a third person, inducing its purchase, *Cardell vs. McNiel*, 21 N. Y., 336.

An agreement to assume liabilities, as the condition of the purchase of property, is independent, and not collateral. *Therasson vs. McSpeddon*, 2 Hilt., 1. So likewise, a similar promise to pay charges, inducing an assignment of property. *Stilwell vs. Otis*, 2 Hilt., 148; 7 Abb., 431.

So also, as to an agreement to pay freight for cattle, previous to, and inducing their delivery to a third person. *New York and Erie Railroad Company vs. Gilchrist*, 16 How., 564. See likewise, as to a delivery of goods to a third party, in express reliance on a previous parol promise of payment, *Darlington vs. McCunn*, 2 E. D. Smith, 411.

A parol agreement by one intended surety, to indemnify another against a liability to be incurred by both, on becoming sureties for a third person, has been held to be independent, and not within the statute. *Barry vs. Ransom*, 2 Kern., 462. See, however, *Baker vs. Dillman*, 21 How., 444; 12 Abb., 313, holding that a promise, not under seal, given by members of a society, to indemnify another against his previous guaranty under seal, for rent of the society's premises, was void, as within the statute.

A guaranty under seal is good, whether consideration be or be not expressed; the seal imports it. *Rosenbaum vs. Gunter*, 2 E. D. Smith, 415; *McKenzie vs. Farrell*, 4 Bosw., 192; *Barnum vs. Childs*, 1 Sandf., 58; affirmed, in error, *Childs vs. Barnum*, 11 Barb., 14.

Though money have been actually paid in pursuance of a contract void by the statute, it cannot be recovered back, where the other party to that contract is willing to go on and perform it. *Collier vs. Coates*, 17 Barb., 471.

The following decisions more especially apply to section 3, in relation to the sale of goods. It will be observed that that section is only applicable to contracts, where the value of the subject-matter is over fifty dollars.

Although effect is given by section 4 to an auctioneer's memorandum of sale, though not subscribed, the memorandum of a broker will not

have the same effect, though containing the names of the parties. To be enforceable as a contract, it must be signed by the party or his agent. *Dennison vs. Carnahan*, 1 E. D. Smith, 144. See, as to the memorandum of a judicial sale not being within the statute, *Hegeman vs. Johnson*, 35 Barb., 200.

But a partial delivery takes the case at once out of the statute. *Same case*. And this, though not made at the time of, but subsequent to, the original agreement. *McKnight vs. Dunlop*, 1 Seld., 537; *Sale vs. Darragh*, 2 Hilt., 184; *Boutwell vs. O'Keefe*, 32 Barb., 434. As to what will be a sufficient delivery to take the case out of the statute, see *Dyer vs. Forest*, 2 Abb., 282. See also, as to the effect of part performance by the principal, of a contract made in his agent's name, *St. John vs. Griffith*, 13 How., 59; 2 Abb., 198. To take the case out of the statute, a delivery must be legal and actual; if imperfect in either view, it will not avail. See *Lewin vs. Stewart*, 17 How., 5; reversing *same case*, 10 How., 509.

The application of a previous advance to the vendor, by way of payment of the deposit, in a subsequent bargain between him and the vendee, was held a sufficient payment to take the case out of the statute, in *Mattice vs. Allen*, 33 Barb., 543. See generally, as to the effect of a payment in this respect, *Whitehouse vs. Moore*, 13 Abb., 142.

A manufacturing or executory contract, is not a sale of goods within the purview of the section. The true criterion in such a case, is to inquire whether the work or labor required to prepare the subject-matter for delivery, is to be done for the vendor himself, or for the vendee. In the former case, the contract is really a contract of sale; in the latter, a contract of hiring. *Courtright vs. Stewart*, 19 Barb., 455; *Donovan vs. Wilson*, 26 Barb., 138; *Robertson vs. Vaughn*, 5 Sandf., 1; *Mead vs. Case*, 33 Barb., 202.

As long as a transaction for extinguishing an antecedent debt by delivery of goods, rests in mere words, it is void under the statute; but it becomes valid, the moment the act of giving credit is performed by the buyer. *Brabin vs. Hyde*, 30 Barb., 265.

A delivery of goods to be made in exchange for others, will not be considered as payment, or as transferring the title, till actually complete. *Chapin vs. Potter*, 1 Hilt., 366.

In *Amburger vs. Marvin*, 4 E. D. Smith, 393, it is held that it is not necessary for a defendant to plead the statute of frauds in terms. The objection lies to the whole cause of action set up by the complaint, and, as such, may be raised on the trial. See also *Haight vs. Child*, 34 Barb., 186, holding that where facts out of which the question arises are apparent, the objection need not be taken in terms. *Lewin vs. Stewart*, 10 How., 509, which holds the contrary, is generally reversed, 17 How.,

5; and, although not specially noticed, the reversal necessarily embraces this point.

(h.) STATUTE OF LIMITATIONS.

This defence is, on the contrary, one that, to be available, must be specially pleaded. *Shears vs. Shafer*, 2 Seld., 268. See also, collaterally, *Arthurton vs. Dalley*, 20 How., 311.

It must also be taken by answer. Code, section 74. See, as to the positive nature of this restriction, *Lefferts vs. Hollister*, 10 How., 383; *Stewart vs. Smith*, 14 Abb., 75; *Voorhies vs. Voorhies*, 24 Barb., 150; *Humphrey vs. Persons*, 23 Barb., 313, and *Swift vs. Drake*, M. S., there referred to. See also *Butler vs. Mason*, 16 How., 546; 5 Abb., 40, and *Sands vs. St. John*, 23 How., 140. *Genet vs. Tallmadge*, 1 C. R. (N. S.), 346, holding that, where the objection is patent on the face of the complaint, it may be taken by demurrer, is evidently contrary to the section in question. These restrictions, however, only date from the amendment of 1851; before that year, the objection was raisable by demurrer. *Fellers vs. Lee*, 2 Barb., 488. See, however, *Stewart vs. Smith*, above cited.

That objection is not one that is favored, and will be waived by suffering a default. *Humphrey vs. Persons*, *supra*. See also, as to refusing leave to set it up, after failure upon a demurrer, *Osgood vs. Whittlesey*, 20 How., 72; 10 Abb., 134; or, upon amendment by leave of the court, *Sagory vs. New York and New Haven Railroad Company*, 21 How., 455.

It is compatible with a traverse of the plaintiff's case on other points, and, if separately taken, cannot be stricken out for inconsistency. *Ostrom vs. Bixbey*, 9 How., 57.

In pleading the objection, it will be sufficient to state it in the words of the statute, without entering into any lengthened detail of the circumstances which render it tenable. See *People vs. Arnold*, 4 Comst., 508, overruling *People vs. Van Rensselaer*, 8 Barb., 189, and *People vs. Livingston*, 8 Barb., 253. See also, *Bell vs. Yates*, 33 Barb., 627.

It is competent for a foreign corporation to put in a plea of the statute, in an action on contract. The exception in section 100, as to absence from the state, applies only to natural persons, and not to corporate bodies. *Olcott vs. The Tioga Railroad Company*, 26 Barb., 147; *Dart vs. The Farmers' Bank of Bridgeport*, 27 Barb., 337.

An executor, cited to account before the surrogate, may also plead the statute, the same as in an ordinary suit. *Martin vs. Gage*, 5 Seld., 398. As to the special limitation, with reference to a suit on a claim rejected by an executor or administrator, and the necessity of such objection being express, to entitle him to the protection of the statute, see *Barsalou's case*, 4 Abb., 135.

The benefit of the statute is, however, strictly defensive. It cannot form the basis for affirmative relief of any description. *Lawrence vs. Ball*, 4 Kern., 477; *Morey vs. Farmers' Loan and Trust Company*, 4 Kern., 302.

There is no other rule of law, except the statute, which can be invoked, to limit the period within which a party may assert his right, or to bar him, by reason of delay in such assertion. *Bidwell vs. The Astor Mutual Insurance Company*, 16 N. Y., 263.

As to the effect of a new promise, in rebuttal of this defence, and the mode of pleading it, see *Clark vs. Atkinson*, 2 E. D. Smith, 112. As to its being provable under the ordinary issue, without being specially replied, see *Esselstyn vs. Weeks*, 2 E. D. Smith, 116, not affected, but, on the contrary, sustained on this point, by the general reversal, 2 Kern., 635; 2 Abb., 272.

(i.) PLEA OF "PLENE ADMINISTRAVIT."

In actions against an executor or administrator, allegations, analogous to the old plea of *plene administravit*, are inadmissible; and, if made, the answer will be held bad upon demurrer, and judgment given for the plaintiff, for future assets, "*quando acciderint*." The plea of *plene administravit* was not even a good plea under the Revised Statutes. *Hyde vs. Conrad*, 5 How., 112; 3 C. R., 162; *Belden vs. Knowlton*, unreported decision of Superior Court. In the latter case, however, allegations of this nature were refused to be stricken out upon motion, though subsequently held bad upon demurrer.

(j.) INFANCY.

This defence must be specially pleaded. If omitted to be raised, either by the answer, or on motion, it will be waived. *Treadwell vs. Bruder*, 3 E. D. Smith, 596.

(k.) ILLEGALITY.

As to the invalidity of a contract, in violation of the prohibitory statute on the subject of betting and gaming, see *Cassard vs. Hinman*, 14 How., 84; affirmed, 1 Bosw., 207; *Same case*, 6 Bosw., 8.

See likewise, as to the illegality of a promissory note, given to induce the exercise of undue influence, *Devlin vs. Brady*, 32 Barb., 518.

The subsequent repeal of a statute, rendering illegal, a contract not *malum in se*, will validate that contract, though void at the time it was made. *Washburn vs. Franklin*, 35 Barb., 599; 13 Abb., 140; reversing *same case*, 11 Abb., 93.

And, to sustain a defence of this nature, a contract must be actually in violation of some statute or rule of law, or tainted by fraud. Its

being discreditable, or in breach of confidence, will not avail. *Moore vs. Remington*, 34 Barb., 427.

(L.) USURY.

This is another, and the last that will be adverted to, of that class of defences, to the consideration of which the present section is devoted. It is statutory in its nature, and must be specially pleaded. When established, it virtually abates the plaintiff's cause of action.

The provisions on the subject are contained in title III., chapter IV., part II. of the Revised Statutes (1 R. S., pp. 771–773, and divers amendatory acts, especially chapter 430, of 1837, amending section 5 of that title). It is not necessary to cite these provisions at length, or to do more than remark generally, that, under the section last alluded to, "All bonds, bills, notes, conveyances; all other contracts or securities whatever (except bottomry and *respondentia* bonds and contracts), and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value, for the loan or forbearance of any money, goods, or other things in action, than is above prescribed (*i. e.*, at the rate of seven per cent. *per annum*), shall be void."

The defence thus created will be now considered. The title in question may also be made the basis of affirmative relief, by suit for the purpose of recovering back the amount usuriously paid, or of avoiding the usurious transaction, and likewise by criminal proceedings; but that view of the question is not pertinent to the subject of the present chapter.

The defence is not one that is favored by the courts, and a defendant setting it up, will be held to strict rules, both in the mode of pleading, and in the substance of the defence itself.

It must accordingly be specially pleaded in all cases, or evidence of it cannot be given. *Scott vs. Johnson*, 5 Bosw., 213; *Smalley vs. Doughty*, 6 Bosw., 66. See likewise, as to the impeachment of a transaction, on the part of a plaintiff, *Williams vs. Birch*, 6 Bosw., 299.

When pleaded, it must be so in clear and precise terms; the facts must be clearly alleged; the terms of the usurious contract, and the *quantum* of usurious interest or premium distinctly and correctly set up; and the proof must correspond with the allegations. A corrupt agreement for the payment of such usurious rate, must also be specifically charged; for, when the state of facts alleged is in any manner consistent with a lawful purpose, the law will never presume the contrary. General averments of usury, without specific allegations of facts, and specific imputations of illegality, will therefore be wholly inefficient. See *Manning vs. Tyler*, 21 N. Y., 567; *Cutler vs. Wright*, 22 N. Y.,

472; *Fay vs. Grimstead*, 10 Barb., 321; *Gould vs. Horner*, 12 Barb., 601; 1 C. R. (N. S.), 356; *Quick vs. Grant*, 10 L. O., 344; *Gould vs. Rumsey*, 21 How., 97; *Bailey vs. Lane*, 21 How., 475; 13 Abb., 354; *Watson vs. Bailey*, 2 Duer, 509; *Griggs vs. Howe*, 31 Barb., 100; *Morse vs. Cloyes*, 11 Barb., 100; *Gasper vs. Adams*, 28 Barb., 441; *Morris vs. Slattery*, 6 Abb., 74. See, however, as to what will be a sufficient allegation of usury in a transaction, though defective in point of form, *Dagal vs. Simmons*, 23 N. Y., 491.

In an answer, impeaching a note in the hands of a transferee, it is essential that its invalidity at the time of transfer to him, should be directly averred. *Burrall vs. Bowen*, 21 How., 378.

When pleaded, it is strictly a defence, requiring no reply. *Burrall vs. De Groot*, 5 Duer, 379.

Where the defendant has suffered a default, the courts may, in an extreme case, be disposed to restrict him from setting up the defence of usury, as a condition, on allowing that default to be opened. *Morris vs. Slattery*, 6 Abb., 74; *Toole vs. Cook*, 16 How., 142.

But, though the defence be not favored, a defendant setting it up will not be deprived of the ordinary rights of suitors, under the Code, in relation to the disregard of variances, and leave to amend. The strict rule which formerly prevailed on this subject, obtains no longer. *Catlin vs. Gunter*, 1 Kern., 368; 10 How., 315; reversing *same case*, 1 Duer, 253; 11 L. O., 201; and overruling, in effect, *Bates vs. Voorhies*, 7 How., 234; *Deuel vs. Spence*, 1 Abb., 237; *Brown vs. Mitchell*, 12 How., 408; 2 Abb., 481.

But, in such a case, or where leave is asked to open a default, the court will be disposed to impose strict terms, and, especially in the latter case, to allow the judgment entered, to stand for the amount really due, or as security. See *Grant vs. McCaughin*, 4 How., 216. *Gasper vs. Adams*, 24 Barb., 287.

To constitute an usurious transaction, there must be, 1st, a loan, and, 2d, an agreement, and intention to pay illegal interest. And it is essential, to constitute a loan, that the thing borrowed is, at all events, to be returned. Where the principal is *bonâ fide* put at hazard, the statute will not apply; nor, if the gain to the lender beyond the legal rate, is made dependent upon the will of the borrower, so that he can discharge himself from it, by punctual payment. *Pomeroy vs. Ainsworth*, 22 Barb., 118. See also generally, *Woodruff vs. Husson*, 32 Barb., 557.

Nor is a loan of goods, to be returned in kind, or of the produce of stock, on an agreement that the stock shall be replaced, a transaction within the statute. *Dry Dock Bank vs. American Life Insurance and Trust Company*, 3 Comst., 344.

To be available as a defence, the usury complained of must be taken upon the transaction itself, which is sought to be impeached. A security given for a precedent loan, though usurious in effect, was accordingly held not to be within the statute, inasmuch as no advance was made, at or after the time when such security was given. *Carson vs. Ingalls*, 33 Barb., 657.

Nor will the giving a fresh check to a *bona fide* holder, on a partial renewal of one previously given, render such holder liable to the defence of usury, in respect of the original transaction between the payee and the maker. *Smalley vs. Doughty*, 6 Bosw., 66.

But, when a transaction is usurious in its origin, the original taint will attach to all subsequent obligations or securities, by whomsoever given, in payment or discharge, or growing out of it. *Vickery vs. Dickson*, 35 Barb., 96.

As before stated, the law will presume nothing in favor of the defence, but rather against it. A corrupt agreement, or intention to take or reserve more than the legal rate, must in all cases be shown. A mere taking or reserving more than the legal rate, does not *per se* constitute a transaction usurious, still less a mistake, arising from error in computation or otherwise. *Bailey vs. Lane* 21 How., 475; 13 Abb., 354. See, as to mortgage transactions, *Booth vs. Swezey*, 4 Seld., 276; *Banks vs. Van Antwerp*, 15 How., 29; 5 Abb., 411; *Citizen's Mutual Loan Association vs. Webster*, 29 Barb., 263. As to the money remaining in the lender's hands, but subject to the call of the borrower, *Keyes vs. Moultrie*, 3 Bosw., 1. As to a check or note, payable in foreign bank-bills, *Codd vs. Rathbone*, 19 N. Y., 37; *Robbins vs. Dillaye*, 33 Barb., 77. As to the making of drafts, payable at different localities in the state, though involving a difference of exchange, no condition being imposed, *Oliver Lee's Bank vs. Walbridge*, 19 N. Y., 134; *International Bank vs. Bradley*, 19 N. Y., 245; *Marvin vs. Hymers*, 2 Kern., 223; *Price vs. Lyon Bank*, 30 Barb., 85; *Cuyler vs. Sandford*, 13 Barb., 339. See also generally, *Hurd vs. Hunt*, 14 Barb., 573; *Murray vs. Barney*, 34 Barb., 336.

A banking arrangement, on discount of one note, by which it was made a condition that the proceeds of another, required to be simultaneously discounted, should be left to the credit of the customer, to secure the payment of the first, was held clearly usurious, in *East River Bank vs. Hoyt*, 22 How., 478.

The taking of a commission or *bonus*, by an agent, but without the privity of his principal, will not taint the transaction with usury. *Condit vs. Baldwin*, 21 N. Y., 219. See also *same case*, 21 Barb., 181; *Davis vs. Illius*, 9 How., 450; *North vs. Sergeant*, 33 Barb., 350; 20 How., 519. Nor will the taking of a commission, by an agent

commodation indorser, in respect of his indorsement. *Flint vs. Schomberg*, 1 Hilt., 532; *Elwell vs. Chamberlain*, 4 Bosw., 320. Or the retainer by such an indorser, out of the avails, of a debt due to himself. *Van Duzer vs. Howe*, 21 N. Y., 531.

So likewise, the taking of a commission, on accepting a draft on a deposit of goods, there being no loan of money, will not be usury. *Ryckman vs. Coleman*, 21 How., 404.

Nor will the receipt of instalments on collateral securities, and the use of the money by the lender, pending the loan, constitute usury, unless such use by him, without interest, was part of the original agreement. *Morgan vs. Mechanics' Banking Association*, 19 Barb., 584.

The lender cannot, under any circumstances, impeach the transaction on this ground. *La Farge vs. Hester*, 5 Seld., 241; *Elwell vs. Chamberlain*, 4 Bosw., 320; *Oneida Bank vs. Ontario Bank*, 21 N. Y., 490. See also *Draper vs. Trescott*, 29 Barb., 401.

And any party who gives, directly or indirectly, a certificate, or makes a representation that a note or bill is business paper, will be estopped from setting up this defence of usury, as against a *bonâ fide* purchaser. *Mechanics' Bank of Brooklyn vs. Townsend*, 29 Barb., 569; 17 How., 569; *Chamberlain vs. The Same*, 26 Barb., 611; 7 Abb., 31; *Truscott vs. Davis*, 4 Barb., 495; *Benedict vs. Caffé*, 5 Duer, 226; *Burrall vs. De Groot*, 5 Duer, 379; *Ferguson vs. Hamilton*, 35 Barb., 427. But one party to such paper, will not be estopped by the representations of another, made without his directions or instructions. *Jackson vs. Fassitt*, 33 Barb., 645; 21 How., 279; 12 Abb., 281. And, to estop the party himself, in this respect, the representations made by him must be outside the face of the bill. *Clark vs. Sisson*, 22 N. Y., 312. If, however, a party, intending to purchase such paper, omits to make proper inquiries, the mere omission to disclose its nature, will not amount to a representation on the part of the vendor. *Clark vs. Loomis*, 4 Duer, 408. See also *Bossange vs. Ross*, 29 Barb., 576; *Hull vs. Wilson*, 16 Barb., 548.

The objection of usury is of a personal nature, and, as a general rule, can only be set up, as between the parties to the usurious transactions, and their legal representatives, or privies in estate. See *Boughton vs. Smith*, 26 Barb., 635; *Reyford vs. Widger*, 2 Comst., 131; *Toole vs. Cook*, 16 How., 142.

See, as to the circumstances, under which a subsequent grantee of premises, subject to a mortgage, will or will not be entitled to interpose the defence of usury. *Chamberlain vs. Dempsey*, 14 Abb., 241; reversing *same case*, 13 Abb., 61; *Sands vs. Church*, *infra*; *Murray vs. Barney*, 34 Barb., 336.

Usury, in the extension of a note, is no answer to the claim of

a surety, not a party to the extension, that, by its operation, he is discharged. *Draper vs. Trescott*, 29 Barb., 401. Nor can a mortgage be impeached on this ground, by subsequent encumbrancers. *Sands vs. Church*, 2 Seld., 347.

By special statute, chapter 172 of 1850, p. 334, corporations, and all associations possessing corporate powers or privileges, are prohibited from interposing this defence.

And this prohibition extends to the receiver or trustee of such a body. He represents the corporation. *Curtis vs. Leavitt*, 15 N. Y., 9 (296); *Same case*, 17 Barb., 309; *Leavitt vs. Blatchford*, 17 N. Y., 521 (542). See also *Butterworth vs. O'Brien*, 28 Barb., 187; 16 How., 503; 7 Abb., 456; affirmed, 23 N. Y., 275.

And the same rule is equally applicable to the case of a foreign corporation. *Southern Life Insurance and Trust Company vs. Packer*, 17 N. Y., 51.

But it has been held, that an accommodation indorser for such a body, is not within the operation of the statute, and that the defence may be set up by him, as liable under a separate contract. *Hungerford's Bank vs. Potsdam and Watertown Railroad Company*, 10 Abb., 24; reversing *same case*, 9 Abb., 124; *The Same vs. Dodge*, 30 Barb., 626; 19 How., 39.

Where the contract is made in another state, it is, *prima facie*, to be governed by its laws on this subject. See *City Savings Bank vs. Bidwell*, 29 Barb., 325; *Pomeroy vs. Ainsworth*, 22 Barb., 118; *Cutler vs. Wright*, 22 N. Y., 472. And where, by the laws of another state, the contract is not avoided, but a penalty is merely imposed, it has been held that the defendant could not avail himself of such penalty, by way of defence in this. *Willis vs. Cameron*, 12 Abb., 245.

But where the contract, though with a foreigner, is made within this state, the law of this state will apply. *Bard vs. Poole*, 2 Kern., 495. And where a contract, made in one state, is to be performed, or has its actual inception in another, the question of usury, or no usury, will depend upon the law of the place of such performance or inception. *Same case*; *Berrien vs. Wright*, 26 Barb., 208; *Hull vs. Wheeler*, 7 Abb., 411; *Pomeroy vs. Ainsworth*, *supra*; *Jewell vs. Wright*, 12 Abb., 55. And, where the place of contract or performance appears upon the face of a written instrument, the terms of that instrument will govern, and the contrary cannot be shown by parol. *Potter vs. Tallman*, 35 Barb., 182.

A note, valid in its inception, may be made the subject of sale, at any price, however small, and cannot be impeached on the ground of usury on such transfer. *Elwell vs. Chamberlain*, 2 Bosw., 230 (237); *Troy City Bank vs. McSpedon*, 33 Barb., 81. And the giving of exchange

notes by two parties, will form a sufficient consideration, where such exchange is a *bonâ fide* mutual sale of the credits of the parties, and not a mere cover for usury. *Cobb vs. Titus*, 6 Seld., 198; *Dry Dock Bank vs. American Life Insurance and Trust Company*, 3 Comst., 344; *Leavitt vs. De Launcey*, 4 Comst., 363; *Odell vs. Greenly*, 4 Duer, 358; *Elwell vs. Chamberlain*, 2 Bosw., 230; *Troy City Bank vs. McSpedon*, 33 Barb., 81. But not so, where the exchange notes are not equal in value, and the excess is sufficient to bring the case within the statute, if the transaction was designed as, or was connected with, a loan of money. *Thomas vs. Murray*, 34 Barb., 157. See also, as to the invalidity of a transaction, where a *bonus* was given in the exchange of securities, *Williams vs. Fowler*, 22 How., 4.

The satisfaction of a precedent debt, will also form sufficient consideration to give a note validity in its inception. *Gould vs. Segee*, 5 Duer, 260. See also *Youngs vs. Lee*, 2 Kern., 551, and *White vs. Springfield Bank*, 3 Sandf., 222, there referred to. Nor will the taking of collateral security for a note thus purchased, taint the transaction. *Odell vs. Greenly*, *supra*.

But if the transaction, though couched in the form of a sale, is made in any manner, by way of a blind, to cover up a transaction, actually a loan by way of usury, the inception of the paper will not be valid, and the defence will be available. *Dry Dock Bank vs. American Life Insurance and Trust Company*, 3 Comst., 344; *Schermerhorn vs. Talmán*, 4 Kern., 93. See also *The Same vs. American Life Insurance and Trust Company*, 14 Barb., 131. So also, if there be any difference in the nominal amount of the securities exchanged. *Same case*. See also *Thomas vs. Murray*, *supra*.

As to the purchase of an accommodation-note, having no legal inception, when made at a discount greater than the legal rate, rendering the defence available, see *Williams vs. Storm*, 2 Duer, 52; *Catlin vs. Gunter*, 1 Kern, 368; 10 How., 315; not conflicting on this point with the decision below, 1 Duer, 253; 11 L. O., 201, before cited; *Clark vs. Loomis*, 5 Duer, 468; *Same case*, 4 Duer, 408; *Bossange vs. Ross*, 29 Barb., 576; *Hall vs. Wilson*, 16 Barb., 548.

An agreement by copartners, to pay to the lender a share of their profits, in addition to the legal interest on money loaned to them, renders the transaction usurious in its inception. *Sweet vs. Spence*, 35 Barb., 44.

Money received on an usurious transaction, extinguishes the debt for which it is paid, and, on a subsequent impeachment of that transaction, the parties to it cannot go behind it, and recover upon the original consideration. *Green vs. Elmer*, 4 Seld., 422.

As to a building association mortgage being usurious, where the effect

of the transaction is to burden the mortgagor with payments exceeding the amount of legal interest, see *Melville vs. American Benefit Building Association*, 33 Barb., 103.

See, as to a mortgage being set aside for usury in the arrangements for the loan, *Williams vs. Fowler*, 22 How., 4.

§ 179. *Statement of New Matter.*

ORDINARY DEFENCES.

The subject of those defences, to which the term “special” may more appropriately be assigned, having been exhausted, that of ordinary defences, going generally to the merits, remains to be considered.

Defences of this nature necessarily vary, in every case according to its peculiar circumstances, and it would be going far beyond the scope of the present work, to attempt the consideration, in detail, of every species of subject-matter which may avail to constitute one. It may, however, be convenient to notice a few of the more prominent classes, adapting the citation of recent decisions, rather to the mode of statement, than to the subject-matter of the pleading in each case; though not wholly excluding the consideration of the latter, according to the plan hitherto pursued.

(a.) GENERAL CONSIDERATIONS.

The mode of statement of a defence, resting in matters of fact, does not differ essentially from that of a cause of action. In both, a clear and pertinent statement of the facts relied on, specially directed to the end sought to be attained, is equally requisite, and the general principles which govern the statement of the facts constituting a cause of action (section 142), or the new matter constituting a defence (section 149), are substantially the same. The former statement must be “plain and concise, without unnecessary repetition;” the latter, “in ordinary and concise language, without repetition.” The principles applicable to both in common, have been already fully considered, in book VI., chapter I. As to the necessity of a defence, when stated, being complete, see *Farmers’ Bank of Saratoga County vs. Merchant*, 13 How., 10.

As to what is or is not new matter in defence, see *Bell vs. Yates*, 33 Barb., 627.

It may be more convenient to arrange the defences to be referred to in distinct classes, and to consider them in the following order:

1. Defences in tort, including that in replevin.
2. Defences in contract.
3. Defences in equitable actions.
4. Defences in real estate actions.

1. *Defences in Tort.*

(b.) LIBEL AND SLANDER.

Precedence is given to this class of actions, as being the only one, as to the defence, in which express provision is made by the Code.

That provision is contained in section 165, and is, that in these two actions "the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and, whether he proves justification or not, he may give in evidence the mitigating circumstances."

By this section, the former technical rules on this subject are completely abrogated. Justification, when pleaded unsuccessfully, is no longer, as heretofore, conclusive evidence of malice, and matter in aggravation. And the defendant is now at perfect liberty to aver, and to prove upon the trial, any facts whatever, which tend to mitigate the amount of damages, by showing an honest belief on his part, or otherwise, though such matter tend to prove the truth of the charge. Nor is it essential, though admissible under the terms of the section, that the allegation of mitigating circumstances should be combined with the defence of justification. They may, on the contrary, be pleaded separately, and without any averment of the truth of the charge. See these principles, as established by *Bush vs. Prosser*, 1 Kern., 347; reversing *same case*, 13 Barb., 221; and *Bisbey vs. Shaw*, 2 Kern., 67; reversing *same case*, 15 Barb., 578. See also *Weed vs. Bibbins*, 32 Barb., 315.

The former of these cases overrules in terms, and both of them in substance, *Graham vs. Stone*, 6 How., 15; and *Brown vs. Orvis*, 6 How., 376. *Fero vs. Rosco*, 4 Comst., 162, there alluded to, is a decision under the previous law. Both cases also overrule, in substance, the following, holding the stricter view: *Meyer vs. Schultz*, 4 Sandf., 664; *Fry vs. Bennett*, 5 Sandf., 54; 9 L. O., 330; 1 C. R. (N. S.), 238; *Matthews vs. Beach*, 5 Sandf., 256; *Lane vs. Gilbert*, 9 How., 150; *Loveland vs. Hosmer*, 8 How., 215; *Herr vs. Bamberg*, 10 How., 128; *Ayres vs. Covell*, 18 Barb., 260; *Lewis vs. Kendall*, 6 How., 59; 1 C. R. (N. S.), 402.

The doctrine held on the subject in the following cases is, on the contrary, confirmed and established by the two decisions in question. *Stiles vs. Comstock*, 9 How., 48; *Follett vs. Jewitt*, 11 L. O., 193; *Heaton vs. Wright*, 10 How., 79. They are followed, in *Howard vs. Raymond*, 11 Abb., 155; and also, but with some hesitation, in *Van Benschoten vs. Yapple*, 13 How., 97.

The above two cases of *Bush vs. Prosser* and *Bisbey vs. Shaw*, also establish the principle, that the defences of denial and justification

may be combined in the same answer, if separately stated. See also *Butler vs. Wentworth*, 17 Barb., 649; 9 How., 282; *Ormsby vs. Douglass*, 5 Duer, 665. They overrule, on this point, *Ormsby vs. Douglass*, 2 Abb., 407; *Anibal vs. Hunter*, 6 How., 255; 1 C. R. (N. S.), 403; *Lewis vs. Kendall*, 6 How., 59; 1 C. R. (N. S.), 402; *Porter vs. McCree*, 1 C. R. (N. S.), 88; *Buddington vs. Davis*, 6 How., 401.

In pleading a justification, where the libel or slander complained of is of a general nature, the facts which establish it must be pleaded. A mere general allegation, that "what the defendant said of the plaintiff was true," or to the like effect, will be wholly insufficient. *Anon.*, 3 How., 406; *Sayles vs. Wooden*, 6 How., 84; 1 C. R. (N. S.), 409; *Anibal vs. Hunter*, 6 How., 255; 1 C. R. (N. S.), 403; *Fry vs. Bennett*, 5 Sandf., 54; 1 C. R. (N. S.), 238; 9 L. O., 330; *Ormsby vs. Douglass*, 2 Abb., 407; *Jaycocks vs. Ayres*, 7 How., 215. And the justification must cover the whole ground of the libel. *Loveland vs. Hosmer*, 8 How., 215.

But, where the charges of libel in the complaint are specific, a general averment in the answer of their truth, will be a sufficient plea of justification. *Van Wyck vs. Aspinwall*, 4 Duer, 268; affirmed, 17 N. Y., 190.

An answer, averring the truth of the charge, on information and belief, has also been held a sufficient plea of justification. *Steinman vs. Clark*, 10 Abb., 132. And, in answer to a general charge of theft, specific acts tending to prove its truth may be pleaded, in addition to those immediately relied on by the plaintiff, as constituting the direct slander complained of. *Jaycocks vs. Ayres*, 7 How., 215. See, generally, as to the defence of justification, *Fry vs. Bennett*, 3 Bosw., 200; *Fulkerson vs. George*, 3 Abb., 75.

The better rule seems to be, that matter in mitigation should in all cases be pleaded. *Anon.*, 6 How., 160; *Russ vs. Brooks*, 4 E. D. Smith, 644. See also *Van Benschoten vs. Yapple*, 13 How., 97; *Stiles vs. Comstock*, 9 How., 48. The contrary conclusion, as come to, in *Anon.*, 8 How., 434; *Newman vs. Otto*, 4 Sandf., 668; 10 L. O., 14; and *Stanley vs. Webb*, 21 Barb., 148, seems to be founded upon the state of the law previous to the enactment of the section in question, which expressly authorizes allegations of this nature.

The question, as to whether such matter may not be proved on the trial, or before a sheriff's jury, in mere mitigation of damages, even under the general issue, seems, however, to be by no means free from doubt.

The following is laid down generally, as the rule with reference to privileged communications, in *Van Wyck vs. Aspinwall*, 17 N. Y., 190 (193); affirming *same case*, 4 Duer, 268: "A communication made, *bonâ fide*, upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged,

if made to a person having a corresponding interest or duty, although it contain criminary matter which, without this privilege, would be slanderous and actionable." And such duty "will not be confined to legal duties, but must include moral and social duties, of imperfect obligation."

Accordingly, in that case, a report from a committee of the College of Pharmacy, to investigate complaints as to the adulteration of drugs, was held to be privileged.

The subject of what are or are not privileged communications, has already been treated in detail, and the decisions in point cited, under the head of *Complaint*, in book VII., chapter II., section 142, to which the reader is accordingly referred.

Where the words complained of are privileged, *per se*, as for instance, as having been spoken or written in the course of a legal proceeding, being material to the controversy, no denial of malice need be made, on setting up the defence on this ground. *Garr vs. Selden*, 4 Comst., 91. As to the two different classes of privileged communications, see *Purdy vs. Carpenter*, 6 How., 361 (366).

When the proceeding is not of this nature, it may, nevertheless, in the absence of express malice, be claimed to be privileged. If express malice is averred, it must, of course, be denied; and, where privilege is claimed on the ground of the publication complained of, being legitimate criticism, the defences of truth and privilege should both be pleaded. See *Fry vs. Bennett*, 5 Sandf., 54; 1 C. R. (N. S.), 238; 9 L. O., 330. As to express malice being a legitimate part of the issue, in this latter class of cases, but not under other circumstances, see *Bush vs. Prosser*, 1 Kern., 347 (355); *Howard vs. Sexton*, 4 Comst., 157; *Purdy vs. Carpenter*, 6 How., 361.

(c.) ASSAULT AND BATTERY.

The provisions of section 165, as above cited, not extending further than to cases of libel and slander, the old rules will prevail, and mere matter in mitigation, standing alone, will not suffice to constitute a defence. Such matter merely goes in reduction of the plaintiff's claim for damages, not in denial of his cause of action, and, as such, it may be proved upon the trial or before a sheriff's jury, without being specially pleaded. See *Lane vs. Gilbert*, 9 How., 150; *Saltus vs. Kip*, 12 How., 342; 5 Duer, 646; 2 Abb., 382; *Rosenthal vs. Brush*, 1 C. R. (N. S.), 228; *Roe vs. Rogers*, 8 How., 356; *Gilbert vs. Rounds*, 14 How., 46; *Schnaderbeck vs. Werth*, 8 Abb., 37. As to the nature of such evidence, see *Corning vs. Corning*, 2 Seld., 97.

The cases which held that matter in justification, could not be pleaded in connection with a denial, seem to be clearly overruled.

The only restriction is, that the defences must be separately stated. See above, section 176.

As to the plea of self defence, and when it will or will not be admissible, and as to the extent to which proof of provocation may or may not be available, on the question of damages, see *Keyes vs. Devlin*, 3 E. D. Smith, 518.

As to the plea of leave and license, to commit an assault, without battery, and the propriety of not excluding evidence in rebuttal, see *Van Voorhis vs. Hawes*, 12 How., 406.

(d.) FALSE IMPRISONMENT, AND MALICIOUS PROSECUTION.

Probable cause, when pleaded as a defence, may be pleaded in general terms; nor is it necessary, or even proper, for the defendant to set out, in detail, the facts on which he relies to sustain the general proposition. They are merely matters of evidence. *Radde vs. Ruckgaber*, 3 Duer, 684.

In relation to the subject-matter of this defence, and its incidents, see heretofore, under these heads, in book VII., chapter II., section 142, and decisions there cited.

As to the necessity of the whole ground of the complaint being covered by a plea of this description, where the suit is one in which several grounds of action are combined, see *Foster vs. Hazen*, 12 Barb., 547.

(e.) SEDUCTION, BREACH OF PROMISE, &c.

The essentials of these actions, including the principal grounds of defence, by which they may be met, have also been considered, as above, in section 142. See especially, as to the defence of connivance, in seduction, *Travis vs. Barger*, 24 Barb., 614; and as to the action for enticement away of a *feme covert*, *Barnes vs. Allen*, 30 Barb., 663, there cited.

In this class of actions, as in those last considered, matters in mere mitigation of damages are not waived by not being specially pleaded, but may be given in evidence under an ordinary denial; but matter going in complete bar of the cause of action must be pleaded. *Travis vs. Barger*, *supra*; *Smith vs. Waite*, 7 How., 227. So also in an action for *crim. con.* *Harter vs. Crill*, 33 Barb., 283.

A former marriage of the defendant, unknown to the plaintiff, constitutes no defence. *Blattmacher vs. Saal*, 29 Barb., 22; 7 Abb., 409. A subsequent offer on the part of the defendant, if refused by the plaintiff, will, however, be a bar to the action. *Liebmann vs. Solomon*, 7 Abb., 409, note.

*Actions for Breach of Duty or Contract.**(f.) ESCAPE.*

The essentials of the sheriff's liability in this form of action, or when he is sued as bail, for want of justification by those originally given, have already been considered, and the principal decisions in point cited, under the head of *Sheriff's Liability*, in book I., chapter VII., section 28, and also in book VII., chapter II., section 143, to which the reader is accordingly referred.

The defendant, in an action of this description, cannot go behind or impeach the validity of the process under which he has acted, on any ground of mere irregularity. *Renick vs. Orser*, 4 Bosw., 384. Nor on the ground that there had in fact been a prior escape of the prisoner, and a return by him into custody, so as to bring the case within the operation of the limitation in section 94, when such escape and return were without the knowledge of the plaintiff. *Same case*.

But, if the original process was absolutely void, it may be shown, by way of defence. *Carpenter vs. Willett*, 6 Bosw., 25; 18 How., 400.

Where the escape is from arrest on mesne or interlocutory process, insolvency of the prisoner is available as a defence. *Loosey vs. Orser*, 4 Bosw., 391. But otherwise, when the action is brought, as in debt, for the escape of a prisoner charged in execution. *Barnes vs. Willett*, 35 Barb., 514; 12 Abb., 448; affirming *same case*, 19 How., 564; 11 Abb., 225; *Latham vs. Westervelt*, 26 Barb., 256; *McCreery vs. Willett*, 23 How., 129; affirming *same case*, 4 Bosw., 643. See, however, *Daguerre vs. Orser*, 10 Abb., 12, note. So also, where his liability is that of bail. *Metcalf vs. Stoyker*, 31 Barb., 62; 10 Abb., 12.

The voluntary return of the prisoner, before summons actually served, forms a complete defence. *Wiggins vs. Orser*, 5 Duer, 118. See also, as to the limitation of an action of this description, which must be brought within one year, Code, section 94.

Assent by the attorney of the plaintiff to an absence amounting to an escape, will not, unless fraud be shown, be available as a defence. *Lovell vs. Orser*, 1 Bosw., 349.

In pleading recapture, or a voluntary return, the answer must distinctly aver that the escape "was made without the consent of the defendant." If omitted, the defence will be insufficient, nor will any hypothetical statement to a similar effect satisfy the requirements of the statute. *Loosey vs. Orser*, 4 Bosw., 391.

(g.) COMMON CARRIERS.

The consideration of these special liabilities, and of the subject-matter of the defences which may be available in an action founded on

them, has been already fully considered, and the decisions in point cited in book VII., chapter II., section 144, and also section 140, as to the attribution of negligence, to which the reader is accordingly referred.

In *Boswell vs. Hudson River Railroad Company*, 10 Abb., 442, there will be found the form of an answer, setting up a special contract exempting the defendant from liability from accident, and decided to be sufficient by the court.

(h.) ACTIONS ON THE GROUND OF FRAUD.

In an action for a fraudulent conspiracy, no *laches* on the part of the plaintiff, short of the statute of limitations, will constitute a defence. *Ilion Bank vs. Carver*, 31 Barb., 230.

But, in an action for damages for false representations, inducing the purchase of property, gross *laches* on the part of the purchaser, in neglecting to inform himself of the real state of the facts, may avail to defeat his remedy. *White vs. Seaver*, 25 Barb., 235. See also, as to representations inducing a contract, *Swift vs. City of Williamsburgh* 24 Barb., 427.

See, as to the rule "*in pari delicto, potior est conditio defendentis*," *Sharp vs. Wright*, 35 Barb., 236.

(h. 2.) DEFENCE OF FRAUD.

When fraud is set up as a defence to an action on contract, the defendant must aver in his answer, that he has done all in his power to restore the plaintiff to his former condition. If omitted, the defence may be unavailable. *Devendorf vs. Beardsley*, 23 Barb., 656.

(i.) TROVER, &c.

The subject-matter of action in trover, and of the incident defences, has already been considered as above, in section 143, *supra*.

A bailee of goods, who claims a lien upon them, must make that claim positively, at the time of demand, or his refusal will be evidence of conversion. *Heine vs. Anderson*, 2 Duer, 318.

Trover being an action sounding strictly in tort, the defence of recoupment is inadmissible. *Walther vs. Wetmore*, 1 E. D. Smith, 7. See likewise, *Andrews vs. Durant*, 18 N. Y., 496. So also, as to that of infancy. *Fish vs. Ferris*, 5 Duer, 49. Nor can title in a third party be set up, when brought for a wrongful taking of goods out of the plaintiff's possession. *King vs. Orser*, 4 Duer, 431; *Kissam vs. Roberts*, 6 Bosw., 154. Where, however, no actual trespass has been committed, it is competent for the defendant to show title in a third person, and that the plaintiff was not in possession. *Davis vs. Hoppock*, 6 Duer, 254.

In trover, a traverse of the value alleged by the plaintiff, is unnecessary, as he must prove his damages, whether denied or not. *Cornoss vs. Mier*, 2 E. D. Smith, 314.

In an action of trover, arising out of a trespass, brought for the value of timber cut by the defendant; a parol license may be pleaded, and, if established, will constitute a defence. *Pierrepoint vs. Barnard*, 2 Seld., 279.

As to the necessity of specially pleading leave and license, if set up by way of defence, in an action for an ordinary trespass, see *Haight vs. Badgeley*, 15 Barb., 499.

A retaking of goods clandestinely abstracted from their lawful owner, by means of due process of law, forms a good defence in his mouth, to an action against him by a subsequent vendee, in respect of such retaking. *Conlan vs. Latting*, 3 E. D. Smith, 353.

(j.) REPLEVIN.

The Code itself makes one provision as to the defence in this action, in section 166, which provides that, in an action to recover the possession of property, distrained *damage feasant*, an averment of possession of the real property on which the distress was made, and that the property distrained was, at the time, doing damage therein, shall be good, without setting forth the title.

In this form of action, positive title in a stranger constitutes a defence; and, in the absence of any right shown to exist in the plaintiff, may be pleaded and proved, without connecting the defendant with such title. *Rockwell vs. Saunders*, 19 Barb., 473.

But, where the plaintiff shows any equitable interest or *prima facie* right to possession, and the defendant shows no privity between himself and the stranger whose title he sets up, the rule will not be applied. See *Johnson vs. Carnly*, 6 Seld., 570.

In this form of action, the title of the plaintiff may be generally impeached by the defendant. See *Schlussel vs. Willett*, 34 Barb., 615; 22 How., 15; 12 Abb., 397; *Thayer vs. Willett*, 5 Bosw., 344; *Pettee vs. Orser*, 6 Bosw., 123.

To be available, as a defence in replevin, a lien claimed upon the property sought to be recovered, must be legal and sufficient, or the claim will be unavailable. *Moffatt vs. Van Doren*, 4 Bosw., 609.

Proceedings in replevin, by creditors at large of an assignor of property, will not enable them to dispute the title of an actual assignee, suing in trover, even though derived under an assignment void upon its face. See *Andrews vs. Durant*, 18 N. Y., 496.

Denial and justification may, if separately stated, be pleaded in the same answer, in this form of action. *Hackley vs. Ogman*, 10 How., 44.

2. Defences in Contract.

(k.) BILLS, PROMISSORY NOTES, AND CHECKS.

The plea of usury, one of the principal lines of defence adoptable in proceedings on this class of instruments, has been already considered in the last preceding section.

The subject of instruments of this description has been already very fully treated, and numerous decisions, bearing on the subject-matter of the various defences which may be interposed, in actions founded upon them, cited and commented upon, in book VII., chapter II., section 146, to which the reader is accordingly referred.

A few of those cases, and those especially which bear upon the mode of allegation of such subject-matter, when admissible as a defence, will, however, be here noticed.

An affirmative defence, such as unreasonable delay in the presentation of a check, should be specially pleaded, and cannot properly be introduced under a mere denial. *Harbeck vs. Craft*, 4 Duer, 122.

A total failure of the consideration for which a note has been given, will form a complete defence, as in the case of notes, given under a contract, afterwards declared to be void. *Sherman vs. Barnard*, 19 Barb., 291; or of one given on account of purchase-money for a property, to which the vendor afterwards fails to make out any title. *Burwell vs. Jackson*, 5 Seld., 535. So also as to a neglect to make out title, constituting a defence to a note given on that condition. *Culver vs. Burgher*, 21 Barb., 324. A note founded on an illegal consideration will also be void. *Bell vs. Leggett*, 3 Seld., 176. See also *Brown vs. Montgomery*, 20 N. Y., 287, as to the effect of a fraudulent suppression of information, on the sale of commercial paper, wholly invalidating a note given for its price.

A partial non-performance of the contract, in respect of which a note is given, will not, however, be a defence. *Pratt vs. Gulick*, 13 Barb., 297. See also *Palmer vs. Smedley*, 18 How., 321. Or a failure in the speculation, out of which a note has arisen. *Lowber vs. Selden*, 11 How., 526. Or an erroneous representation as to the nature of property sold, when made in good faith, and no deceit practised. *United States Trust Company vs. Harris*, 2 Bosw., 75. Nor will a subsequent eviction of the tenant, bar a recovery on a note for rent, given in advance. *Brooks vs. Christopher*, 5 Duer, 216.

The defence of failure of consideration is personal to the parties actually contracting, and cannot be set up by an indorser. *Gillespie vs. Torrance*, 4 Bosw., 36. Nor can it be set up by the maker, as

against a *bonâ fide* indorser for value, without notice of such failure. *Davis vs. McCready*, 17 N. Y., 230; *Britton vs. Hall*, 1 Hilt., 528.

Transfer of a due bill does not, however, shut out any defence, existing in the maker at the time it was given. See *Sackett vs. Spencer*, 29 Barb., 180. See also, as to attempt to sue upon a note, the amount of which has been paid to the holder, after maturity, *Burr vs. Smith*, 21 Barb., 262.

When a partial failure of consideration, as between the original parties, is pleaded, the details should be given, or the answer may be held insufficient. *Castles vs. Woodhouse*, 1 C. R., 72.

A joint maker, setting up want of consideration as a defence, must disprove it as to all who join, to displace the contrary presumption. *Kinsman vs. Birdsall*, 2 E. D. Smith, 395. But such a maker may plead a personal discharge to himself. *Mott vs. Burnett*, 2 E. D. Smith, 50.

Diversion of a note from the purpose for which it was given, with notice to the plaintiff of such purpose, is, *primâ facie*, a good defence. *Rochester vs. Taylor*, 23 Barb., 18.

But the transfer of accommodation paper for a precedent debt, is no answer, in the absence of fraud. *De Zeng vs. Fyfe*, 1 Bosw., 335; *Lathrop vs. Morris*, 5 Sandf., 7. See, however, *Holbrook vs. Mix*, 1 E. D. Smith, 154, as to the effect of circumstances, sufficient to put the transferee on inquiry.

As to the defence of cancellation of a promissory note, by handing it back to the maker, in satisfaction of a debt due to him, see *Edwards vs. Campbell*, 23 Barb., 423.

The mere fact that a note has been levied upon in the hands of the plaintiff, under an attachment, is no defence, though payment of it to the sheriff, after such levy, might avail. *Russel vs. Ruckman*, 3 E. D. Smith, 419.

As to the qualification of his signature, by the drawer or indorser of commercial paper, being available as a defence, when the signer is sought to be charged individually, see *Babcock vs. Beman*, 1 Kern., 200; affirming *same case*, 1 E. D. Smith, 593; and *Hicks vs. Hinde*, 9 Barb., 528; 6 How., 1.

See, likewise, as to the non-performance of a condition on which a note was indorsed, being a complete defence, in the mouth of the indorser, as against a holder with notice, *Prentiss vs. Graves*, 33 Barb., 621.

A denial of the receipt of notice of protest, in an answer, will, although such answer be verified, be wholly insufficient to exclude the certificate of a notary as evidence, under section 8, chapter 271, of 1833. The statute expressly requires a separate affidavit. *Harbeck vs.*

Craft, 4 Duer, 122; *Arnold vs. Rock River Valley Union Railroad Company*, 5 Duer, 207; *Burrall vs. De Groot*, 5 Duer, 379; *Young vs. Catlett*, 6 Duer, 437. As to the form of such an affidavit, see *Barker vs. Cassidy*, 16 Barb., 177.

But such a denial in the answer, will not be stricken out as sham, though contradicted. See *Bailey vs. Lane*, 21 How., 475; 13 Abb., 354.

(l.) BONDS.

As to the defences that will or will not be available, to a surety on an administration bond, when sued on by a creditor of the estate, see *People vs. Laws*, 3 Abb., 450; affirmed, 4 Abb., 292.

The assignee of a bond, takes it subject to all equities existent against his assignor, and any such may be pleaded, and shown by way of defence. *Western Bank vs. Sherwood*, 29 Barb., 383.

The different questions as to the liability of the obligees on a statutory undertaking, have been already fully considered, and the cases in point cited, in book VII., chapter II., section 147, *supra*, to which the reader is accordingly referred.

The same observation may be made, with respect to the various defences which may be interposed to an action on a policy of insurance, as fully treated of in the same section.

(m.) JUDGMENTS.

As a general rule, the validity of a judgment cannot be impeached in a collateral proceeding.

Fraud in the obtaining of it may, however, be set up as a defence in an action of this nature, and, if proved, will defeat it. See *Dobson vs. Pearce*, 2 Kern., 156.

(n.) RENT.

Eviction of the tenant from any part of the premises, by the act of the landlord, suspends the liability for rent, until possession is restored. And total eviction, by the lawful act of a third party, will have the same effect. If partial only, an apportionment of rent should be made. *Hegeman vs. McArthur*, 1 E. D. Smith, 147. See also *Christopher vs. Austin*, 1 Kern., 216. But this defence may be waived, by a voluntary going into possession, and payment of rent for a portion of premises demised. *Hurlburt vs. Post*, 1 Bosw., 28.

See, as to what will or will not amount to a constructive eviction, sufficient to work this effect, *Dyett vs. Pendleton*, 8 Cow., 727; *Cohen vs. Dupont*, 1 Sandf., 260; *Peck vs. Hiler*, 14 How., 155; *Academy of Music vs. Hackett*, 2 Hilt., 217. Where the eviction is temporary,

the landlord becomes entitled, upon its cessation, to recover for rent which had previously accrued. *Ogden vs. Sanderson*, 3 E. D. Smith, 166. Nor will eviction constitute a defence for rent previously due. *Vernam vs. Smith*, 15 N. Y., 327; *Brooks vs. Christopher*, 5 Duer, 216; *Giles vs. Comstock*, 4 Comst., 270. As to a total destruction of premises demised, without substitution of others by the landlord in their place, excluding the ordinary rule in such cases, and working not merely a suspension, but an extinguishment of rent payable under a covenant, see *Graves vs. Berdan*, 29 Barb., 100.

Mere annoyance or injury, not amounting to an actual eviction, will not, however, avail to work an extinguishment, or even a suspension of rent, and cannot be set up by a tenant, who, notwithstanding, remains in possession of the premises demised. *Edgerton vs. Page*, 20 N. Y., 281; 18 How., 359; 10 Abb., 119; affirming *same case*, at general term, 1 Hilt., 320; 14 How., 116; 5 Abb., 1; and reversing *same case*, at special term, 12 How., 58; *Campbell vs. Shields*, 11 How., 565; *Mortimer vs. Brunner*, 6 Bosw., 653. Nor will a failure on the part of the landlord to make repairs agreed upon, amount to an eviction. *Speckels vs. Say*, 1 E. D. Smith, 253; *Tibbetts vs. Percy*, 24 Barb., 39; *Ellis vs. McCormick*, 1 Hilt., 313; *Gottsberger vs. Radway*, 2 Hilt., 342.

Nor does any interference of the superior landlord have the effect of an eviction, as between a subtenant and his immediate lessor. *Luckey vs. Frantzkee*, 1 E. D. Smith, 47.

In relation to acts on the part of the landlord, amounting to acceptance of a surrender, see *Stanley vs. Koehler*, 1 Hilt., 354.

N. B.—Several of the above decisions relate to the liability of a surety for rent, in whose favor, a defence, good in the mouth of his principal, is, as a general rule, equally available.

(o.) GOODS SOLD.

The retaking in replevin, by the vendor, of goods sold by him for cash, but not paid for, forms a complete defence, in a subsequent action for their price. *Morris vs. Rexford*, 18 N. Y., 552. So likewise, an attachment of that price in the hands of the defendant, by creditors of the plaintiff, and payment under a subsequent judgment in that proceeding, even though taken in another state. *Donovan vs. Hunt*, 7 Abb., 29.

In an action for the price of goods fraudulently sold, the title of the true owner may be set up as a defence. See *Sherman vs. Partridge*, 11 How., 154; 1 Abb., 256; 4 Duer, 646; and *Bates vs. Stanton*, 1 Duer, 79, there referred to.

Stipulations, as between individual partners, as to not contracting debts without mutual consent, form no defence, in an action for goods

sold to the partnership, without notice, and in the usual course of business. *Frost vs. Hanford*, 1 E. D. Smith, 540.

(p.) WORK, LABOR, AND SERVICE.

The giving and subsequent payment of a promissory note by the defendant to the plaintiff, after the former's claim accrued, is, *prima facie*, a complete defence, but rebuttable. *Duguid vs. Ogilvie*, 3 E. D. Smith, 527.

As to the defence of neglect in the performance of services, being, when substantiated, completely available, see *Peterson vs. Rawson*, 2 Bosw., 234.

(q.) EXECUTORY CONTRACTS.

Non-performance, on the part of the plaintiff, will constitute a complete defence, in an action of this description. *Voorhies vs. Anthon*, 5 Duer, 178. But a partial failure will only be available *pro tanto*. *Dart vs. McAdam*, 27 Barb., 187.

So also, as to a total failure or worthlessness of the subject-matter. *Kip vs. Monroe*, 29 Barb., 579; *McDougall vs. Fogg*, 2 Bosw., 387. Or even a material impairing of its value, though not amounting to absolute worthlessness. *Benedict vs. Field*, 16 N. Y., 595; affirming *same case*, 4 Duer, 154.

Mistake may constitute a defence to an executory contract, whilst it remains executory, but, when executed, a stricter rule will prevail, and mere mistake will no longer be available. *Mutual Life Insurance Company of New York vs. Wager*, 27 Barb., 354.

(r.) STOCKHOLDERS AND SUBSCRIBERS.

A substantial diversion from the original contract, will release a defendant from his obligation. *Buffalo, Corning, and New York Railroad Company vs. Pottle*, 23 Barb., 21.

A stockholder, sued by a creditor of the company, is liable to such suit, or, to the full extent of the shares subscribed for by him; but previous payment of debts to that extent, or a previous recovery, by another creditor, to the full amount of such liability, will constitute a defence to a subsequent action. *Woodruff & Beach Iron Works vs. Crittenden*, 4 Bosw., 406; *Garrison vs. Howe*, 17 N. Y., 458.

As to the power of the holder of full paid stock, not liable to further calls, to set up that fact in his answer, and as to its constituting a complete defence, unless controverted, see *Lewis vs. Ryder*, 13 Abb., 1.

In an action to charge trustees of a manufacturing corporation, with debts of the company, on the ground of omission to file their annual report, delay, on the part of the plaintiff, in asserting his remedy,

though claimed to be prejudicial to the defendants, will not constitute a defence. *Merchants' Bank of New Haven vs. Bliss*, 21 How., 365; 13 Abb., 225.

3. Defences in Equitable Actions.

(s.) DIVORCE.

Rule 89 (67), makes the following provision on this subject :

"The defendant, in the answer, may set up the adultery of the plaintiff, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract ; and, if an issue is taken thereon, it shall be tried at the same time, and in the same manner as other issues of fact in the cause."

The essentials of this class of suits, including, in a great measure, the essentials of the defences which are admissible, have already been fully entered upon in book VII., chapter II., section 156, to which the reader is accordingly referred. See especially, *McNamara vs. McNamara*, 2 Hilt., 547, as to the incompatibility of pleading matter which would form a subject of total divorce, in answer to a complaint for a separation, or the converse.

Provocation on the part of the wife may be alleged by the husband, in his answer to a complaint by the former, for a divorce, on the ground of cruelty. He may also introduce allegations to show the real value of a dowery received with her, and also statements, in support of any equities he may have on that ground, in opposition to her claim for alimony. *Devaismes vs. Devaismes*, 3 C. R., 124.

When the answer sets up adultery as a defence, it should be alleged in precise conformity with the provisions of the statute, and with the same particularity as is requisite in the statement of a cause of action on the same ground. *Morrell vs. Morrell*, 3 Barb., 236 ; 1 Barb., 318.

(t.) SPECIFIC PERFORMANCE.

As to an offer in the answer to perform, being sufficient, in a suit of this nature, where actual tender of performance has been made, after suit brought, though such tender may be specifically pleaded, see *Beebe vs. Dowd*, 22 Barb., 255. See also *Stevenson vs. Maxwell*, 2 Comst., 408.

See, as to the power of setting up in defence, a different contract from that sued upon by the plaintiff, and the effect of the admission thereby made, *Haight vs. Child*, 34 Barb., 186.

(u.) FORECLOSURE.

The essentials of this description of suit, including, in a great measure, the essentials of such defences as may be available in it, have already been considered in book VII., chapter II., section 154. See that section, and several of the decisions there cited.

The objection as to want of proper parties, is available as a defence to the mortgagor liable for a deficiency, even though he may have parted with the equity of redemption. See *Hall vs. Nelson*, 23 Barb., 88; 14 How., 32. N. B.—The specific objection taken in that case has been obviated by a subsequent amendment of the Code. See, however, *St. Mark's Fire Insurance Company vs. Harris*, 13 How., 95.

A mortgagor cannot set up a defence, going behind the mortgage sought to be foreclosed, in the absence of fraud or misrepresentation. *Northrop vs. Sumney*, 27 Barb., 196. Nor is eviction under a paramount title an available defence to a subsequent grantee, though the suit be for a purchase-money mortgage, and though such grantee be assignee of the covenants of the plaintiff. *National Fire Insurance Company vs. McKay*, 21 N. Y., 191.

It is competent for a defendant to show, in bar of the right of an assignee, that his assignor was not competent to make an absolute assignment. *Renaud vs. Conselyea*, 7 Abb., 105; reconsidering and overruling *same case*, 5 Abb., 346; and reversing decision, 4 Abb., 280.

The defence of usury between mortgagor and mortgagee, is not available to a subsequent encumbrancer. *Sands vs. Church*, 2 Seld., 347.

The defence that a valid mortgage has been assigned for illegal purposes, is available, as against the assignee. *Dewitt vs. Brisbane*, 16 N. Y., 508.

The purchasing mortgaged property by the mortgagee, under an execution sale, will not constitute a merger; nor can such a defence be subsequently set up on a foreclosure, by persons who have bought the land, expressly subject to the mortgage sought to be foreclosed. *Reed vs. Latson*, 15 Barb., 9.

As to the invalidity of the foreclosure of a loan commissioner's mortgage, where the course of proceedings enjoined by the statute is not strictly followed, see *Pell vs. Ulmar*, 21 Barb., 500. See also, as to the invalidity of such a mortgage, when irregularly taken, as against all parties not absolutely estopped by concurrence in the transaction, *New York Life Insurance and Trust Company vs. Staats*, 21 Barb., 570.

Failure to advance the total amount designed to be secured by an executory mortgage, is no defence to a suit upon it, so far as regards advances actually made. *Dart vs. McAdam*, 27 Barb., 187.

Inability to find the plaintiff, in order to pay the interest in due time, constitutes no defence, in the absence of any allegation of fraud or trick on his part. *Dwight vs. Webster*, 32 Barb., 47; 19 How., 349; 10 Abb., 128.

Mere delay, on the part of the plaintiff, in asserting his remedy, will not constitute a defence. See *Merchants' Insurance Company of New York vs. Hinman*, 34 Barb., 410; 13 Abb., 110.

4. Defences in Real Estate Actions.

(v.) PARTITION.

In partition, whether by petition or suit, any thing may be pleaded "which will abate the action, or bar the petitioner's right to a judgment." *Reed vs. Child*, 4 How., 125; 2 C. R., '69. But facts merely introduced for the purpose of endeavoring to charge the adverse party with costs, as, for instance, allegations of an unreasonable refusal to make partition by deed, will be stricken out as irrelevant. *McGowan vs. Morrow*, 3 C. R., 9.

In a proceeding of this nature, it is competent for one defendant to dispute the claims of another; and these claims may properly be tried and settled in the general suit, if they involve interests in, or liens on the property sought to be partitioned. *Bogardus vs. Parker*, 7 How., 305.

(w.) EJECTMENT.

The essentials of this action, involving of necessity the essentials of most of the defences which are pleadable in bar of it, have been already fully entered upon in book VII., chapter II., section 150.

It is clearly competent for a defendant in ejectment to set up in his answer, any equitable title or defence, available in bar of the plaintiff's claim. The amendment of section 149 puts this, in fact, beyond a doubt. The principle is carried out in *Phillips vs. Gorham*, 17 N. Y., 270; *Crary vs. Goodman*, 2 Kern., 266; *Thurman vs. Anderson*, 30 Barb., 621; *Requa vs. Holmes*, 19 How., 430; *McCray vs. McCray*, 30 Barb., 633; *Bigelow vs. Finch*, 11 Barb., 498. See also *Wooden vs. Waffle*, 6 How., 145; 1 C. R. (N. S.), 392, and *Dickinson vs. Smith*, 25 Barb., 102. These cases abundantly overrule the doubts to the contrary, entertained in *Hill vs. McCarthy*, 3 C. R., 49; *Otis vs. Sill*, 8 Barb., 102; *Cochran vs. Webb*, 4 Sandf., 653, and *Crary vs. Goodman*, 9 Barb., 657; reversed by *Crary vs. Goodman*, 2 Kern., 266, *supra*.

In interposing a defence of this description, the defendant must, however, become an actor in respect of his claim. His answer must contain all the necessary allegations to support it affirmatively, and he must ask and obtain affirmative relief. *Dewey vs. Hoag*, 15 Barb., 365.

An allegation of adverse possession must be specific, and must state all necessary facts in relation to the claim so made. *Clarke vs. Hughes*, 13 Barb., 147; *White vs. Spencer*, 4 Kern., 247.

In ejectment brought against the tenant, the landlord may appear, under the authority conferred upon him by the Revised Statutes. He may do so in conjunction with the tenant, if the latter appears; or alone, if he fail to do so. But, to entitle him so to come in, his interest or privity of estate must be shown. *Godfrey vs. Townsend*, 8 How., 398.

A mere denial of possession, or of withholding it, does not put in issue the title of the plaintiff. If the defendant desires to question that title, he must frame his answer accordingly, and set up title in himself, or title out of the plaintiff. *Ford vs. Sampson*, 30 Barb., 183; 17 How., 447; 8 Abb., 332.

As to what will or will not constitute a defence in ejectment for dower, see *Ellicott vs. Mosier*, 11 Barb., 574; affirmed, 3 Seld., 201; *Sparrow vs. Kingsman*, 1 Comst., 242.

(x.) TRESPASS.

In *Watt vs. Rogers*, 2 Abb., 261, it was laid down that an equitable title cannot be set up in defence, in an action of this nature, by a party in actual possession under a grant from the party holding the legal title.

As to the plea of license in an action brought in this form, but looking to collateral relief, see *Haight vs. Badgeley*, 15 Barb., 499.

A defendant, who has put the plaintiff's title at issue by his answer, cannot relieve himself from his consequent liability to costs, whatever may be the amount of the recovery, by admitting that title on the trial. It will be too late for him to do so then, after he has compelled the plaintiff to make the necessary preparations. *Niles vs. Lindsey*, 8 How., 131; 1 Duer, 610.

§ 180. Counter-Claim or Set-off.

The fourth and last class of defences by answer, is that which seeks to diminish or to extinguish the demand of the plaintiff, by the establishment of some counter-right or counter-demand on the part of the defendant.

This class may be again subdivided into three main heads :

1. Recoupment.

2. Set-off, strictly considered.

3. Counter-claim.

In which order the subject will be treated in detail, being preliminarily considered in its more extended and general aspect, and especially with reference to the recent changes in the practice upon this subject.

(a.) GENERAL CONSIDERATIONS.

The important alteration in the previous practice, introducing the novel term of counter-claim, and authorizing a defence in that form, dates from the amendment of 1852. The subject has been already adverted to, and the amendments by way of addition to sections 149 and 150, by which this change was effected, noticed in detail, in book VI., section 120, on the citation of those sections.

But, to avoid the necessity of back references, it may be convenient to restate the definition of the term contained in section 150.

A counter-claim under the Code must present the following characteristics, *i. e.* :

It must be a claim existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the two following causes of action :

1. A cause of action, arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

Under the same section, leave is given to the defendant to set forth by answer, as many defences or counter-claims as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both.

But they must, as before noticed, be separately stated, and clearly distinguished.

Before 1852, the previously existent defences of recoupment, and set-off, remained available under the new, as under the old practice ; and both of them, the latter especially, embraced within their scope much that is also comprised within the present definition. The statutory defence of set-off, was, however, hampered with numerous prerequisites, from which the simpler provisions of section 150 have greatly tended to relieve it. The defence itself is, in a great measure, merged in the more extended operation of that section, and, so far, and where the former provisions are inconsistent with, or comprised within the latter, they may be looked upon as repealed. The practitioner is not, however, entirely relieved from the necessity of considering the former provisions, especially with respect to demands arising on judgment, or

those which have been the subject of assignment, or are made by a trustee. See special reservation as to assigned claims, Code, section 112. It will, therefore, still be necessary to draw attention to those provisions, which will be done in the appropriate subdivisions of the present section.

A similar remark may be made with reference to the defence of recoupment. Where the circumstances which, under the former practice, would have enabled the defendant to interpose a claim of that description, are sufficient in themselves to constitute a cause of action, the former recoupment may be looked upon as merged in the more recent counter-claim. Where, however, they fall short of this, but were still interposable as a defence, by way of mere deduction from the plaintiff's claim, they are still available, in the same manner and to the same extent. They must, however, be pleaded in all cases, as they cannot otherwise be given in evidence.

The defence of counter-claim, though substantially including both of the former, with the exceptions above noticed, is, however, of far wider operation. It authorizes, in fact, in actions arising in contract, the setting up, by means of a pleading, technically defensive, but practically affirmative in its nature, any species of claim whatever, arising in contract also, which, under the former practice, might have been made the subject of a cross action at law, or a cross bill in equity.

It does away, too, with all the previous restrictions, which prevented the setting up of an equitable defence, in answer to a legal demand, or the reverse. The only portion of the former technical impediments, restricting the setting up of counter-demands, by way of defence, instead of by way of a counter-proceeding, which may be looked upon as still existent, is the former rule, which forbids the assertion of an independent cause of action, sounding in tort, by way of answer to another.

In this class of cases, a cross action remains the only remedy of the defendant, unless his adverse claim has been actually reduced into judgment, before the commencement of the action. But even this restriction only holds good, as regards claims strictly independent in their nature. When arising out of the transaction set forth in the complaint, or connected with the subject of the action, a counter-claim in tort may be availably interposed in the answer, and, under subdivision 1 of section 150, there is no limitation imposed as to the time at which it must have accrued. See, however, cases below cited, as to the stricter construction which the courts are disposed to impose upon this branch of the section.

The restricted views, as to the assertion of affirmative defences, as taken in *Wooden vs. Waffle*, 6 How., 145; 1 C. R. (N. S.), 392; *Cochran vs. Webb*, 4 Sandf., 653, and *Haire vs. Baker*, 1 Seld., 357, have refer-

ence to the practice prior to the amendment of 1852, and are no longer tenable, since that amendment.

In *The Xenia Branch of State Bank of Ohio vs. Lee*, 2 Bosw., 694; 7 Abb., 372 (384), the subject of counter-claim will be found fully discussed, and the extent of the term defined, especially as regards the class last alluded to, *i. e.*, such as arise out of the same transaction, or are connected with the subject of the action. An equitable claim to the ownership of promissory notes, and for judgment for their amount, founded on that ownership, was held interposable, in trover for their alleged conversion, as being a defence expressly authorized by subdivision 1 of section 150. The precise limits of that subdivision are fully discussed, and its operation shown to be of far wider scope than that of the former doctrine of recoupment.

That the term counter-claim is wide enough to include, as a general rule, the class of defences available under the former practice by way of set-off or recoupment, is laid down in *Lemon vs. Trull*, 13 How., 248, stated to have been affirmed by the Court of Appeals, 16 How., 576, note, and to overrule *Nichols vs. Boerum*, 6 Abb., 290. No regular report of the case is, however, made, nor are the reasons for the decision given. See also *Pattison vs. Richards*, 22 Barb., 143.

That the operation of that term is still wider, is held in *Vassar vs. Livingston*, 3 Kern., 248 (257); affirming *same case*, 4 Duer, 285; *Kneedler vs. Sternburgh*, 10 How., 67; *Welch vs. Hazleton*, 14 How., 97; *Wolf vs. H.*, 13 How., 84.

It is, however, laid down, with equal clearness, that, extensive as it is, the term in question fails to embrace the whole of the defences formerly available, and that, as regards this latter class, the former rules must still be adhered to. See *Vassar vs. Livingston*, *supra*; *Spencer vs. Babcock*, 22 Barb., 326; *Gleason vs. Moen*, 2 Duer, 639; *Wolf vs. H.*, 13 How., 84, *supra*; *Van De Sande vs. Hall*, 13 How., 458. See also *Nichols vs. Boerum*, 6 Abb., 290, but stated to be overruled as above noticed.

The following general principles of pleading may be referred to, as generally applicable to the whole class of defences in question, irrespective of the peculiar head under which such a defence, when set up, may be properly classifiable.

Whatever the special character of the defence, it must be separately stated, and it must, as so stated, be complete in itself, without any necessity of referring to other portions of the answer, to sustain it. And, if any special averment, or special denial, be necessary, in connection with the defence, as separately pleaded, that denial or averment must be specially made, either in express terms, or by express reference to some previous portion of the answer, separately pleaded, and of express

general application. See *Xenia Branch of State Bank of Ohio vs. Lee*, 2 Bosw., 694 ; 7 Abb., 372 (384), before noticed.

And the same rule is equally applicable to a single counter-claim, or to several made in one answer, when each or any of them is incompletely stated. *Spencer vs. Babcock*, 22 Barb., 326.

As to the clear right of the defendant, under the section, to set up as many defences or counter-claims as he may have, provided only they be separately stated, see *Bennett vs. Le Roy*, 14 How., 178 ; 5 Abb., 55 ; also noticed, 6 Duer, 683.

A defence of this nature was held interposable, by way of amendment to the original answer, in *Beardsley vs. Stover*, 7 How., 294.

Whether a claim of a lien by the defendant does or does not constitute a counter-claim, may sometimes depend upon the form of the plaintiff's action. Thus, such a claim was held to be a mere defence to the claim of a plaintiff in replevin, though, if the latter had sued in *assumpsit* for the value of the same property, it would have been a counter-claim. *De Leger vs. Michaels*, 5 Abb., 203 ; *Gottler vs. Babcock*, 7 Abb., 392, note.

(b.) RECOUPMENT.

This form of defence admits, in its very nature, the existence of a cause of action in the plaintiff, but seeks to reduce the amount of his recovery. See *Vassar vs. Livingston*, 3 Kern., 248 (257) ; affirming *same case*, 4 Duer, 285 ; *Xenia Branch of State Bank of Ohio vs. Lee*, 2 Bosw., 694 ; 7 Abb., 372 (384) ; *Nichols vs. Dusenbury*, 2 Comst., 283.

It is therefore in the nature of a cross action, and, so far, analogous to the defence of counter-claim. It is not, however, confined by the strict rules imposed by section 150, as to its necessarily being restricted to the actual parties to the record, and may therefore be maintainable as an equitable defence, in cases where counter-claim in its strict acceptation cannot be set up. *Vassar vs. Livingston, supra* ; *Gleason vs. Moen*, 2 Duer, 639 ; *Spencer vs. Babcock*, 22 Barb., 326. It cannot, however, be resorted to by a mere stranger to the record, to whom another remedy is open. Thus, a surety cannot, in the absence of special equitable grounds stated in his answer, demand to set-off or recoup a claim in favor of his principal, in an action brought against him by a creditor of that principal. *La Farge vs. Halsey*, 1 Bosw., 171 ; 4 Abb., 397. A surety for rent, however, may set up payment made by the tenant, for repairs agreed to be done by the landlord, by way of reduction of the latter's claim for rent. *Rosenbaum vs. Gunter*, 3 E. D. Smith, 203.

The claim of a defendant may sometimes constitute a counter-claim, or a recoupment, according to the form of the plaintiff's action. See

De Leger vs. Michaels, 5 Abb., 263; *Gottler vs. Babcock*, 7 Abb., 392, note.

A defendant, setting up a claim for recoupment, cannot also maintain a cross action in respect of the same matter, but may, on motion, be put to his election, and compelled to abandon either the one proceeding or the other. See *Farmers' Loan and Trust Company vs. Hunt*, 1 C. R. (N. S.), 1; *Fabbricotti vs. Launitz*, 3 Sandf., 743; 1 C. R. (N. S.), 121.

As to the propriety and power of pleading matter in recoupment, by way of a partial defence, see *Willis vs. Taggard*, 6 How., 433; also generally, *Houghton vs. Townsend*, 8 How., 441. It must, in fact, be pleaded, or it cannot be proved. *Crane vs. Hardman*, 4 E. D. Smith, 339; *Levy vs. Bend*, 1 E. D. Smith, 169. *Kneedler vs. Sternburgh*, 10 How., 67, seems to be founded on too strict a view as to the admissibility of partial defences.

Where the plaintiff sues in trover, for a wrongful conversion by the defendant, the latter cannot claim to recoup, though under circumstances which, in an action on contract, would have entitled him to that remedy. *Walther vs. Wetmore*, 1 E. D. Smith, 7.

The defence of recoupment is peculiarly available in that class of cases, in which the defendant, in an action founded on contract, seeks to reduce the amount of the plaintiff's recovery, by showing damage done to, or deficiency in the value of the subject-matter of such action, arising from the act or default of the plaintiff.

See, as to a deficiency in the quality of goods delivered under an executory contract, with representations amounting to a warranty, *Warren vs. Van Pelt*, 4 E. D. Smith, 202; *Stewart vs. Bock*, 1 Hilt., 122. As to damages, in respect of imperfections in work done under such a contract, *Gourdier vs. Thorp*, 1 E. D. Smith, 697; *Bloodgood vs. Ingoldsby*, 1 Hilt., 388. Or, in respect of non-performance of such a contract at the time stipulated, *Griffin vs. Colver*, 22 Barb., 587; *Boutwell vs. O'Keefe*, 32 Barb., 434.

See also, as to damage to goods, between their sale and delivery, being chargeable by way of recoupment against the vendor, *Gerard vs. Prouty*, 34 Barb., 454.

In an action for rent, the tenant may recoup damages, accruing to him from the wrongful act or default of his lessor, amounting to a breach of the contract of leasing, or in respect of an actual breach of covenant. *Mayor of New York vs. Mabie*, 3 Kern., 151; reversing same case, 2 Duer, 401; *Blair vs. Claxton*, 18 N. Y., 529; *Crane vs. Hardman*, 4 E. D. Smith, 339; *La Farge vs. Halsey*, 1 Bosw., 171; 4 Abb., 397; *La Farge vs. Mansfield*, 31 Barb., 345; *Peck vs. Hiler*, 14 How., 155.

But, in such an action, the defendant cannot recoup damages for a mere wilful trespass of the landlord, not involving a breach of the contract of leasing. *Levy vs. Bend*, 1 E. D. Smith, 169. See also *Drake vs. Cockroft*, 4 E. D. Smith, 34; 10 How., 377; 1 Abb. 203; *Edgerton, vs. Page*, 20 N. Y., 281; 18 How., 359; 10 Abb., 119; affirming *same case*, 1 Hilt., 320; 14 How., 116; 5 Abb., 1, and reversing decision at special term, 12 How., 58.

Nor can damages, arising out of the breach of a different contract, be made the subject of recoupment. *Berdell vs. Johnson*, 18 Barb., 559; *Deming vs. Kemp*, 4 Sandf., 147. Or payments, made by way of mere precaution, and not within the actual scope of the contract sued upon. *Nye vs. Ayres*, 1 E. D. Smith, 532.

As to the rule of damages on a claim for recoupment, in respect of the detention of a vessel, see *Rogers vs. Beard*, 20 How., 98.

To be available by way of recoupment, the claim of a defendant against the plaintiff must be enforceable. See *Cornell vs. Townsend*, 19 How., 184. If tainted with illegality, it cannot be set up as a defence. *Gillett vs. Phillips*, 3 Kern., 114.

(c.) SET-OFF, STRICTLY CONSIDERED.

As before noticed, the former statutory defence of set-off is, in a great measure, merged in the more extended operation of the Code counter-claim. It is, however, necessary to refer to it, as regards those comparatively few instances, in which a resort to the earlier provisions may be either necessary or expedient.

By the Revised Statutes, 2 R. S., 354, 355, section 18, the following provisions are made as to set-off, in actions at law; and by 2 R. S., 174, section 40, their operation is extended, to suits in equity for the recovery of money.

Section 18, above referred to, provides to the following effect, *i. e.*, that, in the following cases, and under the following circumstances, a defendant may set off demands which he has against the plaintiff:

1. It must be a demand arising upon judgment, or upon contract, express or implied; and, if on a bond, or like contract, then of the sum payable under the condition, and not of the penalty.

2. It must be due to such defendant in his own right, either as creditor or payee, or as assignee or owner of the demand.

3. It must be a demand for real or personal property sold, or money paid, or services done; or, if not such a demand, the amount must be liquidated, or ascertainable by calculation.

4. It must have existed at the commencement of the suit, and have then belonged to the defendant.

5. It was only allowable, in actions on demands which could them-

selves be made the subject of set-off. (See as to the inability to set off, in an action sounding in tort, a demand arising on contract, *Anon*, 1 C. R., 40.)

6. If there are several defendants, the demands set off must be due to them jointly.

7. It must be a demand existing against the plaintiff, unless the suit be brought in the name of a plaintiff having no actual interest in the contract sued upon; in which case no set-off was allowable, except as thereafter specified.

8. In an action arising on contract, other than a negotiable promissory note, or bill of exchange, which has been assigned by the plaintiff, a demand, existing against such plaintiff, or any assignee of such contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of such assignment, may be set off, to the amount of the plaintiff's debt, if the demand be such as might have been set off against such plaintiff or such assignee, while the contract belonged to him.

9. If the action be upon a negotiable promissory note, or bill of exchange, which has been assigned to the plaintiff after it became due, a set-off, to the amount of the plaintiff's debt, may be made, of a demand existing against any person or persons who shall have assigned or transferred such note or bill after it became due, if the demand be such as might have been set off against the assignor, while the note or bill belonged to him.

10. If the plaintiff be a trustee for any other, or if the suit be in the name of a plaintiff, who has no real interest in the contract on which the suit is founded, so much of a demand existing against those whom the plaintiff represents, or for whose benefit the action is brought, may be set off, as will satisfy the plaintiff's debt, if the same might have been set off in an action by those beneficially interested.

11. Limits the right of set-off, in actions brought by the assignees of insolvents.

Section 19 especially provides that, to entitle a defendant to a set-off, he must plead or give notice of the same.

And subsequent sections, down to 25 inclusive, provide as to the form of judgment, on the defence, when interposed, and the power of interposing it, as against or in favor of parties standing in a representative capacity.

It will be obvious, on a comparison of the above enactments with the more simple provisions of section 150, that they are in a great measure, but not entirely, superseded by the latter; especially with reference to demands arising on judgment, or such as have been made the subject of transfer or assignment. It is to be especially noticed that, with ref-

erence to the latter, a special reservation is made by section 112 of the Code, as follows :

“In the case of the assignment of a thing in action, the action of the assignee shall be without prejudice to any set-off or other defence existing at the time of, or before notice of the assignment· but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith, and upon good consideration, before due.”

It is obvious that this provision bears directly upon subdivisions 8 and 9 of section 18, as above cited.

The recent decisions, more peculiarly bearing upon the right of set-off, in its stricter application, will be cited in the present ; those which refer to it, in common with that of counter-claim, in the succeeding subdivision.

Set-off, to be available, must be actually pleaded in all cases. *Pinckney vs. Keyler*, 4 E. D. Smith, 469. And that, with sufficient certainty, and with the same particularity as would be necessary to establish a cause of action. An indefinite statement, such as was in use under the former system, will no longer suffice. *Wiggins vs. Gans*, 3 Sandf., 738 ; 1 C. R. (N. S.), 117 ; *Ranney vs. Smith*, 6 How., 420.

The plea is equally admissible in proceedings under the mechanics' lien law, as in ordinary actions. *Owens vs. Ackerson*, 1 E. D. Smith, 691 ; 8 How., 199.

The pendency of a prior action for the same demand, is no bar to the interposition of a plea of this nature. *Naylor vs. Schenck*, 3 E. D. Smith, 135.

The right of equitable set-off cannot be claimed or enforced, in respect of a debt not actually due. *Keep vs. Lord*, 2 Duer, 78 ; 11 L. O., 178 ; *Bradley vs. Angel*, 3 Comst., 475. See also *Myers vs. Davis*, 22 N. Y., 489. But, in respect of a liquidated debt, it is claimable in a case of mutual dealing. *Schieffelin vs. Hawkins*, 14 Abb., 112.

Nor can a set-off be maintained, as against an assignee, in respect of a claim, not actually due at the time of the assignment to him. *Beckwith vs. Union Bank of New York*, 5 Seld., 211 ; affirming same case, 4 Sandf., 604 ; *Ogden vs. Prentice*, 33 Barb., 160 ; *Brookman vs. Metcalf*, 5 Bosw., 429 ; *Hicks vs. MacGrorty*, 2 Duer, 295 ; *Keep vs. Lord*, *supra* ; *Martine vs. Willis*, 2 E. D. Smith, 524 ; *Myers vs. Davis*, 22 N. Y., 489 ; *Crosbie vs. Leary*, 6 Bosw., 312.

As to the right to use a note of the assignor, overdue at the time of assignment, by way of set-off, being merged in a subsequent recovery of judgment on that note by the defendant, so as to render the defence no longer available, see *Lowell vs. Lane*, 33 Barb., 292.

As to whether section 112 of the Code has not so far altered the former rule, as to admit the setting off of a debt, maturing after actual

assignment, but before notice of that assignment, see *Soloman vs. Holt*, 3 E. D. Smith, 139.

As to the right of a bank, to continue payment of the checks of its customer, after actual assignment of the balance in its hands, but before notice of that assignment, see *Griffin vs. Rice*, 1 Hilt., 184. See also, as to the similar right of such a body to write off against such balance, a claim against such customer, become available in its hands, before the receipt of such notice, *Robinson vs. Howes*, 20 N. Y., 84. •

A general assignee for creditors is not, however, entitled to claim the same protection, in respect of claims interposed by way of set-off, but matured after the execution of the assignment, as is available to an assignee for value. Being a mere nominee of his assignor, he can claim no greater rights; and any claim or equity which, in the event of an action by the latter, could have been pleaded by way of set-off against his demand, is equally available, as against such an assignee. *Maas vs. Goodman*, 2 Hilt., 275; *Schieffelin vs. Hawkins*, 14 Abb., 112.

The maker of a promissory note, payable to a corporation, has the same right of set-off against such note, in the hands of a receiver, as he would have had against the corporation itself; nor will the fact that the note has matured after the appointment of such receiver, affect the rule under these circumstances. *Berry vs. Brett*, 6 Bosw., 627.

But bills of a bank, obtained by one of its debtors, after its insolvency, cannot be used by way of set-off or counter-claim, on an action brought by its receiver, for a debt due at the time of its failure. *Diven vs. Phelps*, 34 Barb., 224.

As to the right of equitable set-off, in respect of articles manufactured under an executory agreement, prior to, but not completed until after assignment on the insolvency of the intended purchasers, see *Myers vs. Davis*, 26 Barb., 367.

As to when a promissory note, specifying no time of payment, will or will not be considered as overdue, so as to let in a claim for set-off, in respect of subsequently purchased claims against the original payee, see *Weeks vs. Pryor*, 27 Barb., 79.

When a chose in action has been assigned, a claim of set-off, in respect of a demand against the assignor, must be set up, as such, by way of defence. It is not a counter-claim, because not arising between the parties to the record. *Wolfe vs. H.*, 13 How., 84; *Dil- laye vs. Niles*, 4 Abb., 253. See also *Davidson vs. Remington*, 12 How., 310.

And, to be pleadable, the right of the defendant to maintain a cross action, in respect of the demand claimed to be set off, must be complete. *Kingston Bank vs. Gay*, 19 Barb., 459. See also *Smith vs. Jones*, 2 C. R., 78. And such right must be then existent in the de-

fendant. If he has assigned it, he cannot set it up. *Belknap vs. McIntyre*, 2 Abb., 366.

Set-off is not maintainable, in respect of an assigned claim, where the assignment is not proved to have been made, before the commencement of the suit in which it is claimed to be set up. *Heidenheimer vs. Wilson*, 31 Barb., 636.

Nor can a person, indebted to a bankrupt, declared such under the act of Congress of August 19th, 1841, set off, against that indebtedness, a demand against the bankrupt, purchased after he presented his petition to be discharged. *Smith vs. Brinckerhoff*, 2 Seld., 305.

To be pleadable, a set-off must be between the actual parties to the record, or must fall within some one of the exceptions to that rule allowed by the statute. Thus, a joint demand cannot be made the subject of set-off, by one only of the parties jointly liable, in a proceeding against him, on his individual indebtedness. *Compton vs. Green*, 9 How., 228; *Campbell vs. Genet*, 2 Hilt., 290; *Belknap vs. McIntyre*, 2 Abb., 366. Nor, it has been held, *per contra*, can an individual demand against the plaintiff be interposed, by way of strict set-off, by one of two defendants who are sued on a joint liability. *Pinckney vs. Keyler*, 4 E. D. Smith, 469; *Mott vs. Burnett*, 2 E. D. Smith, 50; 1 C. R. (N. S.), 225.

But, where a defence of this nature is set up by way of counter-claim, this doctrine is not maintained in all its strictness, and, when the liability of the defendants is joint and several, as in the case of joint makers of a promissory note, either defendant may interpose it in that form, against a demand, capable of being made the subject of set-off, and existent in his own favor, against the plaintiff. *Parsons vs. Nash*, 8 How., 454. See also *People vs. Cram*, 8 How., 151, there referred to. See the same principle maintained in *Briggs vs. Briggs*, 20 Barb., 477; affirmed, 15 N. Y., 471, and *Newell vs. Salmons*, 22 Barb., 647. And a defendant, on showing that one of several parties joined as co-plaintiffs is, in fact, the sole plaintiff in the action, may avail himself of a set-off against him. *Cowles vs. Cowles*, 9 How., 361. A claim of set-off of this nature, cannot, however, it has been held, be maintainable by a joint defendant, in respect of a demand in his favor, originating in a several tort, committed by the plaintiff. *Peabody vs. Bloomer*, 3 Abb., 353; 5 Duer, 678; also 6 Duer, 53.

A claim against his original lessor, cannot be set off by a tenant, against a grantee of that lessor, claiming rent, accrued after that grant, and assent on the part of the tenant to continue his occupation, under such grantee. *Peckham vs. Leary*, 6 Duer, 494.

So also, a claim against a party, whose title to goods is incomplete, cannot be made available, as against the action of the original vendors,

claiming adversely to that title. *Dows vs. Dennistoun*, 28 Barb., 393. See likewise *Fleeman vs. McKean*, 25 Barb., 474.

A claim against the original plaintiff, in an action subsequently reduced into judgment, cannot be made available, as against a previous judgment in his favor for costs, assigned to and the property of his attorney. *Roberts vs. Carter*, 17 How., 341; 9 Abb., 366, note. A satisfied judgment cannot be made the subject of set-off, even though it be claimed that such satisfaction has not been actual, but merely colorable. *Smith vs. Briggs*, 9 Barb., 252.

Nor can a debt due from a testator, be interposed, by way of set-off, in an action brought by his executor in his own name, on the defendant's promissory note, even though given in respect of a debt due to the testator's estate. *Merritt vs. Seaman*, 2 Seld., 168. A payment made by order of an administrator may, however, be interposed, by way of defence, in an action brought by him. *Walkley vs. Griffith*, 4 E. D. Smith, 343.

So likewise, the stockholder of a company may set off his demand against it, as a defence to an action by another creditor against him, founded on his statutory liability. *Remington vs. King*, 11 Abb., 278. But not so, in an action by the receiver of such a body. In that case, he can only claim a dividend *pro rata* with the rest of the creditors. *In re Empire City Bank*, 18 N. Y., 199; 8 Abb., 192, note. See also *Garrison vs. Howe*, 17 N. Y., 458, there referred to. Nor can a mutual insurer set off, in such an action, a loss payable to him, as against his liability for premiums due on his policy. The latter is an absolute liability. As to the former, he can only come in for a dividend *pro rata*. *Lawrence vs. Nelson*, 21 N. Y., 158; affirming *same case*, 4 Bosw., 240.

In an action by a tenant against his landlord, for a deposit, by way of security for rent, it was held that the latter could set off a claim for a quarter's rent, payable in advance, though, during the quarter, he had dispossessed the plaintiff. *Cushingham vs. Phillips*, 1 E. D. Smith, 416.

To be pleadable at all, an equitable set-off must be such an equity as can be enforced by judicial action, not one arising from merely moral considerations. *Van Pelt vs. Boyer*, 8 How., 319.

Nor can a fraud, practised by a person other than the plaintiff, be made the subject of an equitable set-off, though arising in respect of the same subject-matter, where there is no allegation or evidence sufficient to connect the actual plaintiff with such fraud. *Reed vs. Latson*, 15 Barb., 9.

Set-off is a remedy of a *quasi* equitable nature, and rests, as such, emphatically in the discretion of the court. This principle is fully laid down in *Baker vs. Hoag*, 6 How., 201; where the court allowed one judgment to be set off against another, although the parties to those

judgments were different: it appearing that equity would be promoted, and injustice prevented by that course.

In an action on a bond for giving a good title to property sold, a deficiency, arising out of a foreclosure for unpaid purchase-money, was allowed to be set off, in *Filkin vs. Ferris*, 18 Barb., 581.

(d.) COUNTER-CLAIM.

The recently established remedy of counter-claim, introduced by the amendment of 1852, demands consideration in the last instance.

It is, as above noticed, restricted within the following limits:

A claim must exist, in favor of the defendant against the plaintiff.

It must be a several claim, not demanding the intervention of other parties; or, if made in a suit where others are joined, it must be severable in its nature, so as to be capable of forming ground for a separate judgment against the plaintiff, under section 274, without connection or interference with the rights of such other parties.

It must be such a claim as will, of itself, constitute a cause of action, capable of assertion by the defendant against the plaintiff, in a separate suit.

If of an independent nature, and not arising out of the contract or transaction which forms the basis of the plaintiff's claim, or connected with the subject of the action, both it, and the claim in answer to which it is interposed, must be causes of action arising in contract. It must also have been existent, as such, at the commencement of the action.

But, when so arising or so connected, it may be a cause of action of any nature.

And, lastly, when existent, and falling within either subdivision of section 150, it is immaterial whether the nature of that claim be legal or equitable. In either case, it will be equally available.

The following test of distinction may be fairly applied: Could or could not the defendant, in a separate action, claim an affirmative judgment against the plaintiff, in respect of the matter set up? If so, that matter is properly the subject of a counter-claim; if not, it is merely ground of defence. See *Vassar vs. Livingston*, 3 Kern., 248 (252); *Burrall vs. De Groot*, 5 Duer, 379; *Gilbert vs. Rounds*, 14 How., 46 (50); *Merritt vs. Millard*, 5 Bosw., 645; *Tyler vs. Willis*, 33 Barb., 327; *Tyler vs. Whitney* (same case), 12 Abb., 465; *Bissell vs. Pearse*, 21 How., 130 (140); *Bates vs. Rosekrans*, 23 How., 98. So also, where complete relief can be obtained by way of defence, a counter-claim will not be maintainable, even although a prayer for relief be inserted. *Prentiss vs. Graves*, 33 Barb., 621.

In the earlier cases, decided in the years immediately succeeding the amendment, the nature and limits of the term counter-claim were made

the subject of some criticism, and considerable discussion. In one case, *Silliman vs. Eddy*, 8 How., 122, it was stated to be "an opposition claim, or demand of something due; a demand of something, which of right belongs to the defendant, in opposition to the right of the plaintiff." See also a similar definition in *Roscoe vs. Maison*, 7 How., 121.

It must be, in all cases, a cause of action, or, in other words, a cross demand between the same parties. *Davidson vs. Remington*, 12 How., 310; *Wolf vs. H.*, 13 How., 84; *Kneedler vs. Sternberg*, 10 How., 67; *Dillaye vs. Niles*, 4 Abb., 253; *Nichols vs. Boerum*, 6 Abb., 290; *Allen vs. Haskins*, 5 Duer, 332; *Cummings vs. Morris*, 3 Bosw., 560; *Vassar vs. Livingston*, 3 Kern., 248 (252); affirming same case, 4 Duer, 285; *Ferreira vs. Depew*, 4 Abb., 131; *Gleason vs. Moen*, 2 Duer, 639; *Putnam vs. De Forest*, 8 How., 146; *Duncan vs. Stanton*, 30 Barb., 533; *Mayor of New York vs. Parker Vein Steamship Company*, 21 How., 289; 12 Abb., 300.

When a demand is properly interposable by way of counter-claim, its amount is immaterial. *Allen vs. Haskins*, 5 Duer, 332.

Its interposition is equally admissible in proceedings for the enforcement of a mechanic's lien, as in ordinary actions. *Grogan vs. McMahon*, 4 E. D. Smith, 754; 6 Abb., 306. See also, as to set-off, *Owens vs. Ackerson*, 1 E. D. Smith, 691; 8 How., 199, before referred to.

A counter cause of action, which, in its assertion, wholly defeats the demand of the plaintiff, is not a counter-claim in its nature. The two claims cannot co-exist. So held, as to the defence of malpractice, in opposition to a demand for medical services. *Bellinger vs. Crague*, 31 Barb., 534.

The section, as above noticed, positively imposes the condition that, to be available, a counter-claim must be between the actual parties to the record. See this distinction taken and enforced, *Vassar vs. Livingston*, 3 Kern., 248; affirming same case, 4 Duer, 285; *Davidson vs. Remington*, 12 How., 310; *Wolf vs. H.*, 13 How., 84; *Dillaye vs. Niles*, 4 Abb., 253; *Ferreira vs. Depew*, 4 Abb., 131; *Gillespie vs. Torrance*, 4 Bosw., 36; 7 Abb., 462; *Weeks vs. Pryor*, 27 Barb., 79; *Spencer vs. Babcock*, 22 Barb., 326; *Gleason vs. Moen*, 2 Duer, 639; *Cummings vs. Morris*, 3 Bosw., 560; *Wilstie vs. Northam*, 3 Bosw., 162; *Chaffie vs. Cox*, 1 Hilt., 78; *Ives vs. Goddard*, 1 Hilt., 434; *Merrick vs. Gordon*, 20 N. Y., 93; *Reed vs. Latsen*, 15 Barb., 9; *Ogden vs. Coddington*, 2 E. D. Smith, 317; *Van de Sande vs. Hall*, 13 How., 458; *Duncan vs. Stanton*, 30 Barb., 533; *Auburn City Bank vs. Leonard*, 20 How., 193; *Bissell vs. Pearce*, 21 How., 130 (140); *Boyd vs. Foot*, 5 Bosw., 110; *Tyler vs. Willis*, 33 Barb., 327; *Tyler vs. Whitney* (same case), 12 Abb., 465.

A claim against individual corporators, composing a corporation,

cannot, it has been held, be used as a counter-claim, in opposition to a demand, made by the corporation, as such. *New York Ice Company vs. Parker*, 21 How., 302.

And where the demand is not of a severable nature, an individual counter-claim cannot be set up by one of several parties jointly sued. *Peabody vs. Bloomer*, 3 Abb., 353 ; 5 Duer, 678 ; and again reported, 6 Duer, 53 ; *Hurlburt vs. Post*, 1 Bosw., 28. See also *Pinckney vs. Keyler*, 4 E. D. Smith, 469 ; *Bissell vs. Pearse*, 21 How., 130 (140). But otherwise, where the liability is joint and several, so that a several judgment might be rendered. *Parsons vs. Nash*, 8 How., 454 ; *Briggs vs. Briggs*, 20 Barb., 477 ; affirmed, 15 N. Y., 471 ; *Newell vs. Salmon*, 22 Barb., 647 ; *Schubart vs. Harteau*, 34 Barb., 447. See also *Cowles vs. Cowles*, 9 How., 361. See likewise, as to a counter-claim being maintainable for goods supplied to partners, in answer to a suit brought for the purpose of enforcing a partnership claim, *Hartmeg vs. Secordi*, 3 E. D. Smith, 560.

The converse of the proposition holds equally good, nor can a counter-claim be maintained on a joint indebtedness, in answer to an action on an individual responsibility. See *Campbell vs. Genet*, 2 Hilt., 290 ; *Mott vs. Burnett*, 2 E. D. Smith, 50 ; 1 C. R. (N. S.), 225.

Nor can a counter-claim be interposed, where, in order to its determination, it is necessary to bring other parties before the court, who have no interest in the determination of the plaintiff's cause of action. *Coursen vs. Hamlin*, 2 Duer, 513.

The principle that an unconnected and independent counter-claim cannot be interposed, unless, as provided by subdivision 2 of section 150, it was existent in favor of the defendant against the plaintiff, at the time of the commencement of the action, is carried out in *Chambers vs. Lewis*, 11 Abb., 210 ; affirming *same case*, 2 Hilt., 591 ; 10 Abb., 206 ; *Rice vs. O'Connor*, 10 Abb., 362 ; *Van Valen vs. Lapham*, 5 Duer, 689 ; *Same case*, 13 How., 240 ; *Gage vs. Angell*, 8 How., 335 ; *Duncan vs. Stanton*, 30 Barb., 533 ; and likewise, in *Ogden vs. Prentiss*, *Lowell vs. Lane*, *Brookman vs. Metcalf*, and *Devin vs. Phelps*, cited in last subdivision.

Where the title of the plaintiff, as receiver of a banking corporation, had accrued before the maturity of a demand against the corporation : it was likewise held that such demand could not be interposed. *United States Trust Company vs. Harris*, 2 Bosw., 75 ; *Brookman vs. Metcalf*, 5 Bosw., 429. See however, *Berry vs. Brett*, 6 Bosw., 627, cited in last subdivision. See also, as to an attempted counter-claim against such a receiver, *Butterworth vs. Fox*, 15 How., 545, and *Diven vs. Phelps*, 34 Barb., 224 ; also cited as above.

Nor can a defendant maintain a counter-claim, in respect of a demand

which he has assigned to another. *Belknap vs. McIntyre*, 2 Abb., 366; *Ives vs. Goddard*, 1 Hilt., 434.

Nor, where he is under an obligation inconsistent with the assertion of his right, *Lyman vs. Newman*, 29 Barb., 162; or is chargeable with *laches*, which would prevent that assertion, *Swezey vs. Lott*, 21 N. Y., 481; *McWilliams vs. Long*, 32 Barb., 194. Or, where such alleged right is not in fact enforceable, *Flint vs. Schernberg*, 1 Hilt., 532; *Moffatt vs. Van Doren*, 4 Bosw., 609; or merely inchoate and contingent in its nature, and not perfected, *Duncan vs. Stanton*, 30 Barb., 533. See also, as to the necessity of rebutting any adverse presumption, *Treadwell's Executors vs. Abrams*, 15 How., 219.

Nor can a counter-claim be set up, for fraud practised on the defendant, with which the plaintiff is not shown to be connected. *Reed vs. Latsen*, 15 Barb., 9.

The right to interpose a counter-claim seeking affirmative equitable relief, in an action of whatever nature, when the case is such as to fall within the scope of section 150, is recognized and provided for in the following cases: *Dobson vs. Pearce*, 1 Duer, 142; 10 L. O., 170; affirmed, 2 Kern., 156; 1 Abb., 97; *Dewey vs. Hoag*, 15 Barb., 365; *Hinman vs. Judson*, 13 Barb., 629; *Hunt vs. Farmers' Loan and Trust Company*, 8 How., 416; and *Dederick vs. Hoysradt*, 4 How., 350; *Arndt vs. Williams*, 16 How., 244; *Knowlton vs. Mickles*, 29 Barb., 465; *Bank of Toronto vs. Hunter*, 4 Bosw., 646; *Wood vs. Merritt*, 2 Bosw., 368; *Cooke vs. Nathan*, 16 Barb., 342; *Crary vs. Goodman*, 2 Kern., 266; *Bank of Toronto vs. Hunter*, 20 How., 292; *Despard vs. Walbridge*, 15 N. Y., 374; *Hannay vs. Pell*, 3 E. D. Smith, 432; *Wemple vs. Stewart*, 22 Barb., 154 (159); *Stone vs. Sprague*, 20 Barb., 509 (516); *Brown vs. Buckingham*, 11 Abb., 387; *Foot vs. Sprague*, 12 How., 355; *Kelsey vs. Bradbury*, 21 Barb., 531; affirming same case, 12 L. O., 222; *Bartlett vs. Judd*, 23 Barb., 262; *Gleason vs. Moen*, 2 Duer, 639 (642); *Chase vs. Peck*, 21 N. Y., 581 (586); *Currie vs. Cowles*, 6 Bosw., 452; *Gage vs. Angell*, 8 How., 335; *Savage vs. Putnam*, 32 Barb., 420. *Ives vs. Miller*, 19 Barb., 196; disapproving of the case of *Gage vs. Angell*, seems to be founded on too restricted a view of the section. The same remark may be made generally, with reference to *Burns vs. Nevins*, 27 Barb., 493. See also *Haire vs. Baker*, 1 Seld., 357, decided before the amendment.

A party claiming equity by a proceeding of this description, must do equity on his own part. If he seek to establish such a claim, where the case is one calling for a mutual accounting, he must state the account, and give up any securities in respect of matters connected with it. *Schenck vs. Wilson*, 2 Hilt., 92; *Hoag vs. Wade*, 2 Hilt., 114.

In a suit for divorce, on the ground of cruelty or of adultery, a demand

for relief of the same nature may be interposed by way of counter-claim. *Anon.*, 11 L. O., 350; *McNamara vs. McNamara*, 2 Hilt., 547; 9 Abb., 18; *Leseuer vs. Leseuer*, 31 Barb., 330.

But, to be so interposed, the relief prayed must be of the same nature. A claim for separation cannot be interposed as a defence, in a suit for total divorce, or the converse. *Diddell vs. Diddell*, 3 Abb., 167; *Griffin vs. Griffin*, 23 How., 183. See also as to their incompatibility, *McIntosh vs. McIntosh*, 12 How., 289.

In alleging a defence of this description, the jurisdictional facts, such as residence, &c., already supplied by the complaint, need not again be averred. *Leseuer vs. Leseuer*, *supra*.

As to the general principle, that an independent cause of action cannot be made the subject of a counter-claim, unless both it and the cause to which it is interposed sound in contract, with the exception of such cases as fall within subdivision 1, of section 150; the following decisions present themselves for notice:

An equitable defence, arising out of an independent agreement, was held not to be interposable, in an action for damages to real estate, in *Patterson vs. Richards*, 22 Barb., 143.

Or a claim founded on contract, in defence to an action sounding in tort. *Chambers vs. Lewis*, 2 Hilt., 591; 10 Abb., 206; affirmed, 11 Abb., 210. See also *Donohue vs. Henry*, 4 E. D. Smith, 162; *Gottler vs. Babcock*, 7 Abb., 392, note; *De Leger vs. Michaels*, 5 Abb., 203; *Bissell vs. Pearse*, 21 How., 130. Otherwise, however, in a case where replevin is brought in lieu of trover: see *Brown vs. Buckingham*, 21 How., 190; 11 Abb., 387.

Independent causes of action in tort, cannot be made the subject of counter-claim against each other. *Askins vs. Hearn*, 3 Abb., 184 (187); *Murden vs. Priment*, 1 Hilt., 75; *Fellerman vs. Dolan*, 7 Abb., 395, note; *Schnaderbeck vs. Werth*, 8 Abb., 37. See likewise, *Berdell vs. Johnson*, 18 Barb., 559; *Barlyte vs. Hughes*, 33 Barb., 320.

Nor can an independent cause of action in tort be made available by way of counter-claim, in an action sounding in contract. *Kurtz vs. McGuire*, 5 Duer, 660; *Piser vs. Stearns*, 1 Hilt., 86; *Peabody vs. Bloomer*, 3 Abb., 355; 5 Duer, 678; also, again, 6 Duer, 53; *Burke vs. Nichols*, 34 Barb., 430.

Nor will basing the demand for relief as upon an implied *assumpsit*, and waiving the tort, render a demand of this nature admissible as a counter-claim, when a tort is substantially alleged. See *Mayor of New York vs. Parker Vein Steamship Company*, 21 How., 289; 12 Abb., 300.

See also, as to independent trespasses of a landlord, not committed under claim of right, not being available by way of counter-claim to

his demand for rent, *Edgerton vs. Page*, 20 N. Y., 281 ; 18 How., 359 ; 10 Abb., 119 ; affirming *same case*, 1 Hilt., 20 ; 5 Abb., 1 ; reversing decision at special term, 12 How., 58 ; *McKenzie vs. Farrell*, 4 Bosw., 192 (202) ; *Drake vs. Cockroft*, 4 E. D. Smith, 34 ; 10 How., 377 ; 1 Abb., 203 ; *Levy vs. Bend*, 1 E. D. Smith, 169 ; *Mayor of New York vs. Parker Vein Steamship Company*, above cited. See also, as to recoupment, *Cram vs. Dresser*, 2 Sandf., 120.

Where a tenant's claim against his landlord, arises out of acts constituting an actual or constructive eviction, or a positive breach of covenant, he may maintain a counter-claim. *Blair vs. Claxton*, 18 N. Y., 529 ; *Peck vs. Hiler*, 14 How., 155 ; *New York Academy of Music vs. Hackett*, 2 Hilt., 217 ; *Myers vs. Burns*, 33 Barb., 401 ; *Rogers vs. Ostrom*, 35 Barb., 523. See also, as to recoupment, *Crane vs. Hardman*, 4 E. D. Smith, 339 ; and as to the landlord's right against the tenant, in respect of a deposit as security, *Healy vs. McManus*, 23 How., 238.

In *Bogardus vs. Parker*, 7 How., 305, it was held that a counter-claim for rent wrongfully received by a widow, was not maintainable as against her claims for an assignment of dower. See also, as to money advanced to her by the guardian of her infant children for their support, *Elliott vs. Gibbons*, 30 Barb., 498.

A claim for unliquidated damages for breach of contract, has been held to be capable of being made the subject of counter-claim, in an independent action, *ex contractu*. *Lignot vs. Redding*, 4 E. D. Smith, 285 ; *Schubart vs. Harteau*, 34 Barb., 447. See, however, *Berdell vs. Johnson*, 18 Barb., 559.

And, when the claim pleaded in defence, arises in any manner out of the contract or transaction on which the plaintiff's complaint is founded, or is connected with the subject of the action, it is always interposable.

See this principle carried out in the following cases :

As to mutual claims for contribution between part owners of a vessel. *Wood vs. Merritt*, 2 Bosw., 368. As to a claim for damages for breach of warranty of goods sold, when otherwise sustainable. *Lemon vs. Trull*, 13 How., 248, stated to be affirmed by Court of Appeals, 16 How., 576, note. See, however, *Nichols vs. Boerum*, 6 Abb., 290 ; and *Vassar vs. Livingston*, 3 Kern., 248, there referred to and above noticed, under the head of *Recoupment*. But such a defence cannot be set up by a stranger to the contract. *Gillespie vs. Torrance*, 4 Bosw., 36 ; 7 Abb., 462.

In an action in trover to recover specific promissory notes, it was held that title to such notes, and a demand of relief in respect of that title, could be set up by way of counter-claim, as a cause of action

arising out of the same transaction, and also as connected with the subject of the action. *Xenia Branch of State Bank of Ohio vs. Lee*, 2 Bosw., 694 ; 7 Abb., 372.

As to an agreement to take payment of goods in a specific manner, constituting a good defence, in an action for their price, see *Lewis vs. Acker*, 11 How., 163.

The restriction in section 71 of the Code, as to bringing a second action on a justice's judgment, within five years, does not prevent the liability upon it being set up by way of counter-claim, within that period. *Clark vs. Story*, 29 Barb., 295. Especially, when such plea is put in by an assignee of that judgment. *Same case*. See also *Tuffis vs. Braisted*, 4 Duer, 607 ; 1 Abb., 83, there referred to.

And not only so, but any judgment whatever, in favor of the defendant against the plaintiff, may, it has been held, be so interposed, and that without leave of the court. *Wells vs. Henshaw*, 3 Bosw., 625.

But, where an indebtedness has been merged in judgment, it can no longer be used by way of counter-claim, in the shape of the original claim. *Ives vs. Goddard*, 1 Hilt., 434 ; *Lowell vs. Lane*, 33 Barb., 292. But such merger only takes place as to the original rights actually the subject of the judgment. It has no effect, as regards the responsibilities of other parties to the transaction, as between each other, and such a party, holding an independent claim, may still set it up in that shape. *Kelsey vs. Bradbury*, 21 Barb., 531 ; affirming *same case*, 12 L. O., 222.

The costs and expenses actually incurred in an arbitration, revoked by one of the parties to the submission, were held to constitute a counter-claim, as against an action of that party, to recover the claims which had been submitted. *Curtis vs. Barnes*, 30 Barb., 225. But expenses, incurred by a party, himself chargeable with *laches*, cannot be set up. *Swozey vs. Lott*, 21 N. Y., 481.

The commencement of a previous action for the same demand, is no bar to its being again interposed in the defendant's answer, by way of counter-claim. *Wiltsie vs. Northam*, 3 Bosw., 162 ; *Fuller vs. Read*, 15 How., 236 ; 6 Duer, 697. Nor will an election between such two proceedings be compelled prematurely. (*Last case*.) But, when both are at issue, that election may be compelled, and proceedings stayed in one or the other. *Fabricotti vs. Launitz*, 3 Sandf., 743 ; 1 C. R. (N. S.), 121 ; *Farmers' Loan and Trust Company vs. Hunt*, 1 C. R. (N. S.), 1.

And, when a defendant has a demand of this nature, he is entitled to make such election at his own will, and he cannot be compelled to interpose such demand by way of counter-claim, if he prefers to assert it by a separate affirmative proceeding. *Halsey vs. Carter*, 1 Duer,

667; *Welch vs. Hazelton*, 14 How., 97; *Naylor vs. Schenck*, 3 E. D. Smith, 135; *Lignot vs. Redding*, 4 E. D. Smith, 285; *Sieman vs. Austin*, 33 Barb., 9 (11). But this rule will not apply to a proceeding, merely seeking to restrain another by way of injunction, on the ground of the existence of an equitable defence; that defence should, in such a case, be set up by answer. *Winfield vs. Bacon*, 24 Barb., 154; *Foot vs. Sprague*, 12 How., 355. See likewise *Bennett vs. Le Roy*, 6 Duer, 683; 14 How., 178; 5 Abb., 55.

Once made, however, the withdrawal of the specific claim at the trial, will not prevent the recovery, in the former suit, from operating in bar of a second proceeding, where the issue, on which that recovery was had, embraced the fundamental question on which the claim must be based. See *Davis vs. Talcott*, 2 Kern., 184.

When a counter-claim has been made by the defendant, it will be extinguished by the operation of an offer, made by him, and accepted by the plaintiff. *Schneider vs. Jacobi*, 1 Duer, 694; 11 L. O., 220. See, as to the effect of such an offer on the question of costs, *Ruggles vs. Togg*, 7 How., 324; *Kilts vs. Seeber*, 10 How., 270.

As to the power of the courts to deny a discontinuance by the plaintiff, when such discontinuance would prejudice a counter-claim, already interposed by the defendant, see *Van Alen vs. Schermerhorn*, 14 How., 287.

When pleaded, a counter-claim must be pleaded, with precisely the same distinctness and particularity, as would be requisite in stating the same facts, as constituting a cause of action. That portion of the answer must contain all the elements of a complaint for the same cause, and must demand the same relief. And it is not sufficient, merely to aver that the counter-claim arose out of the transaction stated in the complaint, when such is its nature, but it must be shown by sufficient allegation of fact. *Brown vs. Buckingham*, 21 How., 190; 11 Abb., 387.

It is, of course, almost unnecessary to remark, that a counter-claim must always be separately stated, and kept perfectly distinct from other portions of the same answer, containing denials, or stating new matter by way of defence. See, as to the above requisitions, *Dewey vs. Hoag*, 15 Barb., 365; *Sheldon vs. Wood*, 2 Bosw., 267; *Moffatt vs. Sackett*, 18 N. Y., 522. And, when made under subdivision 2 of section 150, the answer must show upon its face, that the defendant's title to the claim set up by him, was perfect at the commencement of the action.

Van Valen vs. Lapham, 5 Duer, 689; *Same case*, 13 How., 240; *Rice vs. O'Connor*, 10 Abb., 362.

As to the right of a defendant, setting up matter by way of counter-claim, to demand affirmative relief against the plaintiff, see *Ogden vs.*

Coddington, 2 E. D. Smith, 317; *Anonymous*, 11 L. O., 350; *Dewey vs. Hoag*, and *Gage vs. Angell*, above cited; *Dobson vs. Pearce*, 2 Kern., 156; 1 Abb., 97; affirming *same case*, 1 Duer, 142; 10 L. O., 170; *Bridge vs. Payson*, 5 Sandf., 210, and numerous other cases. It is, in fact, inherent in the very power to set up a defence, virtually amounting to a cross-action, as conferred by the section. *Cochran vs. Webb*, 4 Sandf., 653, was decided prior to its amendment.

Indefiniteness of statement, will not be reason for rejecting this defence, where the essentials of it are apparent on the face of the pleading. The plaintiff's remedy, in such case, will be by motion for uncertainty. *Currie vs. Cowles*, 6 Bosw., 452.

CHAPTER IV.

COURSE OF THE PLAINTIFF, ON RECEIPT OF THE DEFENDANT'S PLEADING.

§ 181. *Proceedings in Impeachment of Adverse Pleading.*

(a.) GENERAL EXAMINATION.—FORMAL DEFECTS.

THE first thing to be looked to by the plaintiff, on receipt of the adverse pleading, is to see whether it be regular in point of form, and duly verified, when verification is requisite. See above, chapter II. of book VI., as to the formal requisites of pleading. If defective, such pleading should be returned forthwith, as there pointed out; and any objection on these or any other merely technical grounds must be taken at once, or it will be treated as waived. See, as to mode of return, *Jacobs vs. Marshall*, 6 Duer, 689.

A joint answer, of parties severally as well as jointly interested, unless verified by all, will be no answer, as regards those who omit to verify, and will be stricken out as such. *Andrews vs. Storms*, 5 Sandf., 609; *Alfred vs. Watkins*, 1 C. R. (N. S.), 343. The answer of a married woman, in her own person, and not by her next friend, was also taken off the file as no answer, as the Code then stood, in *Henderson vs. Easton*, 5 How., 201. See also *Phillips vs. Burr*, 4 Duer, 113.

(b.) SUBSTANTIAL DEFECTS—HOW IMPEACHED.

The different lines of procedure open to the plaintiff for this purpose are well defined by Barculo, J., in *Nichols vs. Jones*, 6 How., 355, as

follows: "Upon the whole, I think, the various provisions of the Code on this subject are consistent, and cover the whole ground precisely, neither more nor less. If an answer, otherwise good, is loaded with unnecessary and redundant matters, the plaintiff's counsel should move, under section 160, to have such matters expunged. If doubts are entertained as to the sufficiency in law of the answer, and the opinion of the court is desired, it must be obtained by demurrer. If, however, any defence is palpably insufficient, a motion for judgment, on the ground of frivolousness, is the proper course; and, if the matters of defence can be shown to be clearly *false*, a motion to strike out as *sham*, will reach the evil. These four modes cover all defects in an answer."

Similar views to the above are also laid down in *Harlow vs. Hamilton*, 6 How., 475; *People vs. McCumber*, 27 Barb., 632; 15 How., 186; affirmed, 18 N. Y., 315; *Thorn vs. New York Central Mills*, 10 How., 19; *Struver vs. Ocean Insurance Company*, 2 Hilt., 475; 9 Abb., 23; *Blake vs. Eldred*, 18 How., 240.

The impeachment of an answer by demurrer will form the subject of a section in the next succeeding chapter.

The expurgation from it of unnecessary or redundant matter, by motion under section 160, has already been fully considered, in chapter IV. of book VI.

There remain to be treated of the two following of the remedies above indicated:

Under section 152, "Sham and irrelevant answers and defences may be stricken out, on motion, and upon such terms as the court may in their discretion impose."

Under section 247, "If a demurrer, answer, or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of court, for judgment thereon, and judgment may be given accordingly."

The portion of section 152 which authorizes the striking out of irrelevant answers or defences, dates from the amendment of 1851. The powers conferred by that section were previously confined to such as were sham, in the strict acceptation of the term. Its operation was accordingly greatly restricted, as is apparent from the decisions prior to the amendment.

The distinction between that section and section 160, must also be carefully noted. Both authorize a striking out, but the cases to which they are applicable are essentially different.

The operation of section 152 extends only to irrelevant matter, constituting an entire defence, separately stated, or separately considered. If any portion of the defence, in which such matter is found, be relevant in any shape, that matter, however grossly objectionable in itself, cannot

be reached in this manner. The remedy is a motion for its expurgation, under section 160, the relevant portion of the allegation being permitted to stand. See *Slack vs. Cotton*, 2 E. D. Smith, 398. If, on the other hand, the answer itself, or any separate defence set up in it, be irrelevant as a whole, and not merely objectionable as containing an admixture of irrelevant matter, a motion under section 160 will not be proper, and resort should be had to section 152. See *Blake vs. Eldred*, 18 How., 240. In *Hull vs. Smith*, 1 Duer, 649; 8 How., 149, and *Quin vs. Chambers*, 1 Duer, 673; 11 L. O., 155, this distinction is, however, omitted to be observed.

Another essential distinction exists between the two remedies. The motion for partial irrelevancy under section 160 must, under rule 50 (40), be noticed before demurring to, or answering the pleading impeached, and within twenty days from its service. If not so noticed, the defect will be waived. There is no such restriction imposed upon a motion under section 152, on the ground of total irrelevancy, either of the answer in general, or of any specific defence set up. This objection goes, not to the form, but to the merits, and may be taken at any time. See *Miln vs. Vose*, 4 Sandf., 660; *Stokes vs. Hagar*, 7 L. O., 16; 1 C. R., 84.

The remedy, under section 152, does not extend to demurrers. It embraces, however, the striking out of irrelevant defences, constituting parts of an answer, leaving other portions of the pleading to stand. Section 247 is wider, so far as it gives a remedy in case of a frivolous demurrer, but narrower in other respects, inasmuch as the objection under it lies only to the pleading, considered as a whole. If any defence set up in that pleading be relevant, so as to raise a competent issue, this form of application is unsustainable, however grossly frivolous the rest of it may be. The plaintiff cannot, in such case, obtain his remedy by anticipation, but must go regularly to trial.

There exist, also, essential distinctions between the classes of pleadings to which the above sections are respectively applicable, the non-observance of which, in practice, has occasionally led to some confusion.

The distinction is thus drawn, in *Brown vs. Jennison*, 3 Sandf., 732; 1 C. R. (N. S.), 156: "A sham answer or defence, is one that is false in fact, and not pleaded in good faith. It may be perfectly good in form, and, to all appearance, a perfect defence. Section 152 provides for striking out such answers. A frivolous answer is one that shows no defence, conceding all that it alleges to be true. Each may be stricken out on motion, but it is under different provisions of the Code."

This distinction is approved of by the general term of the same

court, and more curtly stated, as follows, in *Hull vs. Smith*, 1 Duer, 649; 8 How., 149: "A sham answer is good upon its face, but false in fact; a frivolous answer, denies no material averment in the complaint, and sets up no defence." See also in the Supreme Court, *Lefferts vs. Snediker*, 1 Abb., 41; *Thorn vs. New York Central Mills*, 10 How., 19; *Leach vs. Boynton*, 3 Abb., 1; *Seward vs. Miller*, 6 How., 312.

The same principles, with an additional definition as to what constitutes an irrelevant answer, are restated in *Struver vs. Ocean Insurance Company*, 2 Hilt., 475; 9 Abb., 23: "A sham answer is one that is false in fact. A pleading is irrelevant, which has no substantial relation to the controversy between the parties to the action; and a frivolous answer is one which, assuming its contents to be true, presents no defence to the action." See also, as to what constitutes an irrelevant defence, *Walker vs. Hewitt*, 11 How., 395 (398).

(c.) APPLICATIONS UNDER SECTION 152.

Where an answer is irrelevant as a whole, it can scarcely happen but that it is also frivolous, and a motion under section 247 will be the more expedient course. The remedy for irrelevancy only is, therefore, more peculiarly applicable to the striking out of defences, separately stated.

In *Woodworth vs. Bellows*, however, 4 How., 24; 1 C. R., 129, relief of this nature was granted, and an answer wholly stricken out, which merely sought to lay ground for the adjudication of equities, as between co-defendants, without presenting any defence to the plaintiff's claim. See *Lee Bank vs. Kitching*, 11 Abb., 435; and *Bailey vs. Lane*, 21 How., 475; 13 Abb., 354, as to striking out an irrelevant defence.

But an entire answer, to be irrelevant, must not be pertinent to the cause of action, and must not serve to support any defence to it, in whole or in part. To strike it out, the irrelevancy or frivolousness must be palpable and clear, and must not require argument to establish it. If any question is raised, requiring consideration, it should be presented by demurrer. *Littlejohn vs. Greeley*, 22 How., 345; 13 Abb., 311.

As appears by the definitions above given, an essential element in a sham answer or defence is falsity. It must be false in fact, or it will not be sham. It must also be interposed in bad faith, or the court may refuse to exercise its summary power of striking out. *Benedict vs. Tanner*, 10 How., 455; *Gould vs. Robinson*, 1 Abb., 116; *Munn vs. Barnum*, 12 How., 563; 1 Abb., 281; *Farmers' and Mechanics' Bank of Rochester vs. Smith*, 15 How., 329; *Ostrom vs. Bixby*, 9 How., 57; *Fosdick vs. Groff*, 22 How., 158.

The People vs. McCumber, 18 N. Y., 315 ; affirming *same case*, 27 Barb., 632 ; 15 How., 186, may be looked upon as the leading case, in relation to applications under the present section, and establishes several important principles.

It first lays down, pp. 320, 321, the following definition : " A defence is sham, in the legal meaning of the term, which is so clearly false in fact, that it does not in reality involve any matter of substantial litigation. The chief characteristic of such a defence is its undoubted falsity. Such a formal defence is sometimes designated as a false defence. The words sham and false, applied to such a defence, signify the same thing."

The opinion then notices the former practice of not striking out a plea of the general issue, and lays down that this practice is now abolished, and that defences, by way of denial, according to the forms of the Code, " may be false or sham, and abused for improper purposes, as well as a defence of any other character," and are accordingly within the purview of the present section, pp. 322, 323.

It then establishes (p. 324), that the Code makes no distinction between verified and unverified answers in this respect, and there is none in principle. " If an answer clearly appears to be sham, the spirit of the Code in relation to pleadings, requires it should be stricken out, notwithstanding it has been verified in the usual form."

It disposes (p. 324) of the objection, that a motion on this ground amounts substantially to a trial of the cause upon affidavits, and decides it to be generally untenable.

It imposes, however (in p. 325), the following important limitations on the exercise of the above power, as thus generally asserted :

" This power should be carefully exercised, and not extended beyond its just limits, as above mentioned. It is a power simply to inquire whether there is, in fact, any question to be tried, and, if there is not, but the defence is a plain fiction, to strike out the fictitious defence. Where a defendant, on a motion to strike out his defence as sham, supports it by an affidavit, stating specially the grounds of it, he cannot, as a general rule, be deprived of the benefit of a trial of it in the ordinary mode ; a case for striking out does not exist."

This decision may be looked upon as settling, by paramount authority, two important controversies in relation to the operation of the section.

The first is, as to whether the power was, or was not, strictly confined to defences, stating new matter. This restriction was laid upon it, and defences, by way of denial, held to be altogether excluded from its operation, in *Davis vs. Potter*, 4 How., 155 ; 2 C. R., 99 ; *Temple vs. Murray*, 6 How., 329 ; *White vs. Bennett*, 7 How., 59 ; *Winne vs.*

Sickles, 9 How., 217; *Livingston vs. Finckle*, 8 How., 485; *Caswell vs. Bushnell*, 14 Barb., 393. Also, as *Sherman vs. Bushnell*, 7 How., 171; *Lefferts vs. Snediker*, 1 Abb., 41; *Goedel vs. Robinson*, 1 Abb., 116; *Grant vs. Power*, 12 How., 500; *Farmers' and Mechanics' Bank of Rochester vs. Smith*, 15 How., 329; *Gregg vs. Reader*, 15 How., 371. See also, *Gregory vs. Wright*, 11 Abb., 417.

These cases must now be considered as overruled, and the contrary doctrine supported, as laid down in *Mier vs. Cartledge*, 4 How., 115; *Same case*, 8 Barb., 75; 2 C. R., 125 (sustaining the decision at special term on this point); *Conklin vs. Vandervoort*, 7 How., 483; *Nichols vs. Jones*, 6 How., 355; *Walker vs. Hewitt*, 11 How., 395.

See also the following cases, since decided on the authority of *The People vs. McCumber*: *Corbett vs. Eno*, 22 How., 8; 13 Abb., 65; *Butterfield vs. Macomber*, 22 How., 150; *Fosdick vs. Groff*, 22 How., 158; *Elizabethport Manufacturing Company vs. Campbell*, 13 Abb., 86. See, however, *Mussina vs. Stillman*, 13 Abb., 93, adhering to the former doctrine.

The other controversy arose, with relation to the effect of the verification of an answer. It was laid down that the mere fact of verification was of itself controlling, and that a verified answer could not, under any circumstances, be stricken out as false. *Mier vs. Cartledge*, 8 Barb., 75; 2 C. R., 125; *Tracy vs. Humphrey*, 5 How., 155; 3 C. R., 190; *Catlin vs. McGroarty*, 1 C. R. (N. S.), 291; *Miln vs. Vose*, 4 Sandf., 660; *Caswell vs. Bushnell*, 14 Barb., 393; also as *Sherman vs. Bushnell*, 7 How., 171; *Gregg vs. Reeder*, 15 How., 371. See likewise, *Gregory vs. Wright*, 11 Abb., 417.

These cases must also be held to be overruled, and the contrary doctrine established, as held previously in *Nichols vs. Jones*, 6 How., 355; *Ostrom vs. Bixby*, 9 How., 57 (60); *Thorn vs. New York Central Mills*, 10 How., 19 (25); *Walker vs. Hewitt*, 11 How., 395; *Manufacturers' Bank of Rochester vs. Hitchcock*, 14 How., 406; *Farmers' and Mechanics' Bank of Rochester vs. Smith*, 15 How., 329; *Blake vs. Eldred*, 18 How., 240; *Reed vs. Latson*, 15 Barb., 9 (17). See also decisions following *The People vs. McCumber*, above cited.

The following cases, in which denials of facts, presumptively within the knowledge of a defendant, and evidently interposed for the purpose of delay, have been decided to be no defence, and stricken out, come clearly within the same general principle, as to the falsity of an answer, as above established: *Richardson vs. Welton*, 4 Sandf., 708; *Hance vs. Remming*, 2 E. D. Smith, 48; 1 C. R. (N. S.), 204. (See also *Mott vs. Burnett*, 2 E. D. Smith, 50; affirming, *pro tanto*, *same case*, 1 C. R. (N. S.), 225.) *Fleury vs. Roger*, 5 Sandf., 646; 9 How., 215; *Flammer vs. Kline*, 9 How., 216; *Fleury vs. Brown*, 9 How., 217; *Ketchum*

vs. *Zerega*, 1 E. D. Smith, 553; *Walker* vs. *Hewitt*, 11 How., 395; *Hecker* vs. *Mitchell*, 6 Duer, 687; 5 Abb., 453; *Slack* vs. *Cotton*, 2 E. D. Smith, 398; *Wesson* vs. *Judd*, 1 Abb., 254.

The above principles will not, however, be carried out with rigor, nor, as a general rule, will a defendant be deprived of the benefit of a defence, unless it is incontestably false, and put in, evidently, for the purposes of delay. See 18 N. Y., 325, above referred to.

Thus, where the moving affidavits merely tended to avoid the defence set up, and not to show it to be untrue, the answer was allowed to stand. *Wirgman* vs. *Hicks*, 6 Abb., 17.

Very slight evidence of good faith, will also prevent the pleading from being stricken out. *Munn* vs. *Barnum*, 12 How., 563; 1 Abb., 281; *Farmers' and Mechanics' Bank of Rochester* vs. *Smith*, 15 How., 329; *Gregg* vs. *Reader*, 15 How., 371; *Darrow* vs. *Miller*, 5 How., 247; 3 C. R., 241; *Leach* vs. *Boynton*, 3 Abb., 1; *Fosdick* vs. *Groff*, 22 How., 158.

An answer, containing the elements of a valid defence, though badly pleaded, will not be stricken out. *Alfred* vs. *Watkins*, 1 C. R. (N. S.), 343; *Seward* vs. *Miller*, 6 How., 312; *Struver* vs. *Ocean Insurance Company*, 2 Hilt., 475; 9 Abb., 23; *Gregory* vs. *Wright*, 11 Abb., 417. And even when manifestly put in for delay, the answer must be false in fact, or it will not be sham. *Garvey* vs. *Fowler*, 4 Sandf., 665; 10 L. O., 16.

Matter, constituting a clearly untenable defence, was stricken out, in *Howard* vs. *Franklin Marine and Fire Insurance Company*, 9 How., 45. See also *Lee Bank* vs. *Kitching*, 11 Abb., 435. See, as to a defence, wholly defective in form, *Blake* vs. *Eldred*, 18 How., 240.

When an answer, duly verified, states a sufficient defence, as within the knowledge of the defendant, it should not be stricken out as sham. But this rule should not apply to a statement of transactions between the plaintiff and third parties, when contradicted by sufficient affidavits. In such a case, the defendant must show that the defence is made in good faith. *Miller* vs. *Hughes*, 21 How., 442; 13 Abb., 93, note.

See also, as to striking out the defence of usury, on affidavits showing a sufficient explanation, the defendant failing to show facts sufficient to constitute an usurious agreement. *Bailey* vs. *Lane*, 21 How., 475; 13 Abb., 354. Likewise, as to an untenable plea of foreign usury, *Willis* vs. *Cameron*, 12 Abb., 245.

In *Van Buskirk* vs. *Roberts*, 14 How., 61, a separate defence was stricken out for inconsistency, but whether a motion will properly lie on that ground, seems questionable. See subject heretofore considered in book VI., chapter I., under that head. See, *per contra*, *Smith* vs. *Wells*, 20 How., 158 (167).

In *Drake vs. Cockcroft*, 4 E. D. Smith, 34 ; 10 How., 377 ; 1 Abb., 203, portions of an answer, consisting of mere denials of a conclusion of law, were stricken out.

A motion of this nature is maintainable as to parts of a pleading. Although in the nature of a demurrer, it is not subject to the same restrictions. *De Santes vs. Searles*, 11 How., 477.

As to granting leave to part of the defendants to answer over, in granting a motion of this description, as against the others, see *Burrall vs. Bowen*, 21 How., 378.

(d.) APPLICATION UNDER SECTION 247.

This form of application, like the preceding, is one only admissible in extreme cases, and, being a matter of strict practice, is not entitled to any special favor of the court.

In cases where the question is raisable by demurrer to the answer, a motion will generally be inadmissible. Demurrer will accordingly be the more proper course, when the defence set up consists of new matter, except where such new matter is palpably no defence upon its face. Prior to 1857, when an answer could be generally demurred to, this principle was of still wider application. See *Miln vs. Vose*, 4 Sandf., 660 ; *White vs. Kidd*, 4 How., 68 ; *Alfred vs. Watkins*, 1 C. R. (N. S.), 343 ; *Scovill vs. Howell*, 2 C. R., 33. The restriction, imposed in that year, confining the power of demurrer to answer, to allegations of new matter, has somewhat tended to enlarge the practical scope of section 247, as regards merely negative defences.

Still, in either case, a motion on this ground will not, as a general rule, be entertainable, where the question, as to whether the defence is, or is not, frivolous, is open to any doubt whatever. To ground the objection, and warrant a judgment under section 247, "the case should be entirely clear, palpable on the statement of the facts, and requiring no argument to make it more apparent." *Rae vs. The Washington Mutual Insurance Company*, 6 How., 21 ; 1 C. R. (N. S.), 185 ; *Hull vs. Smith*, 1 Duer, 649 ; 8 How., 149 ; *Smith vs. Mead*, 14 Abb., 262 ; *Shearman vs. New York Central Mills*, 1 Abb., 187 (190) ; *Leach vs. Boynton*, 3 Abb., 1 ; *Seward vs. Miller*, 6 How., 312 ; *Littlejohn vs. Greeley*, 22 How., 345 ; 13 Abb., 311.

On an application of this nature, the truth or falsity of the defence interposed is not material to the question, which is merely, whether it does, or does not, constitute a defence. *Hecker vs. Mitchell*, 6 Duer, 687 ; 5 Abb., 453 ; *Reed vs. Latson*, 15 Barb., 9 (17) ; *Leach vs. Boynton*, 3 Abb., 1.

Nor will mere vagueness in statement constitute a sufficient ground. *Kelly vs. Barnett*, 16 How., 135 ; *Martin vs. Kanouse*, 11 How., 567 ;

2 Abb., 327; *Struver vs. Ocean Insurance Company*, 2 Hilt., 475; 9 Abb., 23; *Alfred vs. Watkins*, 1 C. R. (N. S.), 343.

And, if any material issue, however slight in its nature, be joined by the pleading objected to, the adverse party cannot claim this summary remedy, but must leave the action to proceed in its ordinary course. *Davis vs. Potter*, 4 How., 155; 2 C. R., 99; *Garvey vs. Fowler*, 4 Sandf., 665; 10 L. O., 16; *Lord vs. Cheeseborough*, 4 Sandf., 696; 1 C. R. (N. S.), 322; *Williams vs. Richmond*, 9 How., 522; *Metropolitan Bank vs. Lord*, 4 Duer, 630; 1 Abb., 185; *Shearman vs. New York Central Mills*, 1 Abb., 187; *Wesson vs. Judd*, 1 Abb., 254; *Leach vs. Boynton*, 3 Abb., 1; *Duncan vs. Lawrence*, 3 Bosw., 103; 6 Abb., 304; *Smith vs. Mead*, 14 Abb., 262.

The application rests, however, very much in the discretion of the court; and, where a defence was evidently bad, relief of this nature has not unfrequently been granted on application under this section, even though the question might have been disposed of, by demurrer in the ordinary form.

Thus, as to an evasive denial, of facts clearly within the defendant's means of knowledge. *Chapman vs. Palmer*, 12 How., 37; *Thorne vs. New York Central Mills*, 10 How., 19.

Or an answer, merely denying a conclusion of law, and not the facts on which it is based. *Witherspoon vs. Van Dolar*, 15 How., 266; *Gilbert vs. Covell*, 16 How., 34; *Higgins vs. Rockwell*, 2 Duer, 650; *Fosdick vs. Groff*, 22 How., 158. But not so, if the conclusion denied forms the issue actually tendered by the complaint. *McKnight vs. Hunt*, 3 Duer, 615.

An answer tendering no issue, except one that is immaterial, has also frequently been held frivolous. *St. Mark's Fire Insurance Company vs. Harris*, 13 How., 95; *Wood vs. Derrickson*, 1 Hilt., 410; *Fosdick vs. Groff*, 22 How., 158; *Pettigrew vs. Chave*, 2 Hilt., 546; *Hecker vs. Mitchell*, 6 Duer, 687; 5 Abb., 453 (455); *Elizabethport Manufacturing Company vs. Campbell*, 13 Abb., 86. Or, when it sets up matter wholly inadmissible as a defence, but merely tending to mitigation of damages. *Lane vs. Gilbert*, 9 How., 150; *Saltus vs. Kip*, 5 Duer, 646; 12 How., 342; 2 Abb., 382; *Gilbert vs. Rounds*, 14 How., 46. Or where the new matter set up is merely such that, if set up by way of special plea, under the former system, it would have been held bad on general demurrer. *Strong vs. Stevens*, 4 Duer, 668.

A gross mispleader, in setting up a simply negative defence, has also been held to render an answer frivolous. *Shearman vs. New York Central Mills*, 1 Abb., 187; *Kamlah vs. Salter*, 1 Hilt., 558; 6 Abb., 226; *Tompkins vs. Acer*, 10 How., 309.

A plea of usury, wholly defective in not setting out the facts relied

on, was also held to have been properly adjudged frivolous, on motion under the section, in *Manning vs. Tyler*, 21 N. Y., 567.

Where a defence set up is clearly untenable under former decisions, it may be ground for holding it to be frivolous. *Strong vs. Stevens*, 4 Duer, 668; *Bank of Wilmington vs. Barms*, 4 Abb., 226; *The People vs. McCumber*, 27 Barb., 632 (638); 15 How., 186 (192); affirmed, 18 N. Y., 315.

And, where uncontroverted allegations of the complaint showed a defence set up to be wholly untenable, judgment was awarded upon it as frivolous. *Reilly vs. Cook*, 22 How., 93; 13 Abb., 255.

The questions as to what will or will not constitute a frivolous demurrer, have been already considered, and the decisions in point cited, in chapter II. of the present book, section 172.

(e.) FORM AND INCIDENTS OF ABOVE MOTIONS.

In either case, the notice of motion should be framed in exact accordance with the terms of the section under which it is made.

If the application be made under section 152, the demand should be, that the pleading, or the defence, impeached, be stricken out as sham and irrelevant, or as either, if only one of those objections be applicable. The motion is an ordinary one, brought on in the usual manner, and on the usual notice.

The motion under section 247 is, on the contrary, of a special nature. Five days' notice only is necessary, and the motion may be made to a judge, either in or out of court. The notice must also state that a judgment on the frivolous pleading will be applied for. If it merely give notice of application for an order, it will be insufficient. And it must not ask that the pleading be stricken out. That pleading must, on the contrary, remain upon and constitute part of the record, in order to warrant the decision, and with a view to its revision, on appeal, if taken. See, on these points, *Darrow vs. Miller*, 5 How., 247; 3 C. R., 241; *Rae vs. Washington Mutual Insurance Company*, 6 How., 21; 1 C. R. (N. S.), 185; *Hull vs. Smith*, 1 Duer, 649; 8 How., 149; *Lefferts vs. Snediker*, 1 Abb., 41; *Briggs vs. Bergen*, 23 N. Y., 162. In *Reilly vs. Cook*, 22 How., 93; 13 Abb., 255, this distinction seems to have been disregarded.

A motion under this section will, in all cases, be necessary in order to obtain any relief, for, however frivolous a pleading may be, it cannot, if duly served, be disregarded.

Either form of motion is based upon the pleadings themselves. No extrinsic affidavits will therefore be necessary to be served with the notice. Nor will any be requisite, when the adverse party appears. *Darrow vs. Miller*, 5 How., 247; 3 C. R., 241.

The plaintiff should not ask too much. See *Wesson vs. Judd*, 1 Abb., 254. That he lays ground only for partial relief on the hearing, will not form an objection to the entertaining of the motion. *De Santes vs. Searles*, 11 How., 477. A general demand for relief should be always subjoined to the specific notice, as it may be made the ground for a partial striking out, though the application, as originally made, may not be fully sustainable. *Blake vs. Eldred*, 18 How., 240; *Hecker vs. Mitchell*, 5 Abb., 453; 6 Duer, 687. See also *Hull vs. Smith*, 1 Duer, 649; 8 How., 149.

See, as to the power of granting relief under the usual general demand, by directing the defendant to satisfy admitted portions of the plaintiff's claim, in connection with a motion of this nature, *Fosdick vs. Groff*, 22 How., 158.

The exact objects of the motion, and the exact portions of the pleading sought to be impeached, if the objection be partial, ought in all cases to be distinctly pointed out. *Blake vs. Eldred*, *supra*; though this is not indispensable: see *Bailey vs. Lane*, *infra*.

It is in the power of a plaintiff, or other party aggrieved by the adverse pleading, to combine a demand for both classes of relief, and also one for a partial expunging under section 160, if he think fit, in one and the same motion. *People vs. McCumber*, 18 N. Y., 315; affirming *same case*, 27 Barb., 632; 15 How., 186. See also *Bailey vs. Lane*, 21 How., 475; 13 Abb., 354; *Burrall vs. Bowen*, 21 How., 378.

And not only so, but if he omit to do so, he makes such omission at his peril. Objections of the above nature cannot be split up into several motions. They must all be embodied in the original notice, or relief may be refused on a subsequent application. *Desmond vs. Woolf*, 6 L. O., 389; 1 C. R., 49; *Thursby vs. Mills* (No. 2), 11 How., 114.

A motion on the above grounds, if made within the period during which the pleading impeached is amendable, may be defeated, by an amendment of that pleading in due course. It will then be denied, but without costs. *Currie vs. Baldwin*, 4 Sandf., 690; *Burrall vs. Moore*, 5 Duer, 654.

And, on the hearing of the motion, the judge has full power to grant either an absolute or a conditional order, allowing an opportunity of amendment as he may see fit. *Witherhead vs. Allen*, 28 Barb., 661; *Witherspoon vs. Van Dolar*, 15 How., 266. And this, either in or out of court, where the application is under section 247. *Fales vs. Hicks*, 12 How., 153. These cases seem to overrule the contrary *dictum* in *Shearman vs. New York Central Mills*, 1 Abb., 187 (190). See also, as to a motion under section 152, *Blake vs. Eldred*, 18 How., 240 (244). But, if there be any doubt as to the propriety of extending this relief, the court may put the defendant to his motion at special term.

See *Marquise vs. Brigham*, 12 How., 399; *Tompkins vs. Acer*, 10 How., 309.

In opposing a motion on either ground, the defendant should, in all cases, be prepared with the usual affidavit of merits, if not already filed and served. And, where the good faith of the pleading is impeached, he must also tender a full and sufficient explanation by affidavits. A mere technical affidavit of merits, or a mere denial of bad faith, unaccompanied by sufficient explanation, will not be sufficient. The existence of a valid and sufficient *bonâ fide* defence must be shown. If omitted, the motion will be granted, and leave to plead over may be refused. See *People vs. McCumber*, above cited; *Farmers' and Mechanics' Bank of Rochester vs. Smith*, 15 How., 329; *Allen vs. Fosgate*, 11 How., 218; *Appleby vs. Elkins*, 2 Sandf., 673; *Walker vs. Hewitt*, 11 How., 395; *Fleury vs. Roger*, 5 Sandf., 646; *Ketchum vs. Zerega*, 1 E. D. Smith, 553; *Slack vs. Cotten*, 2 E. D. Smith, 398; *Corbett vs. Eno*, 29 How., 8; 13 Abb., 65; *Miller vs. Hughes*, 21 How., 442; 13 Abb., 93, note.

The various points which have arisen as to the nature of the decision on a motion under section 247, and as to whether it is properly a judgment or an order; and also as to the mode of reviewing, and the extent to which such a decision will be reviewed on appeal, will be hereafter noticed under their appropriate heads. If a pleading have been rightly overruled, the question as to whether it was or was not actually frivolous, will not be entertained on such an appeal. *Wesley vs. Bennett*, 5 Abb., 498; 6 Duer, 688; *Martin vs. Kanouse*, 11 How., 567; 2 Abb., 327; *Griswold vs. Laverty*, 3 Duer, 690; 12 L. O., 316; *Witherhead vs. Allen*, 28 Barb., 661 (668); *Lee vs. Ainslie*, 1 Hilt., 277; 4 Abb., 463.

If the whole of an answer be stricken out as irrelevant, without leave to plead over, the plaintiff becomes entitled to sign judgment as on default, nor can the defendant amend, or serve another answer. See *Aymar vs. Chase*, 1 C. R. (N. S.), 141.

(f.) MOTIONS TO ELECT.

The present is also the proper period for any other applications to the court, of a nature analogous to the above. However defective it may be in its essentials, an adverse pleading, when regular on its face, cannot be treated as a nullity, but the defect must be impeached in regular form.

For instance, a demurrer, put in conjointly with an answer to the same complaint, or the same cause of action, is clearly bad. The defendant, however, cannot disregard it; his course, under those circumstances, will be to move to strike out either the demurrer or the

answer, or that the defendant may be compelled to elect by which defence he will abide. *Spellman vs. Weider*, 5 How., 5; *Slocum vs. Wheeler*, 4 How., 373; *Struver vs. Ocean Insurance Company*, 16 How., 422.

The same power exists, with reference to the assertion of inconsistent defences, and, when the objection is sustainable, a motion of the same description affords the proper remedy. As a general rule, however, this objection will not lie under the Code, where such defences are separately stated. See this subject heretofore fully considered, and the cases in point cited in book VI., chapter I., section 123, under the head of *Inconsistency*. See especially, *Hackley vs. Ogman*, 10 How., 44, there referred to.

In *Groshon vs. Lyons*, 1 C. R. (N. S.), 348, it is laid down that, where the pendency of another action has been set up by the answer of the defendant, it will be irregular for the plaintiff to reply to such answer; and the proper practice will be for him to apply at once for a reference upon that particular point, the result of which will dispose of the preliminary question. See also *Farmers' Loan and Trust Company vs. Hunt*, 1 C. R. (N. S.), 1.

The proper way of bringing the question, and the effect of such pendency upon the suit, to a conclusive result, will be by motion on the referee's report, when obtained. See, as to such a motion, when the decision is in favor of the defendant, *Blydenburgh vs. Borst*, 5 Duer, 657. When the plaintiff prevails, his application should be, that the particular defence be stricken out. If, when this is done, no substantial defence is left standing in the answer, he may include in his application, a demand of judgment upon it, as frivolous, combining both species of relief in one notice. See cases cited in last subdivision.

(g.) MOTIONS ON GROUND OF CONTEMPT.

In some cases, it may be competent for the plaintiff to move to strike out the answer of the defendant, as a punishment of his contempt of court. See such relief granted conditionally, on non-compliance with an order directing the payment of costs and alimony, *Barker vs. Barker*, 15 How., 568; *Farnham vs. Farnham*, 9 How., 231.

Similar relief may also be obtainable, in respect of the omission of a defendant to comply with an order for discovery: see section 388, rule 16 (10); or refusing to submit to an examination, section 394. These questions will, however, be considered at a subsequent stage of the work, in connection with those particular proceedings.

§ 182. *Motion to Satisfy Admitted Portions of Demand.*

The present will be the appropriate time for consideration of the remedies provided in this respect, by section 244.

That section has been already cited *in extenso*, and the mutations which have taken place in it from time to time, noticed in detail, in book V., chapter V., section 116. It may be convenient, however, to repeat in terms, this portion of it, which runs thus :

“ When it is admitted by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

“ Whenever, in the exercise of its authority, a court shall have ordered the deposit, delivery, or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience, as for contempt, may make an order, requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the court.

“ When the answer of the defendant, expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy.”

These provisions, as there noticed, date substantially from the amendment of 1851, except that the power of enforcing the order as a judgment, contained in the last clause, was added on the amendment of 1857. Before that year, the only mode of enforcement was as a provisional remedy, *i. e.*, by process of contempt, without the alternative now allowed, of issuing process in the nature of execution. This amendment, in its practical effect, tends to increase the scope, whilst it diminishes, to a certain extent, the stringency of the remedy as here provided. See cases below noticed.

It will be observed, that the two first clauses of the provisions, as cited, apply equally to cases, where the defendant's admission of money or property in his hands is obtained on his examination, as by means of his pleading. It will be, therefore, necessary to advert again to this part of the section, on a subsequent occasion, passing over that branch of the subject for the present.

This portion of the section has not, however, been made the subject

of much discussion. The remedy provided by it is patent, and the form of the motion grounded upon it obvious.

The application should be in the terms of the section, with the usual supplementary demand for further order or relief, the motion being grounded upon the admission relied on. And the order, when made, should be served personally, as the ulterior remedy may lie by process of contempt. Code, section 418.

Where the court has imposed the giving of security as a condition of granting the motion, that security should be prepared and filed, and notice of the filing, or a copy of it, with such notice indorsed, served simultaneously with the order.

In *Burhaus vs. Casey*, 4 Sandf., 706, this particular form of the remedy was granted, and funds in the hands of the defendant, intrusted to his charge for payment to a third party, were ordered to be deposited in court, or paid to the third party in question, within ten days; and, in the *same case*, 4 Sandf., 707, the same defendant was held arrestable, in respect of his neglect to perform his required duties.

In *Roberts vs. Law*, 4 Sandf., 642, where the defendant admitted partnership funds to be in his hands, which, on his statement, belonged to the representatives of his deceased partner, he was ordered to pay over such funds, though the affairs of the firm were still unsettled. The plaintiffs were required, however, to give security to contribute towards payment of outstanding claims, if established, and also their share of future expenses; and the defendant was allowed to retain sufficient to cover claims against the deceased partner, contested in the suit itself.

The remedy under the last subdivision, was foreshadowed in *Tracy vs. Humphrey*, 5 How., 155; 3 C. R., 190, where similar relief was granted, somewhat summarily perhaps, under the state of the law at that time.

Whilst the enforcement of the remedy lay merely in process of contempt, involving imprisonment of the defendant, the courts were indisposed to grant this relief, especially where bad faith could not be imputed to the defendant. Thus, in *Smith vs. Olszen*, 4 Sandf., 711, where the defendant had already offered judgment for the amount admitted by him, an order was refused. See also *Ryder vs. Union India Rubber Company*, 1 Abb., 444, (note). See, likewise, as to a sum before offered to, but refused by the plaintiff, *St. John vs. Thorne*, 2 Abb., 166. A more extended view has been taken of the operation of the section in some cases, and orders of this description have been made in ordinary actions, when the admission of partial indebtedness has been clear; notwithstanding a previous general offer of judgment for the amount admitted. *Merritt vs. Thompson*, 3 E. D. Smith, 599;

10 How., 428 ; 1 Abb., 223 ; *Meyers vs. Trimble*, 3 E. D. Smith, 607 ; 1 Abb., 399 ; affirming *same case*, 1 Abb., 220 ; 3 E. D. Smith, 608 ; *Quintard vs. Secor*, 3 E. D. Smith, 614 ; 1 Abb., 393. See also *Dusenberry vs. Woodward*, 1 Abb., 443, as to cases where the defendant stands in a fiduciary capacity.

In both *Meyers vs. Trimble*, and *Quintard vs. Secor*, however, it is admitted that the remedy by process of contempt must be cautiously administered, and that inability on the part of the defendant to pay, might be admissible as a sufficient excuse for his contumacy on such process.

In *Merritt vs. Thompson*, the amount had been actually deposited by the defendant, so that immediate question did not arise. The Superior Court are more lenient in their views on the subject, and hold that, unless it is clear that the defendant holds the money in a fiduciary capacity at the time of the order, so as to be then arrestable in respect of its non-payment, an order for satisfaction should not be granted, but the defendant should be left to his ordinary remedies. See *Dusenberry vs. Woodward*, 1 Abb., 443, *supra*. The same principle is maintained in the Supreme Court, in *Lane vs. Losee*, 11 How., 360 ; 2 Abb., 129. See, likewise, *Russel vs. Meacham*, 16 How., 193 ; *Duncan vs. Ainslie*, 26 Barb., 199.

This line of decisions were all previous to the amendment of 1857. That amendment removes the difficulty, as it is now competent for the court to order the enforcement, as on a judgment, of a sum admitted to be due in respect of a mere naked indebtedness ; and, as on a provisional remedy, when the defendant stands in a fiduciary capacity, or process against his person might be otherwise obtainable. See *Guict vs. Murphy*, 18 How., 411 ; *Russell vs. Meacham*, 16 How., 193 ; *Duncan vs. Ainslie*, 26 Barb., 199.

The admission must, however, be total, to warrant an order of this nature. Thus, where the defendants admitted a sum to be in their hands, offering to pay it into court, but ignored the plaintiff's title, an order was refused. *Bender vs. Sherwood*, 15 How., 258. See also *Slawson vs. Conkey*, 10 How., 57, as to an admission of liability on contract, but a denial of it as a liability in tort, according to the form of the complaint.

On a subsequent occasion, however, an order was made in the same action, for payment of the same amount, a more extended view being taken of the operation of the section. *Slawson vs. Conkey*, 1 Abb., 228.

It was also held, in the *same case*, 10 How., 57, that, where the admission, such as it is, extends, not to part only, but to the whole of the plaintiff's claim, the case does not come under the section, but the plaintiff's application should be for judgment on the pleadings.

Where, too, the amount of the plaintiff's claim is unliquidated, no order will be made. *Coursen vs. Hamlin*, 2 Duer, 513. See also *Dolan vs. Petty*, 4 Sandf., 673.

It seems to be settled that such an order may be made, as to an admitted portion of a single demand, leaving the controversy to proceed as to the contested balance. See *Guict vs. Murphy*, 18 How., 411; *Duncan vs. Ainslie*, 26 Barb., 199. See also *Merritt vs. Thompson*; *Myers vs. Trimble*; and *Quintard vs. Secor*; *Slanson vs. Conkey*, 1 Abb., 228; *Baker vs. Nussbaum*, 1 Hilt., 549. In *Russell vs. Meacham*, 16 How., 193, the court doubted whether it was proper to grant this relief, where it had the effect of splitting up a single cause of action. It was, however, allowed in that case, the admission extending to the whole of a separate count of the complaint. The doubt seems, however, to be overruled, by the general effect of the decisions above referred to.

In *Baker vs. Nussbaum*, 1 Hilt., 549, it was held, that rule 57 (35), granting twenty days for the payment of costs, or performance of conditions imposed by an order, has no application to a motion of this description.

See *Fosdick vs. Groff*, 22 How., 158, as to the power of granting relief of this nature, under the usual general demand, in connection with a motion for judgment, on the ground of defects in the answer.

§ 183. *Amendment of Complaint.*

It will be necessary for the plaintiff to consider, at this juncture, whether, on the defence, as disclosed by the pleading of the defendant, it may not be necessary for him to amend his complaint, either to obviate any objection taken by demurrer, or to meet any fresh aspect of the case, suggested by statements contained in the defendant's answer.

The pleadings should be carefully considered with this view, and considered in due time, as the Code allows him only the usual twenty days for that purpose, and, if he omit to do so within that time, he loses his power to amend as of course. He will, on the contrary, be driven to a special application, which, though entertainable at any time, may, or may not, be granted, in the discretion of the court. If he require more time, he should be careful to obtain in due season, either a consent or an order for extension, in the usual manner. The subject of amendment has been already fully treated in book VI., chapter III., devoted to its consideration.

If he decide that the complaint requires no amendment, the next point to be considered is, whether the answer may, or may not, require a reply, or be open to a demurrer; to which subjects the next chapter of this work is devoted.

§ 184. *Discontinuance.*

Before proceeding, however, to those considerations, it may be expedient to take a glance at this proceeding, as one admissible, it is true, at any stage, but more eminently appropriate, for obvious reasons, to this period of the action, in case, on a careful examination of the pleadings, the plaintiff is satisfied that the defence set up must prevail, or is otherwise convinced of the inexpediency of further prosecution of the action, either in a general point of view, or with reference to the peculiar form in which it has been brought.

No particular form is requisite for the notice of discontinuance, but it should of course be in writing, be duly and properly served, and be accompanied with a tender of the full amount of costs and disbursements then actually due, as above referred to. It is usual, and will be always advisable, to obtain at the same time a consent from the adverse party to dismiss the complaint without costs, and to obtain and enter the usual order thereon, in order that the records of the court may be duly discharged of the suit, and that no question may arise thereafter on the subject. If a consent be refused, the order should be applied for, on proof of the service of the notice of discontinuance, and payment or tender of the costs. In such case, it should be on the usual notice to the adverse party.

In the first district of the Supreme Court, an order for discontinuance by consent, may be entered by the clerk, without the judge's signature, under the special order of the 29th of September, 1859, before cited in book IV., section 72. In the other districts and tribunals, the judge's signature is necessary.

The order should be obtained and entered in all cases, except where the plaintiff may be disposed to place full reliance in the good faith of the defendant. And, even in this case, it would be better never to omit it. The mere service of a notice, is of itself insufficient to work an actual discontinuance, and the old practice of always entering an order is still virtually in force. *Schenck vs. Fancher*, 14 How., 95; *Averill vs. Patterson*, 6 Seld., 500; 10 How., 85; *Bedell vs. Powell*, 13 Barb., 183; 3 C. R., 61; *Swart vs. Borst*, 17 How., 69 (71). So, likewise, as to a consent obtained from the defendant in person, but never acted upon, either by notice to the attorney, or entry of an order. *Pilger vs. Gou*, 21 How., 155; 13 Abb., 244.

But where the order itself provided that the plaintiff might discontinue, by service of a notice within a given time, it was decided that such service would have been sufficient, without the entry of a second order. It was held, however, that the right was gone, by omis-

sion to serve within the prescribed period, and that an appeal from the order had no operation as an extension. *Ferry vs. Bank of Central New York*, 9 Abb., 100.

In cases where a defence put in, operates by way of surprise upon the plaintiff, he may be allowed to discontinue without costs, as against a defendant setting up that defence, on a special application.

Thus, this relief has been granted, on the defence of infancy being interposed by one of several co-defendants. *Cuyler vs. Coats*, 10 How., 141; *Wellington vs. Classon*, 18 How., 10; 9 Abb., 175; *Butler vs. Morris*, 1 Bosw., 329. See likewise *St. John vs. Hart*, 16 How., 192.

So likewise, as to the defence of privilege from suit. *Taaks vs. Schmidt*, 19 How., 413.

So likewise, where the suit was to sustain the plaintiff's right under an appeal, taken conformably to existing practice, but subsequently adjudged by the Court of Appeals to be void. *Sunney vs. Roach*, 4 Abb., 16.

So likewise, in a case of misnomer of a defendant, not actually served, but who volunteered an appearance. *Waterbury Leather Manufacturing Company vs. Krause*, 1 Hilt., 560; 9 Abb., 175, note.

It has been held that the plaintiff may also discontinue without costs, as against a defendant who has not actually appeared, though he may have retained an attorney. *Schenck vs. Fancher*, 14 How., 95; *Averill vs. Patterson*, 6 Seld., 500; 10 How., 85. See, however, a contrary view taken on this point, in *Foster vs. Bowen*, 1 C. R. (N. S.), 236, and *Weigan vs. Held*, 3 Abb., 462.

A plaintiff in foreclosure may, on receiving his debt and costs, discontinue without costs, as against the mortgagor, or junior encumbrancers. *Gallagher vs. Egan*, 2 Sandf., 742. See also, as to discontinuance of proceedings against a manufacturing corporation, on payment of the plaintiff's claim, where no other creditors had as yet intervened and acquired rights under the proceedings. *Angell vs. Sillsbury*, 19 How., 48.

A motion of the above nature must be made at once, on the ground of the discontinuance becoming known. If the plaintiff omits to do so, he will not be relieved from any subsequent costs, but must pay them. *St. John vs. Hart*, 16 How., 192; *Lowerre vs. Vail*, 5 Abb., 229. See also *Butler vs. Morris*, 1 Bosw., 329 (330). In that case a discontinuance of this description was allowed at the actual trial, the objection then first becoming apparent.

Of a similar nature will be the plea of an insolvent's or bankrupt's discharge, or any other similar line of defence, unknown to the plaintiff when the action was commenced. Under circumstances of this description, a discontinuance without costs may probably be granted.

On the death of a sole defendant, the plaintiff is entitled, as of right,

to discontinue, and the representatives cannot compel him to proceed with the action. *Keene vs. La Farge*, 1 Bos., 671; 16 How., 377.

Where a defendant had answered jointly with others, and his co-defendants had made an offer of judgment, it was held that the plaintiff, on accepting and entering up judgment on that offer against the one defendant, might discontinue without costs as to the other. *Stafford vs. Onderdonk*, 8 Barb., 99; 2 C. R., 115.

But, if the plaintiff voluntarily dismisses the case at the trial, as against some of the defendants jointly answering, proceeding against the others, payment of the costs of the former may be imposed. *Marks vs. Bard*, 1 Abb., 63.

A discontinuance or dismissal of the above nature, entitles the plaintiff to bring a second action, against the defendants so dismissed (*Earl vs. Campbell*, 14 How., 330); and, where he cannot serve co-defendants in tort, he may discontinue as to them, at any time before the trial. *McKenzie vs. Hackstaff*, 1 E. D. Smith, 75.

But, as a general rule, and unless special circumstances intervene, a plaintiff, on discontinuing after appearance of the defendant, must pay all the latter's costs up to that time. *Averill vs. Patterson*, 6 Seld., 500; 10 How., 85; *Bedell vs. Powell*, 13 Barb., 183; 3 C. R., 61; *Morrison vs. Ide*, 4 How., 304; 3 C. R., 27; *Pignolet vs. Daveau*, 2 Hilt., 584; *North vs. Sargeant*, 14 Abb., 223.

See, as to the disposition to be made, with reference to the costs of a motion, pending at the time of discontinuance, *Crockett vs. Smith*, 14 Abb., 62. And, in the same case, a discontinuance was held to have the effect of a judgment.

When an equity suit has been continued by bill of revivor and supplement, the plaintiff cannot subsequently discontinue, without payment of the costs of both suits from the beginning. *Fisher vs. Hall*, 9 How., 259.

The amount of costs, payable on a discontinuance, when effected, will be hereafter considered, in the chapter devoted to that subject.

A completed discontinuance terminates the action for all purposes; nor can any motion be subsequently made in it. *Hope vs. Acker*, 7 Abb., 308.

If incomplete, the proper course of the defendant is to move for a rule of discontinuance at once, or for a dismissal of the complaint, should the cause be reached, in the same term at which the notice was served. He will not be permitted to keep the cause still on the calendar, for the purpose of multiplying costs. *Jennings vs. Fay*, 1 C. R. (N. S.), 231. He cannot enter up judgment for costs, on the mere notice, but must proceed in regular order. *Hicks vs. Brennan*, 10 Abb., 304. See also *Wilson vs. Wheeler*, 6 How., 49; 1 C. R. (N. S.), 402.

In ordinary cases, the plaintiff's right to discontinue is absolute, on payment by him of all costs to the defendant, and he is entitled to his order as of course. Where, however, a counter-claim is interposed, the rule is not universal in its application. If, by omitting to reply, the plaintiff has entitled the defendant to treat that counter-claim as admitted, it will then be necessary for him to obtain the special leave of the court, and, unless he can show special grounds for the granting of leave to that effect, it may be refused. *Cockle vs. Underwood*, 3 Duer, 676; 1 Abb., 1; 12 L. O., 283. So also, where a discontinuance after issue joined, would have prejudiced the rights of the defendant, by enabling the plaintiff to plead the statute of limitations in a new action, leave was refused. *Van Alen vs. Schermerhorn*, 14 How., 287.

Where, however, issue had been joined by a reply, and no special reason of inconvenience to the defendant shown, the plaintiff's right to discontinue was admitted, and leave given. *Rees vs. Van Patten*, 18 How., 258. And, before the time to reply to a counter-claim has expired, the plaintiff may discontinue, and enter an *ex parte* order in the usual manner, on payment of costs. *Seaboard and Roanoke Railroad Company vs. Ward*, 18 Barb., 595; 1 Abb., 46; affirming *same case*, 12 How., 405; *Oaksmith vs. Sutherland*, 1 Hilt., 265; 4 Abb., 15.

In replevin, where the plaintiff has obtained possession of the property, he cannot discontinue as of course, after claim to it set up by the defendant in his answer. The latter, on service of a notice, is still entitled to bring on the case in its order, and take judgment for a return. He cannot, however, take such a judgment, on motion founded on the notice. *Wilson vs. Wheeler*, 6 How., 49; 1 C. R. (N. S.), 402.

One only of several co-plaintiffs cannot discontinue separately, without the consent of the others. *Perry vs. Tynen*, 22 Barb., 137.

To be available against the plea of *autre action pendant*, the plaintiff must discontinue the former suit at once, and before the issue in that in which the plea is interposed is perfected, and the cause noticed for trial. If he delays, the defendant will be entitled to the benefit of his plea. *Swart vs. Borst*, 17 Barb., 69.

If a suit be improperly brought in the name of a married woman, a discontinuance may be compelled, if that fact appear, upon her separate examination, according to the old chancery practice. *Rusher vs. Morris*, 9 How., 266.

In *Corning vs. Smith*, 2 Seld., 82, it was held incumbent upon the plaintiff in foreclosure, to dismiss his bill, as against an alleged prior encumbrancer, erroneously made a party by him, unless he believed, and was willing to take the responsibility of showing, that the interest of such encumbrancer arose in fact subsequent to his mortgage.

Where a wife voluntarily discontinues an action commenced by her

against her husband, he cannot be compelled to pay her costs of that action. *Phillips vs. Simmons*, 11 Abb., 287.

Although, as a general rule, it is competent for a plaintiff to discontinue, on payment of costs, at any stage of the suit before trial, still, after he has obtained a decree, he cannot obtain an order to dismiss his bill, without the consent of all the defendants. *Picabia vs. Everard*, 4 How., 113.

A submission to arbitration works an absolute discontinuance, capable, however, of being waived by special condition, or by subsequent proceedings in the action. *Buel vs. Dewey*, 22 How., 342.

CHAPTER V.

OF REPLY, OR DEMURRER TO ANSWER, AND PROCEEDINGS CONSEQUENT.

§ 185. *General Considerations.*

ALTHOUGH already given in book VI., chapter I., it will be convenient to repeat the citation of section 153, by which these pleadings are regulated, as finally amended in 1860.

§ 153. (131.) When the answer contains new matter constituting a counter-claim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defence to such new matter in the answer; and the plaintiff may in all cases demur to an answer containing new matter, where upon its face it does not constitute a counter-claim or defence; and the plaintiff may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims.

And, in other cases, where an answer contains new matter, constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and, in that case, the reply shall be subject to the same rules, as a reply to a counter-claim.

It will also be convenient to notice shortly, the different changes in the views of the legislature, from time to time, with respect to this section, as there considered in detail.

In 1848, and down to 1851, the power of replying extended generally to new matter.

In 1851, it was restricted to new matter, constituting a defence or set-off, and a specific denial of each allegation was required.

In 1852, the power was again restricted to new matter constituting a counter-claim, the power of general denial being restored. This system has since continued, but, in 1860, the concluding clause was added, giving the defendant power, on cause shown, to require a reply to new matter, stated by way of avoidance.

In 1848, demurrer to answer was not provided for. In 1849, a power was given to demur to an answer, containing new matter, for insufficiency. In 1852, the power was restricted, to new matter constituting a counter-claim. In 1855, a general power of demurring to an answer for insufficiency was allowed. In 1857, the power of demurring was narrowed to "an answer containing new matter, where upon its face it does not constitute a counter-claim or defence," as the section now stands; and this arrangement has since been unchanged, the power of requiring a reply to a defence by way of avoidance, being superadded in 1860.

Where a special reply is not asked for by the defendant, and granted by the court, new matter stated by way of mere defence, not constituting a counter-claim, requires no reply at all, or, rather, the Code itself supplies one, by the operation of the last clause of section 168, proceeding thus:

"The allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require."

This provision amounts, in effect, to a statutory reply in such cases, analogous to a plea of the general issue, involving the inconvenience of uncertainty, as to the evidence that may be tendered under it. Its scope may be considered as even wider, inasmuch as any facts that, under the section as it stood in 1848, and down to 1852, could have been replied, in avoidance of new matter set up in the answer, may, under the present provision, be tendered in proof, without any special allegation, or even notice of intention to bring forward such evidence. The amendment of 1860 tends greatly to the removal of this inconvenience, and, where an affirmative defence is liable to be affirmatively controverted, or where the existence of the facts constituting such a defence cannot be questioned, a reply should in all cases be required, and the necessary proceedings taken for that purpose. Still, an order to that effect might be refused, or omitted to be asked for; and if so, many cases are perfectly supposable, in which a material issue may fail to appear upon the face of the actual pleadings, and may even be incapable of being formally tendered, and yet evidence upon that issue may not only be admissible,

but even decisive. Discontinuance of an action, the pendency of which is set up as a defence, may be instanced as a case of this nature.

This defect in the section as at present framed, involving, as it necessarily involves, a departure from the principles, elsewhere carried out, of always requiring the joinder of a specific issue of fact, and of dispensing with proof of all affirmative allegations not positively controverted, is rendered still more glaring, by the total omission to make any corresponding alteration in section 154, which section, as still retained without amendment, gives to the defendant power to apply for judgment, in the event of the plaintiff's failure to reply or demur to a statement of new matter in the answer, constituting a defence. It is true that this section has received a construction which amounts to a virtual substitution of the term counter-claim for that of defence. See *Williams vs. Upton*, 8 How., 205; *Quin vs. Chambers*, 1 Duer, 673; 11 L. O., 155. Still, the anomaly remains in terms, and it has even been held that the later controls and widens the operation of the earlier section. See *Wisner vs. Teed*, 9 How., 143. The view taken in the former cases is however, supported, and that in *Wisner vs. Teed* disapproved, in *Richtmeyer vs. Haskins*, 9 How., 481; *Myatt vs. Saratoga County Mutual Insurance Company*, 9 How., 488.

§ 186. *Demurrer to Answer*

Demurrer to answer, is confined to the single ground of insufficiency, and, under the section, as it now stands, it is restricted to an answer, or defence taken by an answer, containing new matter. A general demurrer was only allowable from 1855 to 1857. As to the general nature of this power, while existent, see *Gilbert vs. Covell*, 16 How., 34.

Demurrer will not lie, therefore, to an answer consisting of denials only. See *Thomas vs. Harrop*, 7 How., 57; *Loomis vs. Dorsheimer*, 8 How., 9; *Simpson vs. Loft*, 8 How., 234; *Roosa vs. Saugerties and Woodstock Turnpike Road Company*, 8 How., 237; *Mead vs. Florence*, 9 How., 396; *Richtmeyer vs. Haskins*, 9 How., 481; *Myatt vs. Saratoga County Mutual Insurance Company*, 9 How., 488; *Perkins vs. Farnham*, 10 How., 120; *Ketchum vs. Zerega*, 1 E. D. Smith, 553; *Kneedler vs. Sternbergh*, 10 How., 67 (74); *Rice vs. O'Connor*, 10 Abb., 362; *Lund vs. Seaman's Savings Bank*, 23 How., 258. By these decisions, the following are overruled as to this point: *Salinger vs. Lusk*, 7 How., 430; *Seward vs. Miller*, 6 How., 312; *Hopkins vs. Everett*, 6 How., 159; 3 C. R., 150; *Wisner vs. Teed*, 9 How., 143. And, from the amendment of 1852, until that of 1855, demurrer would not lie to matter of mere defence. See *Quin vs. Chambers*, 1 Duer, 673; 11 L. O., 155; *Sleight vs. Hancox*, 4 Abb., 245; *Myatt vs. Saratoga*

County Mutual Insurance Company, 8 How., 428; *Reiley vs. Thomas*, 11 How., 266. See, however, *Kneedler vs. Sternbergh*, 10 How., 67.

Demurrer has been held to be the proper form of raising objections to an answer, which require consideration by the court, and to be substantiated by argument, and which, therefore, cannot so properly be raised by motion. *Littlejohn vs. Greeley*, 22 How., 345; 13 Abb., 311.

Demurrer will lie to any separate counter-claim or separate ground of defence, nor will a general heading effect an extension of its operation to other portions of the answer, to which objection is not actually made. *Matthews vs. Beach*, 4 Seld., 173; reversing *same case*, 5 Sandf., 256.

Demurrer will not lie to part of an entire ground of defence, or in respect of partial deficiencies, properly the subject of a motion. *Cobb vs. Frazee*, 4 How., 413; 3 C. R., 43; *Watson vs. Husson*, 1 Duer, 242; *Smith vs. Greenin*, 2 Sandf., 702; or, in respect of wholly immaterial matter, *Graham vs. Stone*, 6 How., 15; 1 C. R. (N. S.), 181; *Newman vs. Otto*, 4 Sandf., 668; 10 L. O., 14. See likewise, *Matthews vs. Beach*, 5 Sandf., 256; not affected, on this point, by the reversal, 4 Seld., 173.

But, where immaterial matter forms part of a defence, otherwise insufficient, and is, by the terms of the answer, relied on in bar, it may be reached by demurrer. See *Fry vs. Bennett*, 5 Sandf., 54; 9 L. O., 330; 1 C. R. (N. S.), 238; *Ayres vs. Cobwell*, 18 Barb., 260 (265).

Demurrer will not lie, to an answer amended on the trial. The objection should be presented at the time of the application for amendment. *Therasson vs. Peterson*, 22 How., 98.

Demurrer is the proper form of objection to a counter-claim, as inadmissible. *Van Valen vs. Lapham*, 13 How., 240 (246); *Merritt vs. Millard*, 5 Bosw., 645; or, to an inadmissible set-off, *Welch vs. Hazeltin*, 14 How., 97; or, an insufficient defence, *Russell vs. Harding*, 12 L. O., 216; *Hyde vs. Conrad*, 5 How., 112; 3 C. R., 162; *Thumb vs. Walrath*, 6 How., 196; 1 C. R. (N. S.), 316; *Gregory vs. Levy*, 12 Barb., 610; 7 How., 37; *Merritt vs. Millard*, 5 Bosw., 645; *Merchants' Bank of New Haven vs. Bliss*, 21 How., 365; 13 Abb., 225; *Schermerhorn vs. Gouge*, 13 Abb., 315; or, to a defence insufficiently pleaded, *Bridge vs. Payson*, 1 Duer, 614; *Arthur vs. Brooks*, 14 Barb., 533; *Anibal vs. Hunter*, 6 How., 255; 1 C. R. (N. S.), 403; *Blake vs. Eldred*, 18 How., 240 (242); *Lewis vs. Kendall*, 6 How., 59; 1 C. R. (N. S.), 402; *Sayles vs. Wooden*, 6 How., 84; 1 C. R. (N. S.), 409; *Buddington vs. Davis*, 6 How., 401; *The People vs. Van Rensselaer*, 8 Barb., 189. N. B.—In several of these last cases, the law laid down, as distinguished from the question of pleading, stands overruled. See reversal of last case, 5 Seld., 291. See also, as to facts pleadable, though not constituting a bar, *Bush vs. Prosser*, 1 Kern.,

347; *Houghton vs. Townsend*, 8 How., 441. But the principles there laid down, as regards the mode of taking the objection, when tenable in itself, are not affected by such overruling, but hold equally good. See also *Wilson vs. Robinson*, 6 How., 110; *The People vs. Banker*, 8 How., 258; *Freeman vs. Frank*, 10 Abb., 370.

A demurrer to answer, stands substantially on the same ground, and is governed by the same rules, as an ordinary demurrer under subdivision 6 of section 144. The ground of insufficiency should, in all cases, be stated upon its face, and it will be better, in stating that ground, to follow the precise wording of the section. A general assignment of insufficiency may be made, and, under it, the plaintiff may avail himself of any objection, on that ground, which goes to the merits. *Arthur vs. Brooks*, 14 Barb., 533; *Anibal vs. Hunter*, 6 How., 255; 1 C. R. (N. S.), 403; *Hyde vs. Conrad*, 5 How., 112; 3 C. R., 162. Prior to the amendment of 1857, it was provided that, on a demurrer of this nature, the plaintiff must state the grounds thereof, and a strict construction had been placed upon that provision. See *Ketchum vs. Zerega*, 1 E. D. Smith, 553 (562); *Kneiss vs. Seligman*, 8 Barb., 439; 5 How., 425. But, since that amendment, when those expressions were stricken out, there can be no doubt that a general assignment of insufficiency is all that is requisite. And, not only so, but, if the court be satisfied that an answer is insufficient, they will sustain a demurrer to it, even on grounds not suggested on the argument. *Xenia Branch of State Bank of Ohio vs. Lee*, 2 Bosw., 694; 7 Abb., 372.

The same rule prevails as to admissions, as in the case of an ordinary demurrer; and a plaintiff, demurring to the answer, must admit all facts pertinent to the question raised. Where he demurs to part of an answer, and replies to the residue, his demurrer will not stand, if the reply be inconsistent with the admissions necessary for the purposes of the demurrer. *Burr vs. Wright*, 9 How., 542. Or if a pleading, in effect a demurrer, be stated, as part of a general reply. *Clark vs. Van Deusen*, 3 C. R., 219. See generally, as to the facts admitted upon such a demurrer, *Graham vs. Dunnigan*, 6 Duer, 629; 4 Abb., 426.

As in the case of an ordinary demurrer, demurrer to answer must stand or fall, to the whole extent of the pleading or ground of defence demurred to, and, if any portion of it be sufficient, or any material issue be raised, the pleading will stand, however slight that issue may be. See *Dimon vs. Bridges*, 8 How., 16. So also if, on a liberal construction, any defence may be gathered from it. *Rice vs. O'Connor*, 10 Abb., 362. Nor is a defence demurrable, on the ground that it is merely partial. See *Houghton vs. Townsend*, 8 How., 441; *Willis vs. Taggard*, 6 How., 433.

On the argument of a demurrer to answer, it is competent for the

defendant to go behind it, and attack the complaint as defective; but the grounds of his attack must be such as would have entitled him to a judgment, had he elected to demur instead of answering. If they fall short of this, he cannot do so. *Fry vs. Bennett*, 5 Sandf., 54; 9 L. O., 330; 1 C. R. (N. S.), 238; *Schwat vs. Furniss*, 4 Sandf., 704; 1 C. R. (N. S.), 342; *The People vs. Clarke*, 10 Barb., 120; affirmed generally, 5 Seld., 349; *Stoddard vs. Onondaga Annual Conference*, 12 Barb., 573; *Noxon vs. Bentley*, 7 How., 316; *The People vs. Banker*, 8 How., 255. It was held, however, in the last case that, under these circumstances, the defendant must be held to have waived all objections to the complaint, except those for want of jurisdiction, or insufficiency, as provided in section 148.

Where the matter in the answer, admitted by the demurrer, is sufficient in itself, as a bar to the action, the proper course, on the demurrer being overruled, will be to enter judgment, dismissing the complaint, though there may be issues of fact joined. If insufficient for the above purpose, an order only should be entered. See *Wightman vs. Shankland*, 18 How., 79.

On the service of a demurrer to answer, the defendant has, as in other cases, a right to amend, as of course, except only when such amendment is made for delay, in which case the court will strike it out, or impose terms. *Cooper vs. Jones*, 4 Sandf., 699.

Where a former adjudication on the same question appears on the face of a supplemental answer, it will be demurrable. *Higgins vs. Mayer*, 10 How., 363.

§ 187. Reply.

The uses and applicability of this pleading, as allowed prior to 1852, have been greatly restricted by the amendment of that year, confining it to cases where an answer contains new matter constituting a counter-claim, and substituting the statutory denial, provided by section 168, for the former pleading by way of replication to defences consisting of new matter.

The cases decided prior to that amendment may, therefore, at this distance of time, be passed over without a detailed citation. It will be sufficient merely to enumerate them, stating generally, that they established these principles, *i. e.*, that merely negative matter required no reply; that, to matter stated by way of affirmative defence, a reply was necessary in all cases; but that, as to purely immaterial matter, it was not requisite, inasmuch as such matter, not being sufficient to raise an issue, would not stand admitted, even if omitted to be noticed. See generally, on these heads, *Isham vs. Williamson*, 7 L. O., 340; *Barton*

vs. *Sackett*, 3 How., 358; 1 C. R., 96; *King* vs. *Utica Insurance Company*, 4 How., 485; *Van Giesen* vs. *Van Giesen*, 12 Barb., 520; 1 C. R. (N. S.), 414; *Brown* vs. *Spear*, 5 How., 146; 3 C. R., 192; 9 L. O., 97; *Howard* vs. *Michigan Southern Railroad Company*, 5 How., 206; 3 C. R., 213; *Beals* vs. *Cameron*, 3 How., 414; *Averill* vs. *Patterson*, 6 Seld., 500; 10 How., 85; *Walrod* vs. *Bennett*, 6 Barb., 144; *Wager* vs. *Ide*, 14 Barb., 468; *Stoddard* vs. *Onondaga Annual Conference*, 12 Barb., 573; *Brown* vs. *McCune*, 5 Sandf., 224; *Merritt* vs. *Slocum*, 3 How., 309; 1 C. R., 68; *Groshon* vs. *Lyons*, 1 C. R. (N. S.), 348; *Ketchum* vs. *Zerega*, 1 E. D. Smith, 553.

The question, as to what will or will not be considered as constituting a counter-claim, has been already fully dwelt upon, and the cases in point cited, in the last chapter, section 179, subdivision *Counter-claim*. If any allegation in the answer be of that nature, it must be replied to; if not, and it be merely matter of defence, and incapable of being made the subject of a cross action, a reply will not merely be unnecessary, but even improper. See, as to merely negative matter, *Silliman* vs. *Eddy*, 8 How., 122; *Roscoe* vs. *Maison*, 7 How., 121; *Putnam* vs. *De Forest*, 8 How., 146; *Williams* vs. *Upton*, 8 How., 205; *Simpson* vs. *Loft*, 8 How., 234; *Gilbert* vs. *Cram*, 12 How., 455; *Bracket* vs. *Wilkinson*, 13 How., 102; *McKenzie* vs. *Farrell*, 4 Bosw., 192 (201); *Duffy* vs. *Duncan*, 32 Barb., 587 (588).

Even before the amendment of 1852, it was unnecessary to reply specially to matter, of which evidence could be introduced under the averments in the complaint, as proof of a new promise in answer to a plea of the statute of limitations. *Esselstyn* vs. *Weeks*, 2 Kern., 635; 2 Abb., 272. See also decision below, 2 E. D. Smith, 116, sustained on this point, though reversed on another. See likewise, as to the same principle, *Hodges* vs. *Hunt*, 22 Barb., 150. See also, as to matter constituting a complete defence, but incapable of being made the subject of affirmative relief, *Vassar* vs. *Livingston*, 3 Kern., 248; affirming *same case*, 4 Duer, 285; *Burrall* vs. *De Groot*, 5 Duer, 379; *Rielay* vs. *Thomas*, 11 How., 266; *Davidson* vs. *Remington*, 12 How., 310.

Where, however, there is any doubt whatever, as to whether matter alleged by the defendants may, or may not, constitute a counter-claim, a reply had better be interposed in all cases, even at the risk of its being stricken out, as the result of such a motion will, at all events, remove the doubt. See *Roscoe* vs. *Maison*, 7 How., 121.

A set-off should, in all instances, be replied to. See, as to the effect of an omission of this nature, on taking an inquest, *Potter* vs. *Smith*, 9 How., 262.

A set-off may, it seems, be replied to a set-off, *Miller* vs. *Losee*, 9 How., 356; *Stewart* vs. *Travis*, 10 How., 148.

And, where counter-damages are claimed by the answer, a reply should always be interposed. *Lemon vs. Trull*, 13 How., 248, stated to be affirmed by Court of Appeals, 16 How., 576, note.

A reply to a counter-claim, has substantially the effect of an answer to a counter-demand, and the same rules as to averments, which would have been applicable to that demand, had it been made by way of cross action, instead of by way of counter-claim, must be generally observed. Every material allegation in the answer, constituting or bearing upon the counter-claim set up, should be carefully denied, and a general traverse of all matter of that nature will, as a general rule, be also advisable, save only as to portions of the pleading which may be demurred to. Every affirmative allegation, tending to constitute a defence to the counter-claim set up, must be alleged, according to the usual rules of averment; and, where the reply is to a part only of the answer, or where the plaintiff replies to part and demurs to part of the answer, each separate ground of reply should be carefully severed from other grounds, and from those portions of the pleading which state grounds of demurrer, taking especial care that no portion of the matter demurred to, is controverted, either generally or specifically. Each separate clause of the above nature should be separately stated, and plainly numbered, to comply with the requisitions of rule 19 (86).

As to the necessity of replying any affirmative matter, necessary to rebut or avoid a defence set up by way of counter-claim, see *Schubart vs. Harteau*, 34 Barb., 447.

Denials made in a reply are subject to the same rules, and may be made in the same manner as denials in an answer. See *Doremus vs. Lewis*, 8 Barb., 124; *Gilchrist vs. Stevenson*, 9 Barb., 9; *Lewis vs. Acker*, 11 How., 163; *Gassett vs. Crocker*, 9 Abb., 39. Matter in reply must be pleaded with sufficient detail, and not indefinitely. *Stewart vs. Travis*, 10 How., 148. But, these rules being complied with, any thing which might have been pleaded by way of defence to a cross action, may be set up by way of reply to a counter-claim for the same matter. *Miller vs. Losee*, 9 How., 356.

Departure from the complaint is not admissible in a reply, being expressly prohibited by the section. It cannot, however, be impeached by demurrer, but motion is the proper remedy. *White vs. Joy*, 3 Kern., 83; reversing *same case*, 11 How., 36.

Nor can defects in the prior pleadings be cured by statements in the reply. *Brown vs. Colie*, 1 E. D. Smith, 265.

An omission to reply, has the same effect as an omission to answer, and operates as a complete admission of the facts alleged by the defendant (§ 168). See *Lemon vs. Trull*, 13 How., 248; affirmed, 16 How., 576, note, above cited. But, though admitting all facts, it does not admit

the amount of any damages claimed. This must still be proved by the defendant. *McKenzie vs. Farrell*, 4 Bosw., 192.

In *Sibley vs. Waffle*, 16 N. Y., 180 (182), it was held that the law existent at the time of trial, governed the case, with respect to admissions of this nature, and that matter, constituting a defence, but omitted to be replied to, was to be deemed controverted under section 168, the trial having taken place subsequent to the amendment of 1852; though, at the time when issue was joined, such matter required a reply, and, if the trial had been then had, would have been taken as admitted.

§ 188. *Proceedings on Failure to Reply.*

Section 154 gives a special remedy for the defendant in the event of the plaintiff's failure to reply, when necessary, as follows:

If the answer contain a statement of new matter constituting a defence, and the plaintiff fail to reply or demur thereto, within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and, if the case require it, a writ of inquiry of damages may be issued.

The original operation of this section is greatly restricted by the amendment of 1852, confining the necessity, and indeed the power, of reply, to cases where a counter-claim is interposed. The failure, on the part of the legislature, to make the necessary corrections in this section, on the occasion of that amendment, has already been noticed in the present chapter, section 184, and also the construction put upon it, to the effect that the provision must now be read as if virtually amended in conformity. The amendment of 1860 tends to the augmentation of its practical utility, the power now given to require a reply to a mere affirmative defence, being capable of exercise in many cases, with the especial view of obtaining earlier and more complete relief, by means of a motion of the above description.

The remedy has, however, been always of a limited nature, inasmuch as, to render an application for judgment in the defendant's favor appropriate, the new matter stated in the answer, and admitted by the failure to reply, must, of necessity, be such as to constitute a complete and insurmountable bar to the further assertion of the plaintiff's claim. It must cover the whole ground, and not merely a portion of that claim; and, in the uncorrected state of the section, it is more than doubtful whether it can properly be held to authorize the taking on motion of a judgment in the defendant's favor, in respect of a counter-claim in excess of the plaintiff's demand. As originally framed, it evidently looked to the mere entry of judgment, dismissing the complaint with costs, on the existence of a complete affirmative defence, such as

payment, disability, or the like, being admitted; and it is more than doubtful whether its operation can now be invoked for obtaining more. When, therefore, the judgment claimable under the admission, consists of either more or less than such a dismissal, with any dependent consequences, involving collateral relief in favor of the defendant, which may naturally flow from the failure of the plaintiff to establish his case as stated, a resort to this section can scarcely be appropriate, and the cause must be brought on for trial in the ordinary manner. See *Rielay vs. Thomas*, 11 How., 266.

The motion is clearly inappropriate in the case of a merely negative answer. *Brown vs. Spear*, 5 How., 146; 3 C. R., 192; 9 L. O., 97. It is equally so, where the issue tendered by the answer is not decisive of the whole case, but others remain to be tried, on the defendant's denials of the plaintiff's allegations. *Comstock vs. Halleck*, 1 C. R. (N. S.), 200. But, where such denials are merely part of, and for the purposes of an affirmative defence, as in the case of a plea of title in the defendant, and also license from the plaintiff, in an action for trespass, the motion may be sustained. *Same case*.

When admissible, a motion of this nature should be founded on the pleadings, relief being demanded in the terms of the section. No affidavit of extraneous matter will be necessary. *Brown vs. Spear*, *supra*.

It cannot be made at chambers, except in the first district, no judge out of court having the power to grant this species of relief. See *Aymar vs. Chase*, 12 Barb., 301; 1 C. R. (N. S.), 330.

An omission, at the time, to make a motion of this description, does not preclude the defendant from demanding such a judgment, on the actual trial of the cause. *Bridge vs. Payson*, 5 Sandf., 210.

As to the terms to be imposed on granting leave to reply, on a motion of this description, see *Montecarbole vs. Mundel*, 16 How., 141.

(a.) OTHER MOTIONS FOR JUDGMENT FOR DEFENDANT.

In *Blydenburgh vs. Borst*, 5 Duer, 657, where an issue of the pendency of another action, as taken by the answer, had been referred, and decided in the defendant's favor, judgment of dismissal was granted, on motion, without proceeding to a trial of any other of the issues joined.

§ 189. *Defendant's Proceedings on Reply.*

If the reply put in be unobjectionable, a complete issue is now joined, and the cause proceeds to trial in the regular course.

(a.) DEMURRER TO REPLY.

If, on the contrary, that reply be insufficient, section 155 provides the remedy as follows :

§ 155. If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

This section is open to the same remarks, as to the omission of the legislature to amend it in 1852, as are applicable to section 154, and will, doubtless, receive the same construction, as to the virtual substitution of the term counter-claim for that of defence as above noticed. The same remark may be made, as to the practical extension of its operation by the amendment of 1860.

The following decisions may be noticed, as applicable to the more extended operation of the section, as regards defences in general, prior to the amendment of 1852: *Rae vs. Washington Mutual Insurance Company*, 6 How., 21; 1 C. R. (N. S.), 185; *Slocum vs. Hooker*, 13 Barb., 536; reversing *same case*, 12 Barb., 563; 6 How., 167; 10 L. O., 49. A reply, not involving any traversable fact, but merely denying a conclusion of law from facts alleged in the answer, was held bad on demurrer, in *Bentley vs. Jones*, 4 How., 202. *Willis vs. Havemeyer*, 5 Duer, 447, is also an instance of judgment for the insufficiency of a reply to matter in defence. *Winslow vs. Buel*, 11 How., 373, appears to be a case of the same nature.

Departure from the complaint is no ground of demurrer to a reply, the remedy in such case is by motion. *White vs. Joy*, 3 Kern., 83; reversing *same case*, 11 How., 36.

In *Stewart vs. Travis*, 10 How., 148 (152), it is laid down that the proper mode of testing the sufficiency of new matter stated in a reply, is by demurrer.

This species of demurrer is, as above stated, only admissible for insufficiency, and, on the face of it, the grounds must be stated. A simple impeachment for insufficiency may, however, be sufficient, without entering into any detailed specification. See *White vs. Joy*, 11 How., 36; the reversal of which case does not affect the decision on this point. See also cases cited in section 185, under the head of *Demurrer to Answer*.

(c.) OTHER REMEDIES.

It is of course open to the defendant to move, in the usual manner, to strike out irrelevant or redundant matter contained in a reply, if it be open to that objection.

It might possibly be held, though the point is by no means free from

doubt, that it is also competent for the defendant to move, under section 152, to strike out an objectionable reply, as a "sham or irrelevant defence." See *Rae vs. Washington Mutual Insurance Company*, above cited.

And an unauthorized reply may be stricken out on motion. *Devlin vs. Bevins*, 22 How., 290.

Another proceeding open to the defendant, if the circumstances admit, is to move for judgment on the reply as frivolous, under section 247.

§ 190. *Amendment of Answer.*

If the reply disclose new facts, necessitating an amendment of the answer, it is competent for the defendant to adopt such course within the usual time. If he take that step, he does so subject to the contingency of the plaintiff's amending his complaint in consequence, and of the whole circle of pleading being recommenced.

From the time of the service of the reply, issue is to be considered as finally joined, subject, during the period allowed him for that purpose, to the defendant's right to amend. Notwithstanding the temporary existence of that right, the plaintiff is, nevertheless, at liberty to proceed with the cause, by serving notices of trial, &c., &c., immediately after the reply is served, and is bound to do so at once, if the defendant waives his right to amend, either by express notice, or by noticing the cause himself. *Cusson vs. Whalon*, 5 How., 302; 1 C. R. (N. S.), 27, above cited. If, however, he take judgment within such period, and without such waiver on the part of the defendant as above, he does so at his peril, and under the risk of having such judgment set aside, if the defendant serve an amended pleading in time. *Washburn vs. Herrick*, 4 How., 15; 2 C. R., 2; *Dickerson vs. Beardsley*, 1 C. R., 37; 6 L. O., 389.

In all cases where demurrer will lie to an answer, it is amendable as of course, within the usual period, whether demurred to or not. From 1855 to 1857, this power extended to all answers containing allegations of new matter. See *Townsend vs. Platt*, 3 Abb., 323. Prior to the former and since the latter year, it must be held to be confined to answers setting up a counter-claim. *Farrand vs. Herbeson*, 3 Duer, 655. Nor does the right apply to an answer consisting of denials only. *Lampson vs. McQueen*, 15 How., 345.

Matter in answer to the original complaint, cannot be introduced into an answer to a supplemental one, without special leave of the court. *Dann vs. Baker*, 12 How., 521.

But, when the defendant's right to amend as of course exists, it is

absolute, and cannot be interfered with, unless the amendment is merely colorable, and made for the purposes of delay only. *Griffin vs. Cohen*, 8 How., 451.

See the subject of amendment, heretofore considered in its general aspect, in book VI., chapter III.

§ 191. *Final Joinder of Issue.—Admissions in Pleadings.*

The above proceedings being exhausted, issue is now joined, and the effect of the completion of the pleadings, as regards specific allegations of fact, is laid down by section 168, as follows :

§ 168. Every material allegation of the complaint, not controverted by the answer, as provided in section 149 ; and every material allegation of new matter in the answer, constituting a counter-claim, not controverted by the reply, as prescribed in section 153, shall, for the purposes of the action, be deemed as true. But the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require.

The provisions of the section are plain, and explain themselves. It will be observed, however, that, in order to its operation, the allegation omitted to be controverted must be material.

To be material in this sense, the allegation must be of such a nature as to raise a direct issue, without proof whereof, the action cannot be maintained. *Connoss vs. Mier*, 2 E. D. Smith, 314 ; *Newman vs. Otto*, 4 Sandf., 668 ; *Oechs vs. Cook*, 3 Duer, 161 ; *Ketchum vs. Zerega*, 1 E. D. Smith, 553 ; *Fry vs. Bennett*, 5 Sandf., 54 ; 1 C. R. (N. S.), 238 ; 9 L. O., 330. In *Mayor of Albany vs. Cunliff*, 2 Comst., 165 (170), the rule is strictly laid down, and it is held that "every averment is material, unless it may be struck out as surplusage, and what cannot be so struck out, must be proved." There can be no doubt but that this is the safer rule, and that it will be unsafe to rely upon any fact, as being admitted by non-denial, unless the case clearly comes within it.

But purely immaterial matter, such as mere averments of value or damages, matter in mitigation, and the like, which, though necessary to be proved, as regards the measure of recovery, do not go to establish or to avoid a cause of action, need not be controverted, and must be proved at all events. See the cases above cited. *Isham vs. Williamson*, 7 L. O., 340 ; *McKenzie vs. Farrell*, 4 Bosw., 192 ; *Sands vs. St. John*, 23 How., 140.

Nor will any allegation be treated as admitted, unless it is pleaded. *Same cases* ; also *Harlow vs. Hamilton*, 6 How., 475 ; *Stoddard vs. Onondaga Annual Conference*, 12 Barb., 573. And the principle only

applies to allegations of facts. *Barton vs. Sackett*, 3 How., 358; 1 C. R., 96.

The admission will apply to any portion of an allegation omitted to be traversed. *Levy vs. Bend*, 1 E. D. Smith, 169. But partial admissions will not have the operation of controlling the effect of a general denial. *Troy and Rutland Railroad Company vs. Kerr*, 17 Barb., 581. See also *Swift vs. Kingsley*, 24 Barb., 541. And, to be available, an admission must be unqualified and clear. *Lewin vs. Stewart*, 17 How., 5; reversing *same case*, 10 How., 509.

Where an admission in a pleading is relied on, the whole must be taken together. The adverse party cannot avail himself of such portion as makes in his favor, and reject the residue. *Stuart vs. Kissam*, 2 Barb., 493; *Gildersleeve vs. Mahony*, 5 Duer, 383. See, as to the same principle, *Dorlon vs. Douglass*, 6 Barb., 451.

An admission of this nature is personal, and confined to the defendant in whose pleading it is found. It will have no effect on the case of any co-defendants. *Woodworth vs. Bellows*, 4 How., 24; 1 C. R., 129; *Swift vs. Kingsley*, 24 Barb., 541.

Such an admission, when existent in an answer, and covering the whole ground of an issue, entitles the plaintiff, *prima facie*, to a verdict on that issue. *Bacon vs. Cropsey*, 3 Seld., 195 (198). See also *Walrod vs. Bennett*, 6 Barb., 144, there referred to.

The effect of such an admission is, to relieve the adverse party from the necessity of adducing any proof of the facts so admitted, and to exclude evidence in contradiction of them. *Walrod vs. Bennett*, *supra*; *Hackett vs. Richards*, 11 L. O., 315; affirmed, 3 E. D. Smith, 13. See generally, as to an admission, *Van Giesen vs. Van Giesen*, 6 Seld., 316.

If a party who has made such an admission on the pleadings, goes to trial with them as they stand, he cannot then retract it. *Livingston vs. Miller*, 4 Seld., 283 (289). And the objection will be fatal, if then taken, though the party, if vigilant, could have previously moved for judgment. *Bridge vs. Payson*, 5 Sandf., 210.

But, to be available, the admission must be relied upon, at the trial of the cause. If not then brought forward, the benefit of it will be waived, and it cannot be made available for the first time, on appeal. *Williams vs. Hayes*, 20 N. Y., 58; *Smith vs. Floyd*, 18 Barb., 522. But, when relied upon in due time, it is conclusive in every stage of the suit, though, in a proper case, it may be allowed to be cured, by an amendment, or by a pleading *nunc pro tunc*. *Willis vs. Underhill*, 6 How., 396.

Where, by omitting to reply, a plaintiff has admitted a partial counter-claim, he cannot take an inquest for the whole of his demand. *Potter vs. Smith*, 9 How., 262.

CHAPTER VI

ABATEMENT AND REVIVOR.—SUPPLEMENTAL PLEADING.

BEFORE passing on to the ulterior proceedings consequent on the joinder of issue, these remedies, involving a change, more or less material, in such issue, arising out of subsequent events, require consideration. They will be treated in the order of the title.

§ 192. *Abatement and Revivor.*

The provision of the Code on this subject is contained in section 121, already given in full in book II., chapter I., section 31, under the head of *Parties*. Being short, a re-citation will be convenient. It runs thus :

§ 121. (101.) No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party ; or the court may allow the person to whom the transfer is made, to be substituted in the action.

After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter, in the same manner as in cases where the cause of action now survives by law.

At any time after the death, marriage, or other disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it may direct, and upon application of the person aggrieved, may, in its discretion, order that the action shall be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the court, not less than six months, nor exceeding one year from the granting of the order.

The last clause was added on the amendment of 1862 ; that immediately previous, on that of 1857. The first clause of the section was in the original Code, having been altered in 1849.

By the amendment made in section 132, in 1862, the court is also authorized to remove a notice of *lis pendens* from the file, at any time after an absolute abatement.

(a.) ABATEMENT.

The test of the abatement or non-abatement of an action is, as will be seen, whether the cause of action does or does not survive or continue. If it be of such a nature as to die with the person, the abatement, on death before verdict, is complete and final; in other cases, it is remediable. A technical abatement does not, in fact, take place; but, in cases of death or disability, it is virtually impossible to continue the action, until the proper measures have been taken.

In actions for personal tort, the abatement, by death of either party before verdict, is, as above stated, complete; death after verdict is especially provided for by the section, as now amended. But it has been held that, in the statutory action for death by negligence, the cause of action continues, and that the suit may be revived, as against the executors of a defendant. *Doedt vs. Wiswall*, 15 How., 128; *Yertore vs. Wiswall*, 16 How., 8; overruling *Norton vs. Wiswall*, 14 How., 42.

And, although technically sounding in tort, an action for injury to property, survives in the same manner as an action on contract. *Vide* 2 R. S., 448, § 1; *Haight vs. Hayt*, 19 N. Y., 464.

Replevin is not, however, an action of this nature, but, on the contrary, it is fully abated by the death of a party. *Hopkins vs. Adams*, 5 Abb., 351; 6 Duer, 685. See also *Burckle vs. Luce*, 1 Comst., 163. See likewise cases below cited, with reference to ejectment.

In a case of personal tort, the civil death of a party works a complete abatement. *Freeman vs. Frank*, 10 Abb., 370. And, in other actions, imprisonment for a term of years works an abatement *pro tempore*, and involves the necessity of a revivor. *O'Brien vs. Hagan*, 1 Duer, 664.

And, where the death of a party before judgment, though not actually proved, is to be presumed, it will render any subsequent proceedings irregular. *Gerry vs. Post*, 13 How., 118.

But death of a party, after decree, works no abatement, and subsequent proceedings to carry out the directions of the court will be equally valid. *Thwing vs. Thwing*, 18 How., 458; 9 Abb., 323; *Lynde vs. O'Donnel*, 21 How., 34; 12 Abb., 286.

The dissolution of a corporation works no abatement, but the action may be still continued in the corporate name, or in that of its trustees. *New York Marbled Iron Works vs. Smith*, 4 Duer, 362.

Death of a party, after the hearing of a cause by the court, but before its actual decision, has been held to work no abatement. Judgment may be entered, *nunc pro tunc*, as of the day of trial, and the remedy of the representative will be to come in and appeal. *Ehle vs. Mayer*, 8 How., 244. See also *Diefendorf vs. House*, 9 How., 243. It is not analogous to the case of the death of a party after trial, but before

verdict. See also as to the entry of judgment, *nunc pro tunc*, where delayed by reason of exceptions taken, *Crawford vs. Wilson*, 4 Barb., 504 (524).

The death of an appellant, pending an appeal, has no effect upon its prosecution, but his representatives may, nevertheless, claim to have the suit revived, as against them, even when of a personal nature, in order to secure their rights, for the purposes of an ulterior appeal, where admissible. *Miller vs. Gunn*, 7 How., 159. See also, as to their rights in respect to the prosecution of such appeal, *Beach vs. Gregory*, 2 Abb., 203. See likewise 2 R. S., 185, sections 117 to 119.

In *Warren vs. Eddy*, 13 Abb., 28, it was held, that the respondent could not take an affirmance by default, after the death of the appellant, and that, in such case, the proper course was to have an administrator appointed, and the action revived, in the name of such administrator.

In the Court of Appeals, the right of continuance of an appeal by the representatives of a deceased appellant may, it seems, be secured by motion to that tribunal, without any application to the court below, the provisions of section 121, not being applicable. *Hastings vs. McKinley*, 8 How., 175. But, in the event of a new trial being ordered, it would seem that a motion below would then be necessary.

The death of a sole plaintiff works an absolute abatement, and no proceeding whatever can be subsequently taken in the suit, until it is duly revived. *Jarvis vs. Felch*, 14 Abb., 46.

The death of a judgment-debtor, abates supplementary proceedings against third parties. *Hazewell vs. Penman*, 13 How., 114; 2 Abb., 230. The death of a plaintiff, prevents the subsequent issuing of execution in his name. *Bellinger vs. Ford*, 21 Barb., 311; *Thurston vs. King*, 1 Abb., 126; *Jay vs. Martine*, 2 Duer, 654. And death of a party, after the argument of a motion, suspends any entry of the decision, until the suit has been revived. *Reed vs. Butler*, 11 Abb., 128.

No abatement takes place in ejectment, by reason of the death of any of the parties, except in the case of a sole defendant. *Vide* 2 R. S., 308, section 32. Such a death abates the action, and a new case of action accrues against the succeeding occupant. *Putnam vs. Van Buren*, 7 How., 31.

So also, a transfer of all the interest of a sole defendant, puts an end to the action. The plaintiff has a new cause of action against the transferee. *Mosely vs. Albany Northern Railroad Company*, 14 How., 71; *Mosely vs. Mosely*, 11 Abb., 105. See, however, *per contra*, *Waldorp vs. Bortle*, 4 How., 358.

The title of parties claiming to have succeeded to the right of a deceased plaintiff in ejectment, must be clear, and there must be no conflict between them, otherwise the court will not order a substitution. *St.*

John vs. West, 10 How., 253. See also previous decision in *same case*, 4 How., 329; 3 C. R., 85.

The section makes, as will have been seen, express provision as to the case of a transfer of interest, otherwise than by death, marriage, or other disability. In such cases, the rule is to continue the action in the name of the original party; but the court may allow the transferee to be substituted. This will, of course, be effected, by means of an ordinary motion; the granting or not granting it, lies in the discretion of the court, and no conditions seem to be imposed as to the time within which the motion is to be made, or the manner in which it is to be framed—such as are imposed in the case of an application on the ground of death or disability.

Where the object of such a substitution was to make the original plaintiff a witness, the court refused to allow it, except on terms. *Harris vs. Bennett*, 6 How., 220; 1 C. R. (N. S.), 203; *Murray vs. General Mutual Insurance Company*, 2 Duer, 607. And, on such an application, the court may provide for the defendant's right to costs, as against the original party. *Sheldon vs. Havens*, 7 How., 268. Such an assignment, pending the suit, will have no effect on its prosecution, or on the rights of the parties, even when a substitution has been applied for and denied. *Ford vs. David*, 1 Bosw., 569. Nor will such a substitution be granted on motion of the original plaintiff, without notice to the assignee. *Howard vs. Taylor*, 5 Duer, 604; 11 How., 380.

Where such a substitution is made, without notice to the opposite party, the assignee remains subject to all equities between his assignor and such party. *Terry vs. Roberts*, 15 How., 65. And, before allowing a substitution, the court will provide for those equities. *Howard vs. Taylor*, *supra*. See, as to the general powers of the court, to make a substitution of the above nature, where proper, *Hastings vs. McKinley*, Selden's Notes, Oct. 7th, 1853, p. 19; *Banks vs. Maher*, 2 Bosw., 690; *McGown vs. Leavenworth*, 2 E. D. Smith, 24; 3 C. R., 151.

An order for substitution may, it seems, be resisted, on the ground of the existence of a defence, personal to the plaintiff proposed to be substituted. *Hastings vs. McKinley*, 1 E. D. Smith, 273.

Where the plaintiff's demand has been assigned absolutely, the defendant may move that the assignee be substituted, or the complaint dismissed. *Sherman vs. Coman*, 22 How., 517.

Where, in an action against two defendants, jointly and severally liable, judgment has been taken against one, without service on the other, the action is spent, and cannot be continued, as against the defendant not served, in favor of a subsequent assignee. *East River Bank vs. Cutting*, 1 Bosw., 636.

In the case of an abatement by death, the section makes, as will be seen, a substantial difference in the mode of obtaining the remedy, where the application is made at once, or where it is delayed for more than one year after the occurrence of that abatement. In the latter case, a supplemental complaint is necessary; in the former, the relief is obtainable on motion. *Allen vs. Walter*, 10 Abb., 379. An application to the court is equally necessary in either case. *Johnson vs. Williams*, 2 Abb., 229.

The court cannot continue, on motion only, after the year has gone by. *Green vs. Bates*, 7 How., 296; *Coon vs. Knapp*, 13 How., 175; *Johnson vs. Williams*, 2 Abb., 229. If the application be made within the year, a supplemental complaint will not be necessary. *Gordon vs. Sterling*, 13 How., 405. If afterwards, the old practice in relation to a bill of revivor and supplement must be substantially followed. *Green vs. Bates*, *supra*.

See, as to the continuance of the former practice, in cases antecedent to the Code, notwithstanding the retrospectiveness of the section, *Spier vs. Robinson*, 9 How., 325; *Phillips vs. Drake*, 1 C. R., 63; *Vrooman vs. Jones*, 5 How., 369; 1 C. R. (N. S.), 80.

The delay of the motion for more than one year involves, of necessity, the preparation and service of a supplemental complaint, with power to the defendant to answer, and to create new issues on the fresh matter tendered.

When the application to revive is made by the representative of a deceased plaintiff, the order is almost of course. In clear cases, it may even be made *ex parte*, especially where the defendant has not appeared; but, as a general rule, notice must be given. *Thayer vs. Mead*, 2 C. R., 18. It is, *prima facie*, of course, and, even when the defendant alleged facts in opposition, controverting the right of action, the court refused to try the question on affidavits, and granted the order. *Wing vs. Ketcham*, 3 How., 385; 2 C. R., 7.

But an action cannot, it has been held, be revived in the name of an assignee of the representative of a deceased party. The doctrine of privity has never been carried so far. See *Rogers vs. Adriance*, 22 How., 97.

On abatement by the plaintiff's death, the defendant is entitled, as of right, to an order that the suit be continued in the name of the plaintiff's representative. *Ridgeway vs. Bulkeley*, 7 How., 269. If the latter neglect to do so, the course of the defendant is to obtain an order requiring such representative to continue, and to file a supplemental complaint, when necessary, or that the original complaint be dismissed with costs. *Jarvis vs. Felch*, 14 Abb., 46; *Green vs. Bates*, 7 How., 296; *Chapman vs. Foster*, 15 How., 241.

Where one of several joint plaintiffs dies, the defendant cannot take judgment against the others, without obtaining an order that the action proceed against the survivors. *Holmes vs. Honie*, 8 How., 383. See also, as to the defendant's privilege to obtain an order under such circumstances, that the action be continued in the names of the representatives of such a party, or that it stand dismissed, as far as they are concerned. Such an occurrence does not, however, prejudice the right of the survivors to continue a cause of action which does not survive to such representatives. *Williamson vs. Moore*, 5 Sandf., 647.

In *Keene vs. La Farge*, 1 Bosw., 671; 16 How., 377, it was held that the representatives of a deceased sole defendant could not, before judgment, compel the plaintiff to revive, where he elected to discontinue.

In case of the death of one of several joint plaintiffs, suing as partners, the old practice of entering a suggestion on the record, under the Revised Statutes, is admissible and proper, and it will be unnecessary to obtain an order. *Taylor vs. Church*, 9 How., 190; 12 L. O., 156. See 2 R. S., 386, § 1. See also *Waring vs. Waring*, 7 Abb., 472. See likewise, as to the entry of such a suggestion on the death of a joint defendant, *Lachaise vs. Libby*, 21 How., 362; 13 Abb., 6.

Such suggestion must state the facts, and a copy must be served on the adverse party. Such party may plead thereto, in the same manner as in the case of an adverse pleading. See 2 R. S., 553, § 17. If controverted by him, the fact must of course be proved upon the trial; if not answered it will stand admitted.

Where, on the death of one of the parties, whether plaintiff or defendant, his rights and liabilities devolve absolutely upon another, no abatement takes place, and no revivor will be necessary. *Lachaise vs. Libby*, 21 How., 362; 13 Abb., 6; *Bucknam vs. Brett*, 35 Barb., 596; 22 How., 233; 13 Abb., 119.

In order to enable a revivor against the representatives of a deceased defendant, the action must be actually pending at the time of his decease. A mere order for publication will not have that effect, where the publication is then incomplete, though an attachment, if issued, will have the effect of a commencement. See *Moore vs. Thayer*, 10 Barb., 258; 6 How., 47; 3 C. R., 176; reversing, but in part only, *McEwen's Executor vs. Public Administrator*, 3 C. R., 139.

As to the right of a surviving defendant to compel a revivor as against the representatives of a deceased co-defendant, where the cause of action does not survive, and also to compel their appearance, or have the bill or petition taken *pro confesso* against them, see 2 R. S., 185, §§ 120, 121.

On the death of one of several defendants in an action at law, the plaintiff may treat the action as abated against him, and proceed regu-

larly against the survivors. Or, it seems, an order might be granted, dividing the action into two, one against such survivors, the other against the representatives of the party deceased. *Gardner vs. Walker*, 22 How., 405. See also, generally, as to continuing such an action, *Bucknam vs. Brett*, 35 Barb., 596 ; 22 How., 233 ; 13 Abb., 119.

The several modes in which the representatives of a deceased party, in a case of joint and several liability, can be brought before the court, are discussed and pointed out in *De Agreda vs. Mantel*, 1 Abb., 130 (140, 141).

The representatives of a deceased co-plaintiff may seek to be brought in by motion, under section 121. If they neglect it, the surviving co-plaintiff may make them defendants, under the Code, or under the Revised Statutes. 2 R. S., 185, § 117. If he neglect it, the defendant can petition to have the suit revived in their names, or that the suit stand dismissed as far as their interests are concerned. *Vide* 2 R. S., 185, § 118. See also *Williamson vs. Moore*, 5 Sandf., 647, above cited. And, where there is a cross action, the defendant, as plaintiff in that action, may bring in the representatives. 2 R. S., 184, §§ 108 to 115. Or, a motion may be made to bring in such representatives as necessary parties, under section 122. See *De Agreda vs. Mantel*, above referred to.

The right to revive against an executor applies equally to a cross, as to an original, suit. *Hatfield vs. Bloodgood*, 1 C. R. (N. S.), 212. And, it would seem, there is no statutory limitation fixing a time for its exercise. *Averill vs. Patterson*, 6 Seld., 500 ; 10 How., 85.

Revivor against an executor does not confer any right to recover costs against him. *McCann vs. Bradley*, 15 How., 79. But it has been held, *per contra*, that costs, in such case, may be recovered against the estate, if the deceased would have been liable. *Benedict vs. Caffé*, 12 L. O., 262.

The consequences of an omission to revive in due form, where necessary, may involve irregularity in all subsequent proceedings. *Requa vs. Holmes*, 16 N. Y., 193. But, the objection may be capable of waiver as regards the rights of the parties omitted to be brought in. *Same case*, 19 How., 430.

And, if a person, unnecessarily made a party, dies, pending the suit, his death will work no abatement whatever, nor will any order for revivor or continuance be necessary. See *Hancock vs. Hancock*, 22 N. Y., 568.

(b.) MODE OF APPLICATION.

In a case under section 121, a motion on the ordinary notice may be resorted to. *Waldorp vs. Bortle*, 4 How., 358. As a general rule, however, petition will be the more expedient course, in order that the

substantive facts, on which the application is necessarily based, may appear upon the actual record. And, where the powers of the Revised Statutes are invoked, petition will be the only proper form. See *Williamson vs. Moore*, 5 Sandf., 647, *supra*.

The motion should be made by the parties interested in obtaining the revivor or substitution, and, where a portion of the plaintiffs apply, their co-plaintiffs should be joined. But a party, whose interest is merely inchoate, as a widow before assignment of dower, need not be brought before the court. *Ash vs. Cooke*, 3 Abb., 389.

Notice should be given to all parties interested in the question, and, in no case, should the order be made *ex parte*, unless it is perfectly clear that no adverse interest will be affected, as in the case of a bare substitution, before appearance, or where the survivors have no personal interest. See *Thayer vs. Mead*, 2 C. R., 18; *Gordon vs. Sterling*, 13 How., 405. See, as to the necessity of notice, *Howard vs. Taylor*, 11 How., 380; 5 Duer, 604.

A party delaying such application, delays it at his peril, as all intermediate proceedings against him will be regular. *Beach vs. Gregory*, 2 Abb., 203.

And, when he applies, he must show a clear and indisputable claim to the relief he asks, or it will not be granted. *St. John vs. West*, 10 How., 253; also, *same case*, 4 How., 329; 3 C. R., 85, above cited.

When obtained, the order is conclusive, and cannot be collaterally questioned. *Underhill vs. Crawford*, 29 Barb., 664; 18 How., 112. It is reviewable, however, by way of appeal. *St. John vs. West*, *supra*; *Norton vs. Wiswall*, 14 How., 42 (46).

Where such an order has been granted, testimony taken, *de bene esse*, before the abatement, may be read. *Markoe vs. Aldrich*, 1 Abb., 55. The action by such revivor is continued, and the effect of such continuance is not merely prospective, but retrospective as to anterior proceedings. See *Thwing vs. Thwing*, 18 How., 458; 9 Abb., 323.

Copies of the moving papers must, of course, be served with the notice of motion in the ordinary mode. The notice should ask for the specific relief required, following the terms of section 121, or, where the application is under any provision of the Revised Statutes, then following the exact terms of that provision.

When granted, a copy of the order should be served upon every defendant who has been served with notice. With this service, the proceeding would seem to be complete, when the motion is made within one year; and, as a specific issue is tendered by the moving papers, no amendment of the complaint would seem to be required.

But, where the motion is made after the expiration of the year, an issue is necessarily tendered by the supplemental complaint, which is

then requisite. In such cases, that supplemental complaint should be prepared beforehand, and service of it with the moving papers will be always advisable, that the court may have the whole subject before it. In this case the order may specifically provide for an answer to that complaint as thus served. And, where the relief asked for involves a change of parties, it will be advisable to ask for an amendment of the summons, in connection with the other portions of the application, and to frame the order accordingly.

Where the application is for substitution of the representatives of a deceased defendant, personal service upon them will be necessary, as the attorney for the deceased defendant cannot be held as representing them. It will be prudent also to give notice to co-defendants, in a case where there exist any conflicting interests.

A copy of the order must, of course, be served upon such parties, unless they appear by attorney. And, where the attorney who appears is not the original attorney in the suit, a copy of the original summons and complaint should be served on him. Where the parties have not appeared, such copy should be served personally, together with the order; or, where they have no personal interest, a copy of the summons, with the usual notice of object of action, will suffice.

If the new defendant have any personal interest, it may be necessary for him to answer afresh. If he be a mere representative, and if his testator or intestate has already answered, the former answer will suffice. Where any of the substituted defendants are infants, the usual forms as to the appointment of a guardian *ad litem* must be complied with before the plaintiff will be in a situation to proceed against them. See *Putnam vs. Van Buren*, 7 How., 31.

In cases of disability, by marriage, lunacy, or otherwise, supervening after issue joined, an application, under section 122, for the purpose of bringing in the additional parties rendered necessary, such as, for instance, the husband of a marrying party, or the committee of one becoming lunatic, &c., &c., will afford the proper remedy.

No case has as yet been reported with reference to the power conferred by the recent amendment of section 121, to compel a revivor of the suit, abated by the death or disability of the plaintiff, within the period there limited. The facts warranting the application must, of course, be shown in the usual manner by affidavit, and a preliminary application to the court, to obtain its direction as to the parties to be served, will be necessary. The order must, of course, be framed in the alternative, according to the terms of the section as it now stands.

When obtained, that order must be served in the usual manner. If not complied with, application may then be made at the expiration of the period limited, for an absolute order that the suit be declared

abated, on proof of service, and that the action has not been duly continued within that period.

§ 193. *Supplemental Pleading.*

The Code provides on this subject as follows, section 177 (152):

The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made.

The leave of the court is necessary, as will be seen, in all cases, and motion is the proper mode of obtaining that leave. When made in due time, and in good faith, it is almost a matter of course to grant the application, especially with reference to the assertion of matter in defence. The matter is one, however, that rests entirely in the discretion of the court, and such leave may be refused in the first instance, or even withdrawn where proper. As to a refusal to grant it not being error, see *Bowen vs. Irish Presbyterian Congregation of the City of New York*, 6 Bosw., 245. If, when granted, it be withdrawn by the reversal of the original order, the supplemental pleading falls, and becomes a nullity, and all consequent proceedings fall with it. See *Guild vs. Parsons*, 16 How., 382. And such an order, if obtained, but not acted upon, will become equally a nullity. *Sage vs. Mosher*, 17 How., 367.

A supplemental complaint is, as has been shown in the last section, necessary on revivor of a continuing cause of action, after the expiration of a year. *Johnson vs. Williams*, 2 Abb., 229, there cited. A bill of this nature is a mere continuation of the original suit, and forms, with the original bill and the proceedings under it, but one record. *Vide Harrington vs. Slade*, 22 Barb., 161 (166).

Nor does it require an answer to any matter except what is supplemental. *Dann vs. Baker*, 12 How., 521.

But such a bill will not be allowed where the title of the proposed plaintiffs in substitution is in any wise disputed or questionable. See *St. John vs. West*, cited in last section.

In an action which had abated before the passage of the Code, it was held that a devisee could not revive in the ordinary form, but that his course was to file an original bill in the nature of a bill of revivor. *Spier vs. Robinson*, 9 How., 325. The present provisions of section 121, seem, however, adequate to reach this case.

A supplemental complaint was held to be the proper form of procedure, to continue a suit brought by a special receiver, in the name of a

party who had been appointed his successor, in *Palmer vs. Murray*, 18 How., 545. See also *Johnson vs. Snyder*, 7 How., 395, as to the course on the death of a trustee defendant, and the bringing in of his successor when appointed.

When the application is promptly made, as soon as the necessity is ascertained it is almost a matter of course to grant leave to file a supplemental complaint, without costs. *Palmer vs. Murray, supra*, 549, 550; *Sage vs. Mosher*, 17 How., 367.

But, if the application be delayed, and especially until after a hearing has taken place, this is by no means the case; and, if granted, strict terms will be imposed. If the object sought to be effected can be attained by means of another suit then pending, leave will be refused. *Sage vs. Mosher, supra*. And delay may, of itself, be a sufficient reason for denying the motion. *McMahon vs. Allen*, 12 How., 39; affirmed, 1 Hilt., 103; 3 Abb., 89.

And, where the matter proposed to be set up is insufficient, and especially if any collusion be shown in respect to it, a denial of leave will be proper. *Bowen vs. Irish Presbyterian Congregation of the City of New York*, 6 Bosw., 245.

If, on the trial of a cause, a supplemental pleading appears to be necessary, the trial may be suspended for that purpose. *Sage vs. Mosher*, 28 Barb., 287.

Where new matter, occurring subsequent to the service of the original complaint, requires to be pleaded, a supplemental complaint will, in all cases, be necessary. Such new matter cannot be introduced, by way of amendment of the original pleading; and, if so introduced, will be stricken out. *Hornfager vs. Hornfager*, 6 How., 13; 1 C. R. (N. S.), 180. But, if not objected to in due season, the defect will be waived. *Beck vs. Stephani*, 9 How., 193.

Matter properly the subject of an amendment, cannot properly be introduced by, or form part of a supplemental pleading. *McMahon vs. Allen, supra*.

Nor can a suit, originally defective, be sustained by means of a supplemental pleading. *Same case. McCullough vs. Colby*, 4 Bosw., 603.

A supplemental pleading, if insufficient, may be made the subject of demurrer. *Spier vs. Robinson*, 9 How., 325; *Higgins vs. Mayer*, 10 How., 363.

If, where the plaintiff can prosecute an abated suit by means of a supplemental complaint, he neglect to do so, a defendant injured by that neglect, may, by motion, compel him to do so, or to abandon the action. *Chapman vs. Foster*, 15 How., 241. See also *De Agreda vs. Mantel*, 1 Abb., 130, referred to in last section.

A supplemental answer can only be put in by leave of the court,

which must be applied for in due course. *Lampson vs. McQueen*, 15 How., 345.

And such leave must be applied for on motion, and in due season, and the application should, as in the case of a supplemental complaint, be made at once, on the discovery of the new matter claimed to be set up. It cannot properly be delayed until the trial. *Garner vs. Hannah*, 6 Duer, 262.

Such an answer is closely analogous to the former plea of "*puis darrein continuance*," but without its technicalities, and with a more uncontrolled exercise of discretion on the part of the court. When the application is made within the time originally allowed to answer, it may be looked upon as a matter of right. If made after that time, it then becomes a matter of discretion, but, as a general rule, leave will not be refused, unless the application have been too long delayed, or the defence claimed to be set up be purely technical, or clearly inequitable or frivolous, in which case it may be refused.

Where the party has been recently apprized of the existence of material matter, and then applies with reasonable promptitude, the section gives him a presumptive right to relief. Leave cannot properly be denied when the motion is before trial, on the mere ground of *laches*, unless the consequent delay will affect the rights of the adverse party. And where, on the hearing of the motion, the defence is not shown to be clearly unsustainable, the court should not, as a general rule, pre-judge the question, but should allow the defence to be put in, though its ultimate success may be doubtful. See *Hoyt vs. Sheldon*, 4 Abb., 59; 6 Duer, 661. See likewise *Harrington vs. Slade*, 22 Barb., 161.

Although a supplemental answer under the Code does not necessarily waive defences interposed in the former answer, the court may impose a condition to that effect, where the new defence is of doubtful sufficiency, and doubtful equity. See *Bate vs. Fellowes*, 4 Bosw., 638.

It has been held that, where the facts sought to be pleaded amount to an entire satisfaction of the cause of action, and, if established, will utterly extinguish the rights of the plaintiff, it is the duty of the court to allow the application, without regard to the time of its making. *Drought vs. Curtiss*, 8 How., 56.

The plea of an intermediate adjudication, in another action, is of this nature, and, if admitted by demurrer to the answer, entitles the defendant to judgment. *Higgins vs. Mayer*, 10 How., 363.

When cross actions, the one for assault, and the other for slander, had been brought between the same parties, and the defendant in slander had pleaded the assault of his adversary in mitigation of damages, and that action had been first tried, and a verdict for six cents damages found in consequence; the defendant in assault was allowed to put in a

supplemental answer, pleading the facts of the former trial. *Radley vs. Houtaling*, 4 How., 251.

An intermediate settlement may, in like manner, be pleaded, but if a party, having been allowed to interpose the defence on terms, omits to comply with them, he will lose the benefit of it. *Owen vs. Mason*, 18 How., 156.

Supplemental matter in defence cannot be introduced by way of amendment of the original answer. To enable it, the leave of the court must be specially obtained. *Lampson vs. McQueen*, 15 How., 345. Nor, *per contra*, will matter in answer to the original bill be allowed to be introduced in an answer to a supplemental complaint, without express leave of the court. *Dann vs. Baker*, 12 How., 521.

Where the facts sought to be pleaded were known to the defendant at the time of his former answer, leave to file a supplemental one was refused. *Houghton vs. Skinner*, 5 How., 420.

Where a new plaintiff is substituted, a supplemental answer, setting up matter of defence personal to that plaintiff, will be allowed, or it may even be alleged as reason for refusing to permit the substitution. *Hastings vs. McKinley*, 1 E. D. Smith, 273.

A party substituted as defendant by supplemental bill, cannot deny or vary the admissions or acknowledgments of those under whom he claims, but is bound by the former proceedings in the suit. *Harrington vs. Slade*, 22 Barb., 161.

The former chancery rule, that a defendant will not be allowed to contradict the statements in his original answer by a supplemental one, has been held still to prevail. *Slawson vs. Engleheart*, 34 Barb., 198.

The cessation of the title of a plaintiff in ejectment, is a matter of statutory defence, and may be set up without being supplementarily pleaded. *Lang vs. Wilbraham*, 2 Duer, 171.

But an ordinary defence, occurring after issue joined, will be waived, unless duly set up by supplemental answer. *Hackett vs. Richards*, 3 E. D. Smith, 13.

Harris vs. Hammond, 18 How., 123, is the only reported case on the subject of a supplemental reply; but the matter there interposed forming a clear bar to the defence, the answer itself was stricken out.

An order granting or refusing leave to plead supplementarily, involves the merits, and is appealable. See *Harrington vs. Slade*, 22 Barb., 161.; *St. John vs. West*, 10 How., 253; *Guild vs. Parsons*, 16 How., 382; *Hoyt vs. Sheldon*, 4 Abb., 59; 6 Duer, 661; *Bowen vs. Irish Presbyterian Congregation of the City of New York*, 6 Bosw., 245.

A plaintiff who has continued a cause by bill of revivor and supplement, cannot discontinue without payment of the costs of both suits. *Fisher vs. Hall*, 9 How., 259.

A supplemental answer should clearly be confined exclusively to the new matter pleaded. In a supplemental complaint it is unnecessary to set out at length the statements contained in the original one. The insertion does not, however, render the pleading demurrable. See *Johnson vs. Snyder*, 7 How., 395.

In preparing either, it may be expedient to aver succinctly the fact that leave of the court has been obtained.

BOOK IX.

PROCEEDINGS BETWEEN ISSUE AND TRIAL.

CHAPTER I.

JOINDER OF ISSUE.

§ 194. *Issue Generally Considered.*

(a.) STATUTORY AND OTHER PROVISIONS.

ISSUE and its incidents form the subject of chapter II., title VIII., part II. of the Code, which runs as follows :

§ 248. (203.) Issues arise upon the pleadings, when a fact or conclusion of law is maintained by the one party, and controverted by the other. They are of two kinds :

1. Of law ; and,
2. Of fact.

§ 249. (204.) An issue of law arises—

1. Upon a demurrer to the complaint, answer, or reply, or to some part thereof.

Dates in its present form from 1849. In 1848, an issue of law was predicable on uncontroverted allegations.

§ 250. (205.) An issue of fact arises—

1. Upon a material allegation in the complaint, controverted by the answer ; or,
2. Upon new matter in the answer controverted, either by the reply, or by the special provisions of section 168 ; or,
3. Upon new matter in the reply, except an issue of law is joined thereon.

Dates from 1849. Was the same in 1848, omitting the last words, "except," &c.

§ 251. (206.) Issues, both of law and of fact, may arise upon different parts of the pleadings in the same action. In such cases, the issues of law must be first tried, unless the court otherwise direct.

Dates from 1849. Was the same in 1848, omitting the words "different parts of," in the first sentence.

§ 252. (207.) A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

This definition stood as it stands, in the Codes of 1848 and 1849. In 1851, it was wholly stricken out. In 1852, it was restored.

§ 253. (208.) An issue of law must be tried by the court, unless it be referred, as provided in sections two hundred and seventy and two hundred and seventy-one. An issue of fact, in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract, on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in section two hundred and sixty-six, or a reference be ordered, as provided in sections two hundred and seventy and two hundred and seventy-one.

Dates, as it stands, from 1852. In 1848 and 1849, the first sentence was wholly omitted, and the residue was differently worded, the provision as to divorce cases being omitted.

§ 254. (209.) Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury; or may refer it, as provided in sections two hundred and seventy and two hundred and seventy-one.

§ 255. (210.) All issues of fact, triable by a jury or by the court, must be tried before a single judge. Issues of fact, in the Supreme Court, must be tried at a Circuit Court, when the trial is by jury; otherwise, at a Circuit Court or special term, as the court may, by its rules, prescribe. Issues of law must be tried at a Circuit Court or special term, and shall, unless the court otherwise direct, have preference on the calendar.

Dates, as it stands, from 1852. In 1851, issues of law were made triable at general term, unless otherwise ordered. See, as to same practice in Superior Court of Buffalo, Laws of 1857, chapter 95, section 23, p. 227. In 1849, all issues of fact were triable at circuit, issues of law at circuit or special term. In 1849, all were to be tried at circuit.

Section 256 relates to notices of trial and the filing of notes of issue, and will be cited below in connection with those subjects.

The last section of the chapter runs thus :

§ 257. (212.) The issues on the calendar shall be disposed of in the following order; unless, for the convenience of parties, or the dispatch of business, the court shall otherwise direct—

1. Issues of fact to be tried by a jury;
2. Issues of fact to be tried by the court;
3. Issues of law.

Has come down unaltered. Is antagonistic, as will be observed, to section 255, so far as regards the order of trial of issues of law. So far it is usually disregarded.

The following section of the Code provides for the waiver of the strict right to trial by jury, by default, when suffered, or where thought expedient :

§ 266. (221.) Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and, with the assent of the court, in other actions, in the manner following :

1. By failing to appear at the trial ;
2. By written consent, in person or by attorney, filed with the clerk ;
3. By oral consent in open court, entered in the minutes.

Dates, as it stands, from 1849. In 1848, the power was general, the words from "in actions on contract," down to "other actions," in the first clause, being omitted.

Rule 28 (21) of the Supreme Court provides thus :

Issues of fact to be tried by the court, may be tried at the circuit or special term.

This rule carries out the provision of section 255, above cited. It was first made on the revision of 1854.

In connection with this subject, it will be convenient to cite the following provision of the Code in relation to feigned issues under the former practice :

§ 72. (65.) Feigned issues are abolished ; and instead thereof, in the cases where the power now exists to order a feigned issue, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried ; and such order shall be the only authority necessary for a trial.

The statutory provisions abolished by this section will be found in chapter 317 of 1839 ; also, as regards the legality of marriage, at 2 R. S., 175, section 45. The power, as conferred on the Court of Chancery in 1839, was of a general nature, resting in the discretion of the chancellor or vice-chancellor, as regarded any suit at issue in that court.

The settlement of issues of this description is thus regulated by rule 33 (69) :

In cases where the trial of issues of fact is not provided for in section 253 of the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue, or any specific questions of fact involved therein, be tried by a jury. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, and in proper form to be incorporated in the order ; and the court or judge may settle the issues, or may refer it to a referee to settle the issues. Such issues must be settled in the form prescribed in section 72 of the Code of Procedure.

In all actions for a divorce, when issue is joined by the pleadings upon the question of adultery, such issue shall not be tried by a jury until the issue to be tried shall be settled in like manner as in other actions, where issues arising out of the pleadings are required to be settled.

The remainder of the rule relates to the subject of new trial, and will be, hereafter, cited in that connection.

By this rule, as it now stands, issues as to adultery must be settled in all cases. Before 1858, when this clause was inserted, it was held in *Parker vs. Parker*, 3 Abb., 478, that such cases might be tried on the issues joined by the pleadings, without any special settlement. The contrary was, however, maintained in *Forrest vs. Forrest*, 3 Abb., 144, and also in *Diddell vs. Diddell*, 3 Abb., 167.

Chapter 238 of 1853, p. 526, makes special provision for the joinder and trial, by jury, or by the court, of issues of fact in actions relative to the validity of any actual or alleged devise or will of real estate.

(b.) GENERAL CONSIDERATIONS.

It is scarcely necessary to add any thing to the definition of an issue as given in section 248; but the following may be cited as *dicta* upon the subject:

“An issue is joined where there is a direct affirmation or denial of the fact in dispute; and it makes no difference whether the affirmative or the negative is first averred.” *Van Giesen vs. Van Giesen*, 12 Barb., 520; 1 C. R. (N. S.), 414. Where nothing is, in fact, controverted, no issue is joined. *Pardee vs. Schenck*, 11 How., 500.

Three distinct classes of issues may, as above, be joined upon the pleadings as they stand:

1. An issue of law, arising on demurrer, as defined by section 249.
2. An issue of fact, arising on answer, provided for by section 250.
3. Mixed issues of law and of fact arising on different parts of the same pleading. See section 251.

To which may be added:

4. Special issues, not brought to trial upon the allegations of the pleadings, but specifically framed under the direction of the court.

(c.) 1. ISSUES OF LAW.

There can be no doubt as to the nature and mode of trial of this form of issue. It arises on demurrer only, and is, in all cases, triable by the court, generally at special term, but with power to entertain them at the circuit. They are capable of being referred, but the power is rarely exercised. They are usually called on, in the first instance, by the judge holding special term and circuit, before entering upon the general calendar, following the directions of section 255, and disregarding the order prescribed by section 257; but, of course, this rests entirely in his discretion.

(d.) 2. ISSUES OF FACT.

Issues of fact are equally simple in their definition. Their mode of trial, however, requires more consideration.

What, under the old practice, were common-law actions, are, as a general rule, triable, of right, by a jury. By section 253, they are defined as actions for the recovery of money only, or of specific real or personal property. The phrase, "for recovery of money only," must not be confounded with the actions "arising on contract for the recovery of money only," spoken of in section 129. It includes, not merely those actions, in which a summons is issuable under the first subdivision of that section, but also the whole class of actions for damages. In short, it may be laid down that every action in which the relief demanded is represented by a money payment, of whatever nature, is an action for the recovery of money only within the purview of section 253, and is, therefore, triable by a jury. To these must be added the common-law remedies of ejectment and replevin.

Divorce, on the ground of adultery, may also be added to the catalogue of proceedings in which trial by jury is a matter of right, though, since the last amendment of rule 33, that form of issue must be specially framed, and falls, therefore, under the fourth of the above classes. As to the right to a jury in these cases, see *Forrest vs. Forrest*, 3 Abb., 144; *Diddell vs. Diddell*, 3 Abb., 167.

But, where the action really looks to specific relief, it should be tried by the court, even although in form it be one for the recovery of money only. See *Cheesebrough vs. House*, 5 Duer, 125.

On the other hand, every other issue is triable by the court under section 254. This provision may be broadly stated as including generally all suits in equity, (those for a total divorce excepted), and also all proceedings by way of action (ejectment and replevin excepted), where the relief demanded looks to any thing beyond a mere money recovery. See, however, *Fire Department of New York vs. Harrison*, below cited.

The power of directing a special issue to be tried, as conferred by section 72, relieves the court from the difficulties that might otherwise have arisen under this provision. See, generally, on these subjects, *Hill vs. McCarty*, 3 C. R., 49.

† In actions of the former of the above two grand classes, trial by jury is a right, and claimable as such. It cannot be interfered with or controlled by the court, save only as regards cases referable under sections 270, 271; and any interference with this right on the part of the court, against the consent of the party, will be error. *Greason vs. Keteltas*, 17 N. Y., 491 (498); *Sharp vs. The Mayor of New York*, 18 How., 213; 9 Abb., 426; *Lewis vs. Varnum*, 12 Abb., 305. See also *Reubens vs. Joel*, 3 Kern., 488, there referred to. As to the propriety of trial by jury where there is an issue of fraud, see *Freeman vs. Atlantic Mutual Insurance Company*, 13 Abb., 124.

abated, on proof of service, and that the action has not been duly continued within that period.

§ 193. *Supplemental Pleading.*

The Code provides on this subject as follows, section 177 (152):

The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made.

The leave of the court is necessary, as will be seen, in all cases, and motion is the proper mode of obtaining that leave. When made in due time, and in good faith, it is almost a matter of course to grant the application, especially with reference to the assertion of matter in defence. The matter is one, however, that rests entirely in the discretion of the court, and such leave may be refused in the first instance, or even withdrawn where proper. As to a refusal to grant it not being error, see *Bowen vs. Irish Presbyterian Congregation of the City of New York*, 6 Bosw., 245. If, when granted, it be withdrawn by the reversal of the original order, the supplemental pleading falls, and becomes a nullity, and all consequent proceedings fall with it. See *Guild vs. Parsons*, 16 How., 382. And such an order, if obtained, but not acted upon, will become equally a nullity. *Sage vs. Mosher*, 17 How., 367.

A supplemental complaint is, as has been shown in the last section, necessary on revivor of a continuing cause of action, after the expiration of a year. *Johnson vs. Williams*, 2 Abb., 229, there cited. A bill of this nature is a mere continuation of the original suit, and forms, with the original bill and the proceedings under it, but one record. *Vide Harrington vs. Slade*, 22 Barb., 161 (166).

Nor does it require an answer to any matter except what is supplemental. *Dann vs. Baker*, 12 How., 521.

But such a bill will not be allowed where the title of the proposed plaintiffs in substitution is in any wise disputed or questionable. See *St. John vs. West*, cited in last section.

In an action which had abated before the passage of the Code, it was held that a devisee could not revive in the ordinary form, but that his course was to file an original bill in the nature of a bill of revivor. *Spier vs. Robinson*, 9 How., 325. The present provisions of section 121, seem, however, adequate to reach this case.

A supplemental complaint was held to be the proper form of procedure, to continue a suit brought by a special receiver, in the name of a

(e.) 3. MIXED ISSUES.

In these cases, it is expressly provided, by section 251, that the issues of law must be first tried, unless the court should otherwise direct.

Where the issue of fact has been in fact tried first, it has been held that the court will presume a direction. *Warner vs. Wigers*, 2 Sandf., 635.

Where mixed issues have been joined, the course will be to set down the case for general trial, and either to bring on the issues of law preliminarily, or to ask the court for its directions as to the proper mode and order of trial. *Same case*; *Fry vs. Bennett*, 9 Abb., 45.

Where, however, if decided in favor of the party demurring, a partial issue of law will, in fact, involve a disposition of the whole case, as where the defendant has demurred by answer, on the ground of the pendency of another action, it has been held that an immediate reference on that specific point is admissible, and that the plaintiff should apply for one, instead of waiting to bring on the cause regularly. *Groshon vs. Lyons*, 1 C. R. (N. S.), 348. See also *Farmers' Loan and Trust Company vs. Hunt*, 1 C. R. (N. S.), 1.

Where an issue of law does not go to the whole, but only to a portion of a pleading, it has been held that the case may be put on the calendar for trial of issues of fact, joined by other portions, without waiting for the decision on the former. *Palmer vs. Smedley*, 13 Abb., 185.

(f.) 4. SPECIAL ISSUES.

The fourth and last form of issue is the special issue, to be settled by the court, under the powers conferred by section 72.

This form of practice is more peculiarly applicable to proceedings in equity, or the settlement of collateral questions of fact, not directly put in issue by the pleadings. In suits for divorce, on the ground of adultery, this course is now not merely admissible, but imperative.

It may be adopted either on application of the parties, or on the motion of the court itself, signified at the trial.

In the former case, the practice is clearly pointed out by rule 33. The motion must be noticed within ten days after issue joined; it must be grounded upon the pleadings; and the relief asked must be either that the whole issue, or that any specific questions of fact involved therein, be tried by a jury. The questions of fact proposed to be so submitted to the jury must be prepared by the moving party, in the form of simple propositions, capable of a direct answer, similar to those submitted by the judge to the jury, at the close of an ordinary trial. and a copy of those questions served with the notice. Where the proposed submission is in respect of collateral facts, not directly apparent

upon the pleadings, the existence and nature of those facts must be shown by affidavit.

This motion cannot be made as of right, after the period prescribed by the rule. See *O'Brien vs. Bowes*, 4 Bosw., 657; 10 Abb., 106. It has not been decided, but it might probably be held, that, when the pleading of a party is amendable, that period will not commence to run till the time allowed him for that purpose has expired. The motion may, of course, be brought on at any time, on consent to waive the technical objection. But, after trial, even the leave of the court will not sustain it, if opposed. See *O'Brien vs. Bowes*, *supra*.

On the hearing, the court or judge may either settle the proposed issues, or may order a reference for the purpose. Where the questions are clear and simple, the former course may probably be pursued. Where they are complicated, and involve a detailed investigation into facts, the latter is usual.

When settled, the special issues, with the order under which they are settled, which order forms, in fact, the ground of the proceeding (see section 72), must be incorporated in and form part of the actual record. When settled by a referee, his report thereon is also a necessary constituent, and, that report being interlocutory, it should be confirmed in the usual manner, and evidence of its confirmation subjoined.

The issues, when thus settled, must be brought on for trial at the circuit in the usual manner, and the final disposition of the cause may be either made upon the same occasion, or at a subsequent hearing at special term, as the case may require.

In equity cases, the court has the power of directing any question to be tried by a jury, of its own motion, and without any application of the parties. If not convinced that the formation of a special issue is necessary, it may refuse the motion, in the first instance, and leave it to come up upon the trial. See *Church vs. Freeman*, 16 How., 294, where a motion was refused on this ground, leaving the question for subsequent determination.

In *McMahon vs. Allen*, 10 How., 384, a motion to settle special issues was denied, on the ground of the crowded state of the calendars in the first district, and a reference directed. See likewise *Wilson vs. Forsyth*, 16 How., 448, where an order of this description was vacated, the court not considering that there was any adequate reason for the intervention of a jury. Nor will an issue be granted upon a question already adjudicated. See *Nichols vs. Romaine*, 3 Abb., 122.

At the trial, the question rests entirely in the discretion of the court, which may or may not order an issue to be made and tried by a jury, as it may see fit, and this in the absence of any application of the parties, and even without regard to their wishes on the subject. See

Church vs. Freeman, supra. And such direction may be made by the court of its own motion, and for its own relief, either before or at the trial. *O'Brien vs. Bowes*, 4 Bosw., 657; 10 Abb., 106. But, when once the trial is over, and the cause reserved for decision, the power of the judge, in this respect, is exhausted, and he must pass upon the questions, as submitted, and cannot order an issue, or authorize a subsequent motion for that purpose, and any order made on such motion will be void. *Same case.*

When ordered at the actual trial, the issues to be submitted may either be settled by the judge at the time or subsequently; or, if expedient, a reference may doubtless be directed by him, in the manner above prescribed.

In *Forrest vs. Forrest*, 3 Abb., 144, it was considered that, even before the rule, a special issue must always be framed, in a suit for divorce on the ground of adultery. Such issue must, however, be confined simply to that question. It cannot properly comprise, nor can the jury properly pass upon, questions going to the subject of alimony, or other collateral or consequent relief. An issue as to the legitimacy or illegitimacy of any children, should, however, be passed upon at the same time. See rule 90 (68).

CHAPTER II.

PROCEEDINGS FOR SPEEDIER OR MORE CONVENIENT TRIAL.

THE proceedings of this nature, and which will be considered in the present chapter, consist of the following:

1. Motion to consolidate.
 2. Motion to elect.
 3. Motion for a reference.
 4. Motion to dismiss complaint for want of prosecution.
 5. Motion to place cause on special calendar, where admissible.
- Which subjects will be considered in the above order.

§ 195. Consolidation.

The Code is silent as to this remedy. It is obtainable, however, under article IV., title VI., chapter VI., part III. of the Revised Statutes, 2 R. S., 383, sections 36, 37 and 38, which run as follows:

§ 36. Whenever several suits shall be pending in the same court, by the same plaintiff against the same defendant, for causes of action which may be joined, the court in which the same shall be prosecuted may, in its discretion, if it shall appear expedient, order the several suits to be consolidated into one action.

§ 37. If one or more such suits be pending in the Supreme Court, and others be pending in any other court, the Supreme Court may order the suits in other courts to be consolidated with that in the Supreme Court.

§ 38. When several suits shall be commenced against joint and several debtors, in the same court, the plaintiff may, at any stage of the proceedings, consolidate them into one action.

It will be observed that the granting of this relief rests entirely in the discretion of the court, except in the case provided for in section 38. The enlarged facilities granted by the Code, with reference to the joinder of causes of action, materially extend the scope of this remedy beyond that originally conferred.

A special right to consolidation is given, where separate actions have been brought by the attorney-general against several persons on one mortgage, covenant or agreement, or who claim under the same title; and it is made the duty of such officer to consent to such consolidation at the request of the defendants. *Vide* 1 R. S., 181, section 14.

The motion should, as appears by the above sections, be made in the court in which the actions sought to be affected by it, are pending. If pending in different courts, one of which is the Supreme Court, it must be made in the latter. The case of actions pending in different tribunals of limited jurisdiction does not appear to be provided for. It may be reached, however, by a motion to elect. See next section.

The motion should be framed according to the terms of the particular section relied upon, a demand for further relief being always inserted. The facts necessary to bring the case within the scope of the section invoked, must be shown by affidavit, which must be positive, or it will be insufficient. See *Crane vs. Koehler*, 6 Abb., 328, note. It must be clearly evidenced that the suits sought to be affected, are for causes of action capable of being joined, and the nature of the defence must be disclosed; it must be also shown, that they are all pending by the same plaintiff, against the same defendant, and in the same court; or, if not, then that one, at least, is pending in the Supreme Court. If any statements of fact be necessary to establish these conditions clearly, those statements should be made. The motion should also be grounded upon the pleadings in the action in which it is made, and also, where feasible, in those sought to be consolidated. The allegations in those plead-

ings, may often be sufficient, in themselves, to satisfy the court as to most of the facts required to be established.

The proper period for the motion is, upon the final joinder of issue in all the actions sought to be consolidated. If made before, it will be premature, and subject to be defeated by any subsequent pleading or amendment, where admissible. *Le Roy vs. Bedell*, 1 C. R. (N. S.), 201.

Where, however, the fact that a number of actions in different counties were brought for the same libel, an order to consolidate was granted, on motion of the defendant, immediately on his appearance made in the county of residence of the parties, the time to plead being that remaining in the county to which the suits were drawn by the consolidation. *Percy vs. Seward*, 6 Abb., 326.

The motion under section 38, must, under that section, be made by the plaintiff. Under the special statute in relation to actions brought by the attorney-general, the defendant must be the applicant, if a consent be refused. Under sections 36 and 37, it has been held that it is competent for either party to make the motion. *Briggs vs. Gaunt*, 4 Duer, 664 ; less fully, 2 Abb., 77. See, however, *dictum* to the contrary, and adverse to the plaintiff's right to move, in *McMahon vs. Allen*, 12 How., 39 (46).

Unless it is clearly shown that the defences in actions sought to be consolidated are identical, an order will be refused. *Crane vs. Koehler*, 6 Abb., 328, note ; *Morris vs. Knox*, *ibid.*

In *Cook vs. The Metropolitan Bank*, 5 Sandf., 655, where the plaintiff had commenced sixty-four separate suits for penalties, and which suits were divisible into two main classes, the motion for an actual consolidation was denied, in the first instance, but on terms that the plaintiff was to notice and bring to trial one suit of each class, and that the proceedings in the other suits were to be stayed until after the trial of those selected : with liberty to the defendants in the remaining causes, after such trials, to renew their motion for a consolidation, or further stay ; and a like liberty to the plaintiff to move for a consolidation, unless the defendants in the remaining causes should consent to abide the ultimate result of the proceedings in the former ; in which event, the plaintiff was not to be entitled to any further costs, for putting the subsequent causes on the calendar.

On a consolidation, provision should be made in the order for the costs in the discontinued actions ; otherwise the plaintiff, if successful, cannot ultimately recover them. *Blake vs. Michigan Southern and Northern Indiana Railroad Company*, 17 How., 228.

§ 196. *Motion to Elect or Stay.*

This application is of a nature closely akin to the former, and substantially for the same purpose.

It cannot properly be made, until a complete issue is joined in both the proceedings sought to be affected. *Fuller vs. Read*, 15 How., 236; 6 Duer, 697.

It should also be made in the proceeding last instituted; if brought forward in the first, it cannot be entertained. *Farmers' Loan and Trust Company vs. Hunt*, 1 C. R. (N. S.), 1.

A defendant, who has brought a cross action in respect of matter which he has already set up by way of recoupment, may be compelled to elect. *Same case. Fabricotti vs. Launitz*, 3 Sandf., 743; 1 C. R. (N. S.), 121. So also, between an action and a counter-claim, in respect of the same matter, when it clearly appears that both causes can be tried on their merits in either. See *Fuller vs. Read*, 15 How., 236 (240); 6 Duer, 697.

But no order will be made to compel an election between cross actions in reference to the same subject-matter. *Wright vs. Delafield*, 11 How., 465.

And, unless two actions in relation to the same subject-matter be coincident, so that a trial of one will, in fact, decide the other, an election will not be compelled. *Sorley vs. Brewer*, 18 How., 509. See also *Wells vs. Smith*, 7 Abb., 261 (265).

A motion to elect cannot be sustained after judgment. But, if appeal be regularly taken, the court may then grant a single argument in one case, and direct that the others abide the result. *Toll vs. Thomas*, 15 How., 315.

Where several suits involved the same question as to the right of recovery, the court stayed proceedings in all except the first, on a stipulation by the defendant that, in the others, he would only contest the question of damages, the parties, though nominally different, being, in fact, substantially connected. *McFarlan vs. Clark*, 2 Sandf., 699.

The mere fact that another action has been commenced in another state or country, will not form, *per se*, ground for ordering a discontinuance of the proceedings here. *Republic of Mexico vs. Arrangois*, 5 Duer, 634; 1 Abb., 437. But if, in the foreign country, the plaintiff interferes to prevent the course of justice in the proceeding in this, his suit may be stayed, or even ordered to be discontinued. *Same case*, 3 Abb., 470.

And, in a case where a party sues in two states for the same cause,

and makes use of one suit to interfere with proceedings in the other, the court will compel him to elect between the two, and stay proceedings until such election. *Hammond vs. Baker*, 3 Sandf., 704; 1 C. R. (N. S.), 105.

In a case of conflicting creditors' suits, the courts will be disposed to interfere in favor of one for the general benefit of all creditors, as against one for the benefit of a single creditor only, and to stay the latter, and also supplementary proceedings. See *Hammond vs. Hudson River Iron and Machine Company*, 11 How., 29. But not until the general suit is in a condition for all creditors to come in. *Lachaise vs. Lord*, 4 E. D. Smith, 612, note; 10 How., 461; 1 Abb., 213. See likewise, generally, *Dambmann vs. The Empire Mill*, 12 Barb., 341.

On a motion of this description, the pendency and nature of the different proceedings, and such circumstances as are necessary to prove that their scope is identical, or so far so that the relief sought in one, can be obtained with equal certainty and efficiency by means of the other, should be shown by affidavit, and, where practicable, the pleadings in both suits should be referred to in the notice, and the motion grounded on them also. The relief asked for should usually be, that the adverse party be compelled to elect, and to signify his election in writing, and that, upon election, proceedings should be stayed in the action in which he elects not to proceed, or otherwise, according to the special circumstances of the case; and a demand of further, or other relief, should under no circumstances be omitted. The order, if granted, should be entered accordingly, requiring the party to elect within a given time, and to signify his election in writing, and staying proceedings thereupon. If, when served, such party neglects to do so, or otherwise disregards the order, an absolute stay should then be applied for in the action in which the motion is made.

The above observations are, of course, merely general; the demand or order for such relief should be framed in each specific case according to its circumstances, keeping the above general objects in view.

§ 197. *Motion for a Reference.*

(a.) STATUTORY AND OTHER PROVISIONS.

This proceeding, where admissible, is peculiarly appropriate to the present stage of the action.

The provisions of the Code on the subject are contained in chapter V., title VIII., part II., sections 270, 271, and 273. Section 272 relates to the proceedings before a referee or referees, when appointed, and will be hereafter considered in connection with the subject of *Trial*.

These provisions supersede those of the Revised Statutes, as contained

in article IV., title VI., chapter VI., part III., sections 39 to 53, inclusive. 2 R. S., 383 to 385. And likewise those of the judiciary act. Ch. 280 of 1847, § 77.

The provisions in question run as follows :

§ 270. (225.) All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties.

§ 271. (226.) Where the parties do not consent, the court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases :

1. Where the trial of an issue of fact shall require the examination of a long account on either side ; in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein ; or,

2. Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment or order into effect ; or,

3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action.

This provision dates, as it stands, from 1849. In 1848 the exception at the commencement was omitted.

§ 273. (228.) In all cases of reference, the parties, except when an infant may be a party, may agree in writing upon a person or persons not exceeding three, and a reference shall be ordered to him or them, and no other person or persons ; and if the parties do not agree, the court shall appoint one or more referees, not more than three, who shall be free from exception. And no person shall be appointed referee to whom all parties in the action shall object, except in actions for divorce. And no justice or judge of any court shall sit as referee in any action pending in the court of which he is a judge, and not already referred. Unless the court shall otherwise order, the referee or referees shall make and deliver his report within sixty days from the time the action shall be finally submitted, and on default thereof said referee or referees shall not be entitled to receive any fees, and the action shall proceed as though no reference had been ordered.

The section, as it stands, dates from the recent amendment of 1862. On which occasion the three last clauses were for the first time inserted ; before that, the section consisted only of the first sentence, or its equivalent.

That sentence came down from 1851, as it now stands, in substance, but less positively, as to the right of parties to choose their own referee or referees.

In 1849, the residence of the referee in the county of venue was made a condition, and a peculiar practice was provided with reference to appointments in the city and county of New York. It is needless to cite that clause now, it having become practically obsolete.

In 1848, the provision was to the same effect as in 1849, save only that it was there divided into two sections, 228 and 229, and that it especially provided for filing the agreement of reference.

References in connection with proceedings on the entry of judgment by default, or on an issue of law, are also enabled and provided for by sections 246 and 269.

The reference of a claim presented to an executor or an administrator, and disputed by him, provided for by the Revised Statutes, though a special proceeding at the outset, assumes, when the agreement is filed and a rule entered, as prescribed, the character of an ordinary hearing. See 2 R. S., 88 to 90, sections 36 to 42 inclusive, amended as to section 36 by chapter 261 of 1859, p. 569, under which either three or one person may act. The agreement for such a reference may be in general terms, and, on its approval and filing with the clerk of the court, as prescribed by the statute, it becomes operative as a voluntary appearance of the parties in the Supreme Court, and a submission to its jurisdiction to adjudicate upon the claim presented. *Tracy vs. Suydam*, 31 Barb., 110.

Arbitration, though closely akin to a reference in its nature and objects, is altogether a special proceeding, and falls as such out of the scope of this work. It presents this essential difference, that a reference, when made, is irrevocable, save by order of the court, whereas an arbitration may be withdrawn from at the will of either party at any time before the case has been finally submitted upon a hearing. For statutory provisions upon the subject, see title XIV., chapter VIII., part III. of the Revised Statutes, 2 R. S., 541 to 545 inclusive.

The rules of court on the subject of reference are as follows :

Rule 32 (22) relates entirely to the proceedings before referees after their appointment. It will be noticed hereafter, under the head of *Trial*.

Rule 33 (69) has been already cited in the first chapter of the present book, section 193. It provides, as there shown, for a reference to settle special issues, if directed by the court. The latter portion relates to the subject of new trial, and will be noticed hereafter under that head.

Rule 71 provides for a reference in undefended foreclosure cases, for the purpose of computing the amount due, reporting as to the mode of sale, if the whole sum be not due, and of taking proof of the facts or circumstances, if any of the defendants are infants or absentees.

Rule 72 also authorizes the appointment of a referee for the purpose of making the necessary sale under a decree of foreclosure if granted, though not necessarily, as the sheriff may also act.

A reference to take the necessary proofs in partition is provided for by rules 78 (73) and 79 (74).

Under rule 86 (64) a reference to take proof of the material facts charged in the complaint, is prescribed as the proper course in divorce cases, when undefended.

Rule 87 (65) prescribes the particulars which must be stated in the moving affidavits on applying for a reference of this description, in suits for annulment of marriage; and rules 89 (67) and 90 (68) provide as to the practice in the hearing of divorce suits in general.

Under rules 67 (61) and 70 (56), a reference may also be ordered to take proof in connection with applications for sale of the real estate of an infant, and for payment over of any share of the proceeds.

Rules 72 and 86, above referred to, both contain special provisions as to appointment of referees as follows:

In rule 72, "The referee to be appointed in foreclosure cases shall be selected by the court, and the court shall not appoint as such referee a person nominated by the party to the action, or his counsel."

In rule 86, "The court shall in no case order a reference to a referee nominated by either party."

These provisions were both inserted on the amendment of 1858.

The following rule in relation to causes in the second district, was made by the justices of that district, on the 24th of October, 1856:

When a cause shall be called for trial upon any circuit calendar, if either party shall apply for a postponement thereof, and the opposite party desires to have the cause referred for trial and decision, the court will, except in special cases, make it one of the conditions of such postponement, that the cause be so referred.

(c.) REFERENCE ON CONSENT.

This proceeding, as authorized by section 270, presents no difficulty. A consent must be drawn, the signature of all parties who have appeared, or of their attorneys, obtained, and, when complete, it may be presented to a judge at chambers, or out of court, accompanied with the proper form of order. His signature to the latter will follow almost as of course, and, under section 273, he cannot even object to any person or persons whom the parties may agree in naming.

Where, however, infants are parties, the section does not apply, and he may deny the order if the appointment is not suitable. See *Litchfield vs. Burwell*, 5 How., 341; 9 L. O., 182; 1 C. R. (N. S.), 42.

The order, when signed, must be entered in due course, and served upon all parties. If a party signing the consent has not appeared, or, not being an attorney of the court, appears in person, proof of his signature must accompany it. If any party has already suffered a default, his signature will not be essential, but proof of due service upon him, and that he has not answered, will be necessary, and must accompany the consent of the others.

Consent to a reference may also be given orally in open court; and

if so given, entered on the minutes, and acted upon by the entry of an order, and proceedings before the referee cannot afterwards be retracted, even though the cause would not otherwise have been referable. *Keator vs. Ulster and Delaware Plank Road Company*, 7 How., 41. See also, as to the validity of the appointment of an additional referee, by consent entered on the minutes of the others, and subsequently acted upon, *Leaycroft vs. Fowler*, 7 How., 259.

In *Ludington vs. Taft*, 10 Barb., 447, the parties were even held to be concluded by a stipulation to refer, when acted upon by both, the reference proceeded with and a report made, though it did not appear that any order had been actually entered. If necessary, an order may be entered *nunc pro tunc*, under such circumstances. *Whalen vs. Supervisors of Albany*, 6 How., 278.

The precaution of the previous entry of an order should, however, never be omitted, as the referees, when agreed upon, derive their authority from the order of the court, by which the appointment is directed to be made. Section 273. See also *Litchfield vs. Burwell*, 5 How., 341; 1 C. R. (N. S.), 42; 9 L. O., 182, above cited. In this latter case the stipulation was, in fact, a nullity under the terms of the section last referred to, the defendants being infants.

In *Diddell vs. Diddell*, 3 Abb., 167, a very strict view was taken, and it was held that, under the conjoint operation of sections 270 and 266, the objection that it did not appear on the face of the moving papers that an actually existent consent to waive trial by jury, and to refer a suit for divorce on the ground of adultery, had been filed with the clerk as required by the latter section, was fatal even after actual trial had and report made, and that such defect rendered the order, and all proceedings under it, irregular. This view appeared to have been acquiesced in, and a new order entered and proceeded upon, *nunc pro tunc*, and a second report taken upon the same evidence. See note, p. 173. See similarly strict view, as to the effect of a failure to appear at the trial, *Parker vs. Parker*, 3 Abb., 478.

A cause, not otherwise referable, becomes so by means of a binding consent to refer, and the objection cannot afterwards be taken. See *Keator vs. Ulster and Delaware Plank Road Company*, above cited; *Elmore vs. Thomas*, 7 Abb., 70.

A written consent, if obtained, must not be altered in any manner, or the proceedings under it will be wholly void, and the opposite party may disregard any order so obtained, and proceed to trial as if no consent had been given. *Haner vs. Bliss*, 7 How., 246.

It has been held that, where actual issue has been joined in a divorce case, a reference to take testimony cannot properly be granted, even on consent, the provisions in the rules, above referred to, being only appli-

cable to cases where default is made, or where the plaintiff's allegations are not denied. *Whale vs. Whale*, 1 C. R., 115. The issue joined may, however, be referred on consent. *Anonymous*, 3 C. R., 139. See also *Flagg vs. Munger*, 3 Barb., 9; 2 C. R., 17; as to the general inadmissibility of a mere reference to take testimony according to the former equity practice. See likewise, *Draper vs. Day*, 11 How., 439.

(c.) REFERENCE ON MOTION.

A reference may be moved for by the parties, under section 271, for any of the following purposes :

For trial of the whole issue when it involves the examination of a long account. Subdivision 1.

To report upon any specific question of fact under the same circumstances. Same subdivision.

To take any account which may be necessary for the information of the court, before or after judgment. Subdivision 2.

To report upon any collateral questions of fact, arising on motion or otherwise, in any stage of the action. Subdivision 3.

But the motion is not admissible "when the investigation will require the decision of difficult questions of law."

Where such is the case, however, as regards the trial of the principal issues, a report upon specific questions of fact, under the last branch of subdivision 1, may often be admissible and appropriate, as tending to clear away the difficulties which impede the consideration of the main question.

It is competent for either party to move for a general reference immediately on the joinder of issue, and such is, in fact, the time peculiarly appropriate for the motion. It may, it seems, be made immediately, and without waiting for the expiration of the time allowed the adverse party to amend; nor will a subsequent amendment necessarily defeat the order, unless by means of it there ceases to be a referable issue between the parties. *Enos vs. Thomas*, 4 How., 290.

In a case which does not involve the examination of a long account, the court has no power to order a reference, if objected to. *Sharp vs. The Mayor of New York*, 18 How., 213; 9 Abb., 426; affirmed, 31 Barb., 578; *Draper vs. Day*, 11 How., 439.

Nor is a reference proper for the assessment of items of damages in an action sounding in tort. *Sharp vs. The Mayor of New York*, *supra*; *McCullough vs. Brodie*, 6 Duer, 659; 13 How., 346; *Dewey vs. Field*, 13 How., 437; *Cameron vs. Freeman*, 18 How., 310; 10 Abb., 383; *McMaster vs. Booth*, 4 How., 427; 3 C. R., 111; *Hewitt vs. Howell*, 8 How., 346. See also, *Boyce vs. Comstock*, 1 C. R. (N. S.), 290; *Gray vs. Fox*, 1 C. R. (N. S.), 334. This series of cases seems to

overrule *Sheldon vs. Wood*, 3 Sandf., 739 ; 1 C. R. (N. S.), 118. See also, as to a reference not being proper in an action defended on the ground of fraud, *Freeman vs. Atlantic Mutual Insurance Company*, 13 Abb., 124.

And, to warrant a reference of the whole issue, as involving the examination of a long account, the accounting to be taken must arise upon contract, must be directly involved in the issue to be tried, must be necessary to the trial of that issue, and must be a matter of right between the parties. *Cameron vs. Freeman*, 18 How., 310 ; 10 Abb., 333. If the taking of such account be contingent on the trial of the main issues joined, and will be unnecessary if either party fail in those issues, a reference should, if objected to, be refused. *Keeler vs. Poughkeepsie and Salt Point Plank Road Company*, 10 How., 11 ; *Sheldon vs. Weeks*, 7 L. O., 57 ; *Graham vs. Golding*, 7 How., 260. Such an order is not, however, appealable. *Kennedy vs. Shilton*, 9 Abb., 157, note.

So, likewise, where by stipulation the question between the parties has been narrowed down to a simple issue, the court will not refer the cause, though originally involving a long account. *Mullin vs. Kelly*, 3 How., 12.

In cases of the foregoing description, where the taking of a long account is not originally, but may become contingently necessary, the proper course will be to go to trial in the first instance, and then, if such account proves to be necessary, to take it specially by a reference under subdivision 2. *Cameron vs. Freeman*, *supra* ; *Graham vs. Golding*, *supra* ; *O'Brien vs. Bowes*, 4 Bosw., 657 ; 10 Abb., 106.

And such an accounting may be taken before the trial, on motion for that purpose, under the same subdivision. *Ketchum vs. Clark*, 22 Barb., 319. As to the practice on a reference of the whole issue, involving a question of this description, see *Palmer vs. Palmer*, 13 How., 363.

But, where the examination of an account forms a principal part of the issue, a general reference will be ordered. *Mills vs. Thursby*, (No. 1), 11 How., 113.

The account to be taken should, to render the cause referable, be a *bonâ fide* account in an action on contract, and literally and truly a long account. *Sharp vs. The Mayor of New York*, 18 How., 213 ; 9 Abb., 426, *supra*. The items must be distinct, and arising in respect of different transactions, so as to make the case really one of accounting between the parties. For instance, the fact that an account of goods sold at one time contains many items, is not sufficient to render it referable. *Stewart vs. Elwell*, 3 C. R., 139. See also *Freeman vs. Atlantic Mutual Insurance Company*, 13 Abb., 124.

When the case clearly involves the examination of a long account, the court will order a reference. *Masterton vs. Howell*, 10 Abb., 118. And, when the case is clear, it may do so on its own motion. In *Jackson vs. De Forest*, 14 How., 81, this course was taken by the judge, on a preliminary motion for a receiver.

Or where, on the trial, it appears indispensable that an account be taken, the trial may be suspended, and a reference ordered in the first instance. *Smith vs. Dodd*, 3 E. D. Smith, 348.

In *Van Zandt vs. Cobb*, 10 How., 348, a reference was ordered, on the trial, to find the facts on the issues raised by the pleadings, and to state accounts upon such finding. Whether the case was to be reserved for further directions upon the report, when made, does not appear clearly upon the face of the report, but probably such was the disposition of it, under the powers conferred by subdivision 2, and the last portion of subdivision 1.

The decision in *McMahon vs. Allen*, 10 How., 384, directing a reference of the whole issue, though not necessarily involving the examination of a long account, on the ground of the crowded state of the calendars, seems clearly to be beyond the power conferred by the section, even when taken in connection with section 254.

When the case clearly involves the examination of a long account, it is no objection to the motion that it has been already tried by a jury. *Brown vs. Bradshaw*, 1 Duer, 635; 8 How., 176.

In *Bowman vs. Sheldon*, 1 Duer, 607; 11 L. O., 219, an action for an attorney's fees, a preliminary reference to fix the amount, analogous to a taxation under the former system, was ordered on motion, the amount not to be conclusive on the subsequent trial.

References, under subdivision 3, are less usual. In the following cases they have, however, been granted:

In *Elmore vs. Thomas*, 7 Abb., 70, where the issues joined by the pleadings, in an equity suit, had been tried by a referee, a further reference was ordered, to report the facts in relation to collateral equities, claimed by the defendant, but not set up by his answer, in order to enable the court to make a further decree thereon. See, as to reference to take a consequent account, *McMahon vs. Allen*, 27 Barb., 335; 7 Abb., 1.

In *Pendleton vs. Weed*, 17 N. Y., 72, a reference appears to have been granted by the court below, to report specific facts in relation to a matter brought before the court on motion, though the motion itself was denied.

In *Meyer vs. Lent*, 7 Abb., 225, a reference was held by the Court of Appeals to be the proper course for determining a disputed question of fact arising on motion. This case reverses *Meyer vs. Lent*, 16 Barb.,

538, but on another point. See also, as to granting a reference on a question arising upon motion, especially where all the facts are not fully before the court, *Munn vs. Barnum*, 2 Abb., 409; *Barron vs. Sanford*, 14 How., 443; 6 Abb., 320, note. But, where the question is sufficiently brought before the court on affidavit, the application may be refused. *Steele vs. Palmer*, 7 Abb., 181; *Barber vs. Case*, 12 How., 531. Compelling a party to attend before the court, and be examined, under such circumstances, seems to be overruled by *Meyer vs. Lent*, 7 Abb., 225, above cited.

In *The People vs. Cholwell*, 6 Abb., 151, a reference in relation to the regularity of proceedings complained of, was ordered, on an application for a *certiorari*.

When a reference within the powers conferred by the court has been granted, the order granting it is not appealable. *Bryan vs. Brennan*, 7 How., 359; *Dean vs. Empire State Mutual Insurance Company*, 9 How., 69; *Gray vs. Fox*, 1 C. R. (N. S.), 334; *Ubsdell vs. Root*, 3 Abb., 142.

But otherwise, if the order be such as the court has, under the section, no power to grant. *Cram vs. Bradford*, 4 Abb., 193. See also several of the decisions above cited, as to the want of power to order a reference in specific cases.

A defect of this or the like nature will, however, be waived by an omission to object, and by proceeding before a referee, though unduly or imperfectly appointed. *Renouil vs. Harris*, 2 Sandf., 641; 1 C. R., 125; *Whalen vs. Supervisors of Albany*, 6 How., 278; *Hawkins vs. Avery*, 32 Barb., 551; *Keator vs. Ulster and Delaware Plank Road Company*, 7 How., 41; *Leaycroft vs. Fowler*, 7 How., 259. But not so where the objection is as to the jurisdiction of the court to grant any reference. See *Garcie vs. Sheldon*, 3 Barb., 232; *Bonner vs. McPhail*, 31 Barb., 106.

Unless made in the form prescribed by the Code, an order purporting to refer a cause may only have the effect, and be subject to the incidents, of an ordinary arbitration. *Blunt vs. Whitney*, 3 Sandf., 4. See also, as to a reference to four referees, *Jones vs. Cuyler*, 16 Barb., 576.

As to an interlocutory reference in partition, see *Northrop vs. Anderson*, 8 How., 351.

(d.) MODE OF APPLICATION.

When a reference is ordered on the motion or suggestion of the court, no specific form of application is necessary.

When brought on on motion of one of the parties, the ordinary notice must be given, grounded on an affidavit. The pleadings should also be referred to in the notice, to enable them to be read, in case of opposi-

tion by the adverse party. The precise form of application will, of course, depend upon the nature of the reference applied for, whether limited or of the whole issue.

Where practicable, the affidavit should, it seems, be made by the party, and not by the attorney; and, if by the latter, a sufficient excuse should be shown. See *Mesick vs. Smith*, 2 How., 7.

When the motion is made under subdivision 1, or under subdivision 2, before judgment, the affidavit should show upon its face that an issue of fact has been joined.

Under subdivision 1, it is also essential that a statement be made upon its face, that the trial of such issue requires the examination of a long account.

If under either of the other subdivisions, the case must be brought within the letter of that subdivision in express terms.

The affidavit under subdivision 3, should show with sufficient detail what the question of fact is that is proposed to be referred, how it arises, and that it arises other than upon the pleadings.

It will be a more literal compliance with the statute, and, therefore, the more advisable course, to make, upon the face of the affidavit, a formal statement in all cases that "the investigation will not require the decision of any difficult questions of law." It has been held, however, that the omission of this statement will not constitute a defect in the moving papers; that the fact will be presumed, as essential to the motion; and that it is incumbent on the adverse party to show the contrary, in his opposing affidavits, and, if he fail to do so, the objection will be untenable. *Barber vs. Cromwell*, 10 How., 351. In such affidavits, if made, that party should not merely take the objection in the words of the statute, but should also set forth what such questions are, to enable the court to judge whether they are questions of real difficulty. *Dewey vs. Field*, 13 How., 437 (439).

The objection that the case does not require the examination of a long account will usually be apparent upon the pleadings. If taken, however, by affidavit, facts should be shown, and the objection should be specifically stated, in the words of the section.

Any objection as to the insufficiency of parties, or the like, must be taken at the time, or it will be waived, and cannot be raised subsequently on the trial. *Hawkins vs. Avery*, 32 Barb., 551.

On the argument of the motion, each party should be prepared with the names of a referee or referees, in order that a selection may be made by agreement, if possible, or, if not, by the court. In the absence of any agreement, the appointment rests with the court in all cases, and the judge is not bound to confine himself to the names suggested, but may, and frequently does appoint his own nominee. Under

the last amendment, however, he cannot appoint a person to whom all parties object, save only in divorce cases.

See, as to the practice in the first district, announcement on the 25th of November, 1856, noticed 13 How., 346.

The practice of appointing three referees is falling into disuse, being obviously both expensive and inconvenient, and a single one is almost invariably named. In relation to the appointment of a third referee under the repealed provisions of 1849, as to New York cases, see *Renouil vs. Harris*, 2 Sandf., 641 ; 1 C. R., 125. See also generally on the same subject, *Leaycroft vs. Fowler*, 7 How., 259.

When granted, care should be taken to draw the order in exact conformity with that portion of the section on which it is based. It must be duly entered, and a certified copy should always be obtained for the use, and as constituting the authority of the referee. It must, of course, be served upon all parties who have appeared.

§ 198. *Motion to Dismiss.*

The Code provides, on this subject, as follows, in the last sentence of section 274, relative to judgment :

The court may also dismiss the complaint, with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.

This clause was first inserted in 1849, and has come down unchanged.

The following rules have reference to the same subject :

Rule 26. Whenever the plaintiff shall have neglected to bring his cause to trial according to the practice of the court, and the same shall not have been noticed by the defendant, the plaintiff may, if he has not before stipulated, tender a stipulation, and offer to pay the costs to which the defendant is entitled up to that time.

Rule 27. Whenever an issue of fact shall have been joined, in any action, and the plaintiff therein shall fail to bring the same to trial according to the course and practice of the court, the defendant may move for the dismissal of the complaint with costs.

If it is made to appear to the court that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the court shall permit the plaintiff, on payment of costs, to bring the said action to trial at the next court where the same is triable.

These rules, previously Nos. 20 and 21, were stricken out in the revision of 1854, but restored on that of 1859. See, as to the reasons for its temporary abolition, *Moeller vs. Bailey*, 14 How., 359. See also *Schroeder vs. Kühlenback*, 3 Abb., 66.

The powers thus conferred are analogous to the former chancery practice of dismissing a bill for want of prosecution, or a common-law motion for judgment, as in case of nonsuit, the scope of the remedy being extended.

The proper season for a motion of the above nature is evidently that now under consideration, *i. e.*, the intermediate stage between the joinder of issue between the plaintiff and the defendant making such application, and the actual trial of the cause. This motion must not be confounded with the taking of judgment by default, when the cause is regularly called on, a proceeding of similar effect, but different nature.

The motion for this purpose must, of course, be brought on upon the usual notice, and must be grounded upon an affidavit, showing the neglect complained of. The notice should follow the exact words of the section and rule above cited, or both, adapted to the exact state of circumstances complained of. The same rule should be observed with respect to the affidavit.

It is competent for any one defendant to make a motion of this description, seeking a dismissal as against himself, notwithstanding others may not have answered. *Hoyt vs. Loomis*, 1 C. R., 128; *Ward vs. Dewey*, 12 How., 193.

A defendant who has not been served, cannot, however, voluntarily appear and make a motion of this description, unless his rights are positively affected. *Tracy vs. Reynolds*, 7 How., 327. But where he can show that he is sustaining injury by the delay, his application may be entertained and granted. *Lyle vs. Smith*, 13 How., 104. See likewise, as to the right to appear, *Higgins vs. Rockwell*, 2 Duer, 650.

When a new trial is granted on motion of the defendant, his attorney must see that a copy of the order is duly served in time for the plaintiff's attorney to notice the cause for the next circuit, otherwise he cannot move to dismiss. But not so, where it is granted on the plaintiff's own motion; in that case he is bound to proceed to trial without notice from the defendant. *Robb vs. Jewell*, 6 How., 276.

A motion of this nature will be the proper course to be pursued by one defendant, in the event of a neglect on the part of the plaintiff to take proper proceedings to revive the action against the representatives of another defendant, when such representatives are necessary parties. *Chapman vs. Foster*, 15 How., 241. See likewise, as to a motion to dismiss, on the death of the plaintiff himself, leaving no representative within the state, *Crawford vs. Whitehead*, 1 C. R. (N. S.), 345.

Where, on refusal of a postponement, the plaintiff gave notice of discontinuance, accompanied by a tender of costs, but did not carry out

the proceeding by entry of an order, a dismissal of the complaint with costs, granted some days after, was sustained. *Moffat vs. Ford*, 14 Barb., 577.

The plaintiff is bound to notice the cause for the next term or circuit after issue finally joined. If he neglect to do so, he will be open to this motion on the part of any of the defendants, nor will it be necessary for the defendant moving, to notice the cause himself. *Cusson vs. Whalen*, 5 How., 302; 1 C. R. (N. S.), 27; *Roy vs. Thompson*, 1 Duer, 636; 8 How., 253; *Bishop vs. Morgan*, 1 C. R. (N. S.), 340; *Bowles vs. Van Hone*, 19 How., 346; 11 Abb., 84. The moving affidavit, under these circumstances, ought to show not merely the neglect to notice, but also that younger issues have been tried at the term for which the case might have been noticed. See *Roy vs. Thompson*, *supra*. The fact that the defendant has himself noticed the case at previous terms, will not, of itself, bar the application. *Bowles vs. Van Hone*, *supra*. *Moeller vs. Bailey*, 14 How., 359, holding the contrary, was decided during the period when the present rule 27 was in abeyance, as above noticed. *Lee vs. Brush*, 3 C. R., 165, and 3 C. R., 220, seems to be overruled.

But, in all this class of applications, the plaintiff will, as a general rule, be permitted to stipulate and try the cause at the next circuit, on payment of all costs to the defendant. See rule 26, above cited. See also *Bowles vs. Van Hone*, *Cusson vs. Whalen*, and *Bishop vs. Morgan*, *supra*.

By means of a motion of this nature, the defendant can obtain nothing further than a mere dismissal. If he seeks to become, in any manner, an actor, or to obtain any affirmative relief in his own favor, his only course is to notice and set down the cause for trial, and move it when it is reached. *Roy vs. Thompson*, *supra*; *Wilson vs. Wheeler*, 6 How., 49; 1 C. R. (N. S.), 402. And, under these circumstances, as, for instance, in replevin, where a return of the property is sought, a dismissal, on motion, cannot properly be granted. *Schroeder vs. Kohlenback*, 6 Abb., 66.

On default of the plaintiff, the defendant should move at the earliest opportunity, or the court may not impose the payment of costs. See *Whipple vs. Williams*, 4 How., 28. And he may lose his right to move in respect of a circuit at which he has himself noticed the cause, but omitted to take judgment on the plaintiff's failure to appear. *McCarthy vs. Hancock*, 6 How., 28; 1 C. R. (N. S.), 188. Nor can he move, when the cause has fallen through at the circuit, owing to its being postponed and set down by consent. *Fuller vs. Sweet*, 9 How., 74.

And where, after stipulation by the plaintiff, the defendant neglected

to take the necessary steps to adjust and demand his costs, his motion to dismiss was denied with costs. *Hawley vs. Seymour*, 8 How., 96.

The defendant may also lose his absolute right to the motion by improper delay, as by allowing the case to remain on the calendar, in order to multiply the costs, after notice of abandonment of the proceedings. *Jennings vs. Fay*, 1 C. R. (N. S.), 231.

When granted, an order of this nature is equivalent to, and has the effect of, an ordering judgment of nonsuit. *Holmes vs. Slocum*, 6 How., 217 (218); 1 C. R. (N. S.), 380. See also *Harrison vs. Wood*, 2 Duer, 50.

A motion of this nature will not lie for a neglect to proceed before a referee. The proper course is for the defendant to give notice himself, and proceed to take the plaintiff's default. *Williams vs. Sage*, 1 C. R. (N. S.), 358; *Thompson vs. Krider*, 8 How., 248. These cases seem to overrule *Holmes vs. Slocum*, *supra*; and *Mathews vs. Jones*, 1 E. D. Smith, 429, so far as this holds to the contrary; besides which, there can be no doubt as to a referee's power in this respect under section 272, as it now stands. Rule 32 also expressly provides for the case.

In an action for a joint and several tort, a defendant cannot move for a discontinuance by the plaintiff, on the ground that others joined with him have not been served. *McKenzie vs. Hackstaff*, 1 E. D. Smith, 75.

A motion of this nature is maintainable, in respect of an incurable defect in the complaint, at any stage of the proceedings, however advanced. *Burnham vs. De Bevoise*, 8 How., 159.

§ 199. *Short Causes, Hearing of.*

The following special rule has been made by the judges of the first district, for the purpose of expediting the business of the circuit calendar.

SPECIAL CIRCUIT CALENDAR.

At any circuit, until further orders, any causes belonging to either of the two following classes, may be placed on a special circuit calendar, unless the trial is likely to occupy more than one hour:

1st. Where the action is on contract, and the answer merely denies the allegations in the complaint, without setting up any new matter.

2d. Where the action is on contract, and new matter is set up in the answer, and there shall be reason to believe that the defence is made only for the purpose of delay.

3d. Where it shall appear by affidavit that the case can be tried in an hour.

To entitle the cause to be placed on such calendar, the plaintiff's attorney must give a notice of four days, to be heard before a judge at chambers, that he will move to have the cause placed on such calendar; and if the motion be granted, the cause may be heard on any subsequent Friday.

If the motion be founded on the belief that the defence is for delay, affidavits must be served at the time of notice.

The plaintiff's attorney must deliver to the clerk of the circuit a like notice one day before such Friday, containing also the number of the cause on the general circuit calendar.

If the cause shall actually occupy more than one hour on the trial, the trial may be suspended at the discretion of the court, and the cause be put down at the foot of the calendar.

The New York Common Pleas have made a similar rule, as follows:

All causes where the action is on contract, and there shall be reason to believe that the defence is made only for delay, may be placed on a special trial calendar (as hereinafter provided), unless the trial is likely to occupy more than one hour.

To entitle the plaintiff to place the cause on such calendar, he must move therefor at chambers, upon a notice of four days, and must serve with a notice the affidavits on which the motion will be founded.

If the motion is granted, the cause may be heard on the third Wednesday, for which day of each term the calendar will be made up.

It shall be the duty of the plaintiff's attorney to file with the clerk of the court a note of issue, on or before the third Monday of the term, which shall contain the number of the cause on the general trial calendar, and the date of the order directing it to be placed on the special calendar.

If the cause shall actually occupy more than one hour, the trial may be suspended at the discretion of the court, and the cause put down at the foot of the general trial calendar.

Dated, New York, Dec. 1st, 1858.

In the Superior Court a similar practice has been followed, by the passing of special rules from time to time. A general rule has been recently made, October 19th, 1861, which runs as follows:

In actions on contract, where there is reason to believe that the defence is interposed for the purpose of delay, and that the trial will not occupy more than one hour, the plaintiff may apply by motion at chambers or special term, on a notice of four days, to have the issue placed upon a special calendar for trial (serving with such notice any affidavits or papers he may wish to use on the motion, which have not already been served); and the same may be so ordered in the discretion of the justice before whom the motion shall be made.

If such motion be granted, the cause will be entered on a special calendar to be made by the clerk, on receiving a note of the issue, specifying the number of the cause on the general trial calendar, and the date of the order directing it to be placed on such special calendar. Such note of issue to be filed with the clerk four days before the day on which the cause shall be so entered.

The special calendar will be called on the second and last Friday of each trial term in part No. 1, for trials, by the justice there presiding, and the causes may be tried in either part, as may be directed by such justice.

If the trial of the cause shall occupy more than one hour, the trial may be suspended at the discretion of the court, and the cause be placed at the foot of the general trial calendar.

In the second district the same practice has been introduced by the rules adopted by the general term, October 24th, 1856; the rule on this subject being as follows :

3. At each circuit to be held after the first day of January, A. D. 1857, in the county of Kings, and also in any other county in the district where the circuit calendar shall contain more than one hundred causes, upon the order of the justice holding such circuit, a special circuit calendar shall be made up of causes belonging to either of the two following classes, unless the trial is likely to occupy more than one hour :

1st. Where the action is on contract, and the answer merely denies the allegations in the complaint, without setting up any new matter.

2d. Where the action is on contract, and new matter is set up in the answer, and there shall be reason to believe that the defence is made only for the purpose of delay.

Either party intending to make application to place any cause on such calendar, shall give notice thereof to the opposite party at the time of noticing the cause for trial; and, if the application shall be founded on the belief that the defence is for delay, affidavits, disclosing the grounds therefor, must be served at least seven days before the circuit. On the first day of the circuit, after the juries shall have been empanelled, and after hearing motions to correct the calendar, the calendar will be called through, and motions to place causes upon the special circuit calendar will be heard as the causes are called.

The causes ordered to be placed on such special calendar, will be arranged by the clerk on such a calendar in the order of their dates of issue. And such calendar will be taken up on Monday of the second week of the circuit, and proceeded with till all the causes thereon shall be tried, unless the court for cause shall alter the course of business.

If any cause placed on such special calendar shall actually occupy more than one hour on the trial, the court, in its discretion, may suspend the trial, and either restore the cause to its place on the general calendar, or order it to be put at the foot of the calendar.

The practice on these occasions is so clearly defined by the different rules, that any special instructions on the subject would be needless.

In the Supreme Court the motion, when falling within the first of the three classes stated, may be made on the pleadings only.

When on the second or third grounds, an affidavit must be made, showing that there is reason to believe that the defence is made only for the purpose of delay, or that the case can be tried in an hour, and this not by bare allegation to that effect, but by a statement of facts sufficient to show that reason. The pleadings should also be referred to in the notice.

The motion in the Superior Court or Common Pleas should be made in the same manner as that last prescribed.

In framing both the affidavit and notice, the exact wording of the rule under which the application is made should be strictly followed, and every requisition of such rule satisfied.

No special note of issue need be filed in the second district. The clerk of the court makes out the special calendar from his notes on the general call. In the first district of the Supreme Court and in the Superior Court and Common Pleas, attention must be paid to the filing of the specified note of issue in due course.

In all, the applicant acts to a certain degree at his peril, in the event of the trial legitimately occupying more than one hour. He risks in that case a further postponement instead of an acceleration of his cause. The practice has, however, proved most beneficial, and is extensively followed.

If the author has omitted to notice the existence of similar rules in any of the other districts, he apologizes for the omission. The practice, if existent elsewhere, is probably the same in its essentials.

In the first district, this course will often be preferable to a motion to strike out the answer. If there is any doubt about the existence of merits in the defence, it will be better settled in this manner. See *Munn vs. Barnum*, 13 How., 563; 1 Abb., 281.

CHAPTER III.

OF THE CHANGE OF VENUE.

§ 200. *Motion to Change Venue.*

(a.) STATUTORY AND OTHER PROVISIONS.

THIS proceeding is regulated by section 126 of the Code, already cited in book VI., chapter I., section 137. The portion of that section which relates to the subject of the present chapter runs as follows :

The court may change the place of trial in the following cases :

1. When the county designated for that purpose in the complaint, is not the proper county.
2. When there is reason to believe that an impartial trial cannot be had therein.
3. When the convenience of witnesses, and the ends of justice, would be promoted by the change.

When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided, by the consent of the parties, in writing, duly filed, or order of the court; and the papers shall be filed or transferred accordingly.

This provision dates from 1851. It carries out the previous provisions of the judiciary act, chapter 280 of 1847, section 49.

The subject of change on the ground that the venue has not been fixed in the proper county, has been already fully considered in book VIII., chapter I., section 163, under the subdivisional head of change on that ground. The considerations entered upon in this chapter will therefore be only those relative to subdivisions two and three.

The following are the rules of court on the subject of a motion upon these grounds :

Rule 58 (44). No order to stay proceedings for the purpose of moving to change the place of trial shall be granted, unless it shall appear, from the papers, that the defendant has used due diligence in preparing the motion for the earliest practicable day after issue joined. Such order shall not stay the plaintiff from taking any step, except subpoenaing witnesses for the trial, without a special clause to that effect. On presenting to and filing with the officer granting the order, an affidavit, showing such facts as will entitle the plaintiff, according to the settled practice of the court, to retain the place of trial, the officer shall revoke the order to stay proceedings; and the plaintiff shall give immediate notice of such revocation to the defendant's attorney.

Rule 59 (45). In addition to what has usually be enstated in affidavits concerning venue, either party may state the nature of the controversy, and show how his witnesses are material; and may also show where the cause of action or the defence, or both of them, arose; and those facts will be taken into consideration by the court, in fixing the place for trial.

Rule 3 specially provides thus, concerning the papers in the cause, in furtherance of the provisions of the section:

Papers shall be filed in the county specified in the complaint as the place of trial, or in the county to which the place of trial has been changed. And in case the place of trial is changed, for the reason that the proper county is not specified, the papers on file at the time of the order making such change, shall be transferred to the county specified in such order; and all other papers in the cause shall be filed in the county so specified.

(b.) MODE OF APPLICATION.

The above rules settle the question as to the proper time of making a motion of this description. It is only appropriate after issue joined, but then it must be made at once and without delay, or the remedy will be lost.

Before the revision of the rules in 1852, the question as to when the motion could properly be made was considered doubtful: one class of cases held that it should be made at the outset of the case and before issue; the other, and the more numerous, that the course of practice now specially prescribed, was more correct. The point being settled as above, it seems superfluous, at this distance of time, to refer to these decisions in detail. The court will not now entertain the motion before issue joined. See *Merrill vs. Grinnell*, 10 How., 31; 12 L. O., 286. An amendment, after notice of motion, will not, however, defeat it. *Toll vs. Cromwell*, 12 How., 79.

Prior to the revision in question, it was held that the delay of one term after issue joined, was not, *per se*, sufficient ground for denying the motion. *Lynch vs. Mosher*, 4 How., 86; 2 C. R., 54. Whether this same latitude is allowable under the present rule, seems more questionable. Possibly, when good reason is shown for any actual delay, the court may not refuse to interfere. No formal demand is necessary preliminary to a motion of this description, as in the case of an application under subdivision 1 of the section in question. *Hinchman vs. Butler*, 7 How., 462.

The application must be made upon notice of motion, which should be in the usual form, following the exact words of the subdivision on which the application is grounded, and it should include in its terms an interim stay of proceedings, if such stay be requisite, as, otherwise, no

measure on the part of the plaintiff will be suspended, except only the actual preparations for trial. See rule 58, above cited.

The application must be grounded on affidavit. If practicable, that affidavit should be made by the party applying; if not, reasons should be shown why it cannot be procured, and the grounds of knowledge of the party actually deposing, should appear. The particulars mentioned in rule 59 should in all cases be stated. It is essential that the usual affidavit of merits should either accompany, or should be incorporated in, that moved on. See *Lynch vs. Mosher*, 4 How., 86; 2 C. R., 54; *Mizer vs. Kuhn*, 4 How., 409; 3 C. R., 106; *Jordan vs. Garrison*, 6 How., 6; 1 C. R. (N. S.), 400. As to the requisites of an affidavit of merits, see hereafter *in loco*.

The moving affidavit should be to the following purport: The defendant should state, first: the bringing of the action, and the nature of the controversy, and also where the cause of action, or the defence, or both of them, arose (see rule 59), specifying the particular county or counties, and if any special grounds of convenience exist attending them. He must then state how and when issue was joined, so as to make it appear that he has used due diligence in preparing for the motion. If there be actual delay, he had better state such facts as may tend to show that he has prepared the motion for the earliest practicable day after that joinder (rule 58). If the motion be on the ground of convenience of witnesses, the defendant should state the names and residences of his own witnesses, and show the nature of their testimony, and how that testimony is material (rule 59), giving such reasonable details as will show that materiality as a matter of fact, and not of mere allegation. See *American Exchange Bank vs. Hill*, 22 How., 29. He should also state that he has been advised by his counsel, whose name and address must be given, and that he himself verily believes that such witnesses are all of them material, and that he cannot safely go to trial without their testimony. He should likewise state such facts as may tend best to show that their convenience, and the convenience of any other necessary witnesses, will be promoted by attendance in the county of proposed change, and that it will be inconvenient for them to attend elsewhere; making a general allegation that the action cannot, without great inconvenience and expense, be tried in the county fixed by the plaintiff, and inserting any allegations tending to show that the plaintiff's own necessary witnesses will not be put to real inconvenience, or the superior convenience of the county of proposed change, if grounds exist for the making of any statements of this nature.

In relation to the mode of making the proper statement as to the materiality of witnesses, see *Price vs. Fort Edward Water Works Com-*

pany, 16 How., 51. The affidavit will be defective, if, on a fair construction, the testimony of part of the witnesses appears to be merely cumulative. It should show, in some sufficiently distinct manner, what facts are to be proved by the several witnesses named, specifying them, so that the court may judge as to the materiality of their testimony. *American Exchange Bank vs. Hill*, *supra*.

Where the motion is on the ground that an impartial trial cannot be had in the original county, the defendant must show, by sufficient allegations, that there is reason to believe that such is the case. The facts which lead to that conclusion must be stated fully; and, if the prejudice relied on as a ground of change, be such as to extend also into any neighboring counties, the facts must be clearly shown, and the counties specified.

The above may be taken as a sketch of the essential particulars which will, as a general rule, be necessary in all cases; but, of course, the exact statements of fact, and the mode of making them, will vary in each particular instance.

The motion should be grounded on affidavits to the effect above stated and also on the pleadings, and, when noticed, should be brought on as early as practicable.

(c.) MOTION ON GROUND OF PREJUDICE.

On the motion under subdivision 2, it will evidently be necessary to make out a very clear case, showing that an impartial trial cannot be had in the district nominated by the plaintiff. The bias of the courts will be strongly in favor of retaining the place of trial, unless "the inability to obtain a fair and unprejudiced jury be clearly established." *The People vs. Wright*, 5 How., 23; 3 C. R., 75. The mere existence of excitement in the county, and of the matter in question having been the subject of newspaper discussion, and the expression of the belief of the witnesses who swore to those facts, that it was "very doubtful" whether a fair and impartial trial could be had in the county of venue, were there considered insufficient grounds for a change, on the ground of local prejudice. The cases under the old practice will be found collected in the opinion. The exertion of undue or improper influence on the part of one of the parties, if sworn to, would, however, in all probability, form a sufficient ground for such a motion. See *The People vs. Webb*, 1 Hill, 179, as there commented upon. See likewise, *New Jersey Zinc Company vs. Blood*, 8 Abb., 147.

Where, however, strong local excitement was proved, a change was granted without going through the form of previously attempting to select an unprejudiced jury. *People vs. Long Island Railroad Company*, 16 How., 106. See, as to similar change in criminal cases, after

failure to obtain an impartial trial, and the principle that, when necessary, a distant county may be selected, *The People vs. Baker*, 3 Abb., 42.

Similar principles were laid down, and a similar course taken, in *Budge vs. Northam*, 20 How., 248.

(d.) MOTION ON GROUND OF CONVENIENCE OF WITNESSES.

In motions of this description, the place where the principal transactions between the parties occurred, will form a very material element in deciding as to the place of trial. The rule will be to make the change, when asked for, to that county, unless a preponderance of non-resident witnesses is clearly shown. See *Goodrich vs. Vanderbilt*, 7 How., 467; *Hinchman vs. Butler*, 7 How., 462; *Mason vs. Brown*, 6 How., 481; *People vs. Wright*, 5 How., 23; 3 C. R., 75.

Where, however, a preponderance of material witnesses resident in some other county is clearly shown, this consideration may not prevail. *Beardsley vs. Dickenson*, 4 How., 81. See also *King vs. Vanderbilt*, 7 How., 385. In the former case the residence of the parties themselves was also taken into consideration.

If either party swears unqualifiedly to a greater number of material witnesses than the other, the venue will, as a general rule, be changed, or be retained accordingly. See 4 Hill, p. 629, note to case of *Brittain vs. Peabody*. See also *Austin vs. Hinkley*, 13 How., 576.

This rule is, however, subject to considerable qualifications, and materiality, not mere preponderance in number, will constitute in fact the real test. In determining whether cause for a change has been shown, "the court can generally rely more safely upon the nature of the case to be tried, and upon the facts and circumstances connected with the transactions which are the subject of investigation in the cause, than the number of witnesses sworn to be material by either party." *Barnard vs. Wheeler*, 3 How., 71. A clearly exaggerated statement as to the number of witnesses, will not avail either party, and may be even looked upon as a fraud upon the court. *Wallace vs. Bond*, 4 Hill, 536. See also, generally, *King vs. Vanderbilt*, 7 How., 385; *Jordan vs. Garrison*, 6 How., 6; 1 C. R. (N. S.), 400.

It may be laid down as a general principle, governing applications of this nature, that the place of trial should be in the county where the principal transactions between the parties occurred, and where it appears the largest number of witnesses who know anything of the transaction sued upon reside. See *Jordan vs. Garrison*, 6 How., 6; 1 C. R. (N. S.), 400; *People vs. Wright*, *supra*.

As a general rule, it will also be assumed that, where witnesses reside

in a county, that county will be the most convenient for their examination, without regard to other circumstances. *People vs. Wright, supra*. In *Mason vs. Brown*, however, 6 How., 481, this principle was departed from in a case of obvious practical convenience being made out.

The materiality and importance of the issue on which witnesses are proposed to be examined, will also be taken into consideration. See last case. If obviously untenable, a motion to change will be denied. *Hartman vs. Spencer*, 5 How., 135.

To be available to either party, on a motion of this nature, the materiality of the testimony relied on must be shown by specific statement, not bare allegation. It must also be shown that such testimony is not cumulative. An affidavit not coming up to this standard will be slightly, if at all regarded, when brought forward by either party. *Price vs. Fort Edward Water Works Company*, 16 How., 51. See also *The People vs. Hayes*, 7 How., 248; *Hinchman vs. Butler*, 7 How., 462; *Jordan vs. Garrison, supra*; *King vs. Vanderbilt*, 7 How., 385; *American Exchange Bank vs. Hill*, 22 How., 29.

The possible delay arising from a change of venue has been taken into consideration on such a motion. *King vs. Vanderbilt, supra*. In *Goodrich vs. Vanderbilt*, 7 How., 467, this consideration was obviated by giving the plaintiff an election to remove the venue, within twenty days, into some county immediately adjacent to that of the proposed change, and granting the order subject to that election.

The convenience of witnesses, residing out of the state, will be no ground for denying the motion. *New Jersey Zinc Company vs. Blood*, 8 Abb., 147.

The plaintiff may oppose a motion of this description, on the ground that he has himself material and necessary witnesses in the county of venue, or near it, within the state; and, if he swears unqualifiedly to a number, equal to or greater than that brought forward by the defendant, and it appears that such statement is made *bonâ fide*, and the balance of material testimony is really in his favor, the venue will probably be retained. See the cases above cited. As to the necessity of his stating in terms what is expected to be proved by his witnesses, see *American Exchange Bank vs. Hill*, 22 How., 29.

His affidavit for this purpose must, however, be clear and unqualified. He must distinctly rebut, as far as he is able, the defendant's allegation, and must also show a clear preponderance of material witnesses in his own favor, or other dominant grounds of convenience, sufficient to convince the court that the general convenience of trial will be greater in the county originally designated than in that of the proposed change. *Hinchman vs. Butler*, 7 How., 462. See also *Sherwood vs. Steele*, 12 Wend., 294.

And, if no rebuttal be attempted, the order may be granted, even though moved for on papers clearly open to objection. *The People vs. Hayes*, 7 How., 248. In *Price vs. Fort Edward Water Works Company*, however, 16 How., 51, the contrary course was taken.

The existence of popular excitement in the proposed county does not constitute a valid ground of opposition. *New Jersey Zinc Company vs. Blood*, 8 Abb., 147.

Nor can the question of a change, on the ground that the trial ought of right to be had in another county, be brought forward on either side. It belongs to a different stage of the proceedings. *Houck vs. Lasher*, 17 How., 520; *Park vs. Carnley*, 7 How., 355. See, however, *The People vs. Hayes*, 7 How., 248. Both motions may, however, be noticed conjointly, and an amendment which obviates the one ground, and makes a change to the proper county, will not avoid the notice on the ground of convenience, which may be still brought on. *Toll vs. Cromwell*, 12 How., 79.

The denial of such a motion, when made by one defendant, does not operate to prevent or prejudice its renewal by another. *New Jersey Zinc Company vs. Blood*, 8 Abb., 147.

If the plaintiff omits to present his opposition to the defendant's motion in due season, his default will not be opened. If not ready, he should apply for a postponement. *Van Alstrand vs. House*, 3 Abb., 226.

A party who disregards an order of this nature, entered on stipulation, disregards it at his peril, in the event of his objections proving groundless. *Fitch vs. Hall*, 18 How., 314.

So likewise, if, after motion made and decision reserved, the plaintiff disregards it, and goes on and takes an inquest, he does so at his own risk, and, in the event of a subsequent decision changing the venue, such inquest will be set aside, even though regular at the time, his proceedings not having been stayed. *Willson vs. Henderson*, 15 How., 90.

Until the venue is actually changed, the cause remains in the original county, in which all applications may be made. *Bangs vs. Selden*, 13 How., 163; *Same case*, 13 How., 374.

Nor does the appointment of a referee in another county have any effect whatever on the question. *Wheeler vs. Maitland*, 12 How., 35.

In *Northrup vs. Van Dusen*, 5 How., 134; 3 C. R., 140, it is held that, in motions of this description, costs to abide the event will, as a general rule, be allowed, if asked for in the notice, but, if not, the court has no power to make the order. This precaution should therefore be taken in all cases.

(e.) DEFENDANT'S COURSE, ON ORDER.

On a change being granted, the defendant's attorney will, of course, see that all papers and proceedings are duly transferred to the clerk of the substituted county, according to the provision above referred to. In strictness, this is the duty of the clerk of the court, on the order being filed with him (which must, of course, be done), and he is the responsible party in all cases; but still it should always be looked to, both as regards the transmission and the due filing of the proceedings in the substituted county, when transmitted, in order to insure regularity, and avoid future inconvenience.

(f.) REVOCATION OF STAY, ON PLAINTIFF'S APPLICATION.

The plaintiff's remedy, in respect of a stay of proceedings unduly obtained by the defendant for the purposes of a motion, as above, is pointed out by rule 58. On affidavit, showing such facts as will entitle him to retain the venue according to the settled practice, he may obtain a revocation of the order to stay, from the officer who granted it. This application may be made *ex parte*, but immediate notice of the order of revocation must be given to the defendant's attorney.

Of course, this revocation only operates as regards the *interim* stay of proceedings, and the motion itself will still come on, and be decided on its merits, in due course. If the defendant consider himself aggrieved by a revocation so obtained, he may make a counter-application, on which it would doubtless be competent for him to controvert the affidavit, on which the plaintiff has obtained the revocation, by counter-affidavits on his part, either evidencing his own right to require a change, or impeaching the plaintiff's statement.

(g.) DISQUALIFICATION OF JUDGE, CHANGE FOR.

The last point to be noticed is the change of venue in consequence of the justices of the district, in which the action is triable, being disqualified, on the ground of interest, relationship to the parties, or employment as counsel in the matter. This subject is specially provided for by chapter 15 of the Laws of 1850, p. 20, as regards actions in the Supreme Court; which enacts that, in such cases, the court may, upon special motion, order the action to be brought to argument in any adjoining district, to be specified in such order, and then such cause shall be heard and decided in such district. This measure is, of course, inapplicable to courts of strictly local jurisdiction, the disqualifications as to which, where existent, are positive and irremovable.

CHAPTER IV.

DISCOVERY OF DOCUMENTS.

§ 201. *Nature of Remedy.*

(a.) STATUTORY AND OTHER PROVISIONS.

THE Code provides on this subject as follows, in the latter branch of section 388 :

The court before which an action is pending, or a judge or justice thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents, in his possession, or under his control, containing evidence relating to the merits of the action or the defence therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

This section, as part of section 388, dates from 1849. In the original Code it formed a separate section, No. 342. The only difference was that the words "a paper" stood instead of "any books, papers, or documents." See, as to this defect while existent, *Follett vs. Weed*, 3 How., 303 ; 1 C. R., 65.

The rules on the subject are as follows :

Rule 14. (8.) Applications may be made, in the manner provided by law, to compel the production and discovery of books, papers, and documents relating to the merits of any civil action pending in this court, or of any defence in such action, in the following cases :

1. By the plaintiff, to compel the discovery of books, papers or documents, in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to frame his complaint, or to answer any pleading of the defendant.

2. The plaintiff may be compelled to make the like discovery of books, papers, or documents, when the same shall be necessary to enable the defendant to answer any pleading of the plaintiff.

3. Either party may be compelled to make discovery, as provided by section 388 of the Code.

The last subdivision dates from the revision of 1858. The prior portions regulated the anterior practice under the Revised Statutes.

Rule 15. (9.) The moving papers upon the application for such discovery, shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit, stating that the books, papers, and documents whereof discovery is sought, are not in the possession nor under the control

of the party applying therefor. The party applying shall show to the satisfaction of the court, or judge, the materiality and necessity of the discovery sought, and the particular information which he requires.

Prior to the revision of 1858, this rule prescribed petition as the form of application. The last sentence was also wholly different, requiring an affidavit of advice of counsel, and belief as to the necessity of the discovery sought, but otherwise less extensive in its purport.

Rule 16. (10.) The order for granting the discovery shall specify the mode in which the same is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or, by requiring him to produce and deposit the same with the clerk of the county in which the trial is to be had, unless otherwise directed in the order. The order shall also specify the time within which the discovery is to be made. And when papers are required to be deposited, the order shall specify the time that the deposit shall continue; and shall also declare the consequences of an omission to comply with the same; and the court at any special term, upon proof of the default, may, of course, grant a rule absolute, giving effect to such order, either by nonsuiting the plaintiff, striking out the defendant's answer, debarring him from a particular defence, excluding the paper from being given in evidence, or punishing the party in default as for a contempt, as the order for the discovery may require.

The concluding provisions, requiring the order to declare the consequences of an omission to comply, with all that follows, are new, having been first inserted on the revision of 1858.

Rule 17. (11.) The order directing the discovery of books, papers, or documents, shall operate as a stay of all other proceedings in the cause, until such order shall have been complied with or vacated; and the party obtaining such order, after the same shall be complied with or vacated, shall have the like time to prepare his complaint, answer, reply or demurrer, to which he was entitled at the making of the order. But the justice, in granting the order, may limit its effect, by declaring how far it shall operate as a stay of proceedings.

The above rules, with the exception of the amendments above noted as having been made on the revision of 1858, were existent prior to the Code, and were made for the purpose of carrying out the provisions of the Revised Statutes on the same subject. In view of the decisions below cited to the effect that both remedies may be considered as still concurrent, it may be expedient shortly to notice the provisions in question.

They will be found under the head of *The Supreme Court*, at 2 R. S., 199, 200; sections 21 to 27 inclusive.

Section 21 confers the power in substantially the same terms as the provisions of the Code above cited.

Section 22 provides for the making of rules on the subject, "to be governed by the principles and practice of the Court of Chancery in compelling discovery;" and section 25 is in furtherance of the same object.

Section 23 prescribes a verified petition as the form of application, and provides that the order may be made for the discovery, or that the adverse party show cause why it should not be granted.

The next section provides thus :

§ 24. Every such order may be vacated by the officer granting the same, or by the court,—

1. Upon satisfactory evidence that it ought not to have been granted.
2. Upon the discovery sought being made.
3. Upon the party required to make the discovery denying on oath the possession or control of the books, papers, or documents ordered to be produced.

Sections 26 and 27 prescribe thus, as to a neglect to comply with the order, and as to the effect as evidence of the documents sought to be discovered, if and when produced :

§ 26. In case of the party refusing or neglecting to obey such order for a discovery within such time as the court shall deem reasonable, the court may nonsuit him, or may strike out any plea or notice he may have given, or may debar him of any particular defence in relation to which such discovery was sought ; and the power of the court to compel such discovery shall be confined to the remedies herein provided, and shall not extend to authorize any other proceedings against the person or property of the party so refusing or neglecting.

§ 27. The books, papers, and documents, produced under any order made in pursuance of the preceding sections, shall have the same effect, when used by the party requiring them, as if produced upon notice according to the practice of the court.

As to the extension of the same powers to other tribunals, see chapter 38, of 1841, sections 1 and 2. *Gould vs. McCarty*, 1 Kern., 575.

(b.) GENERAL REMARKS.

Since the revision of the rules in 1858, the two systems may be looked upon as in effect amalgamated, for most if not for all practical purposes. Prior to that revision, however, they were held to be concurrent, and, to a certain degree, separate, discovery under the Revised Statutes and the rules being the proper practice on application, prior to the actual joinder of issue, for the purposes of pleading, and discovery under the Code to those made subsequently, and for the purpose of preparing for trial. See *Follett vs. Weed*, 3 How., 303 ; 1 C. R., 65 ; *Stanton vs. The Delaware Mutual Insurance Company*, 2 Sandf., 662 ; *Moore vs. Pentz*, Ibid., 664 ; *Gelston vs. Marshall*, 6 How., 398 ; *Brevoort vs. Warner*, 8 How., 321 ; *Lovell vs. Clarke*, 7 How., 158 ; and *Hoyt vs. American Exchange Bank*, 1 Duer, 652 ; 8 How., 89 ; *Gould vs. McCarty*, 1 Kern., 575 ; *Davis vs. Dunham*, 13 How., 425.

The above provisions may be looked upon as a substitute for the practice in relation to profert and oyer of an instrument under the former system. See *Mayor of New York vs. Doody*, 4 Abb., 127. The former practice as to bills of discovery is likewise wholly superseded by the provisions for examination of parties, noticed in the next chapter, taken in connection with these and with the present rules as to verification of pleadings. See *Merritt vs. Thompson*, 3 E. D. Smith, 283.

It may be expedient to divide the subject into two general heads.

1. Discovery with a view to plead ;
2. Discovery with a view to prepare for trial ; concluding with the general consideration of the mode in which these remedies are now attainable.

(c.) 1. DISCOVERY WITH A VIEW TO PLEAD.

This branch of the remedy is more peculiarly regulated by the provisions of the Revised Statutes, and of the rules as they stood antecedent to the recent revision. The former boundaries are, however, much broken down, petition being no longer the prescribed form of application, and the same statements as to the materiality and necessity of the discovery sought, and the particular information required, being now equally prescribed in all cases.

The distinction was strictly taken, the requisitions of the Revised Statutes and the former rules insisted upon, and discovery refused of matters of evidence not requisite for the purposes of pleading separately considered, in *Gelston vs. Marshall*, 6 How., 398. See also *Stanton vs. Delaware Mutual Insurance Company*, 2 Sandf., 662 ; *Hoyt vs. American Exchange Bank*, 1 Duer, 652 ; 8 How., 89 ; *Brevoort vs. Warner*, 8 How, 321.

Some, however, of the difference in essentials is still existent. Discovery with a view to plead, is, of course, only appropriate before issue joined. Discovery to prepare for trial, belongs, for the same reason, to a later period ; for, until after issue joined, it cannot be accurately known, for what preparation is to be made. The former is more peculiarly the remedy conferred by the conjoint operation of the rules and the Revised Statutes ; the latter falls especially under the powers conferred by section 388, the rules merely regulating the mode of application.

These provisions, and the collateral remedies for examination of parties, are only appropriate to a regular controversy. They cannot be resorted to, on an application to perpetuate testimony. Where, too, it is sought with a view to enable a plaintiff to frame his complaint, the discretionary powers of the court will not be exercised, without strong affidavits, showing its necessity to enable the plaintiff to obtain redress.

Keeler vs. Dusenbury, 1 Duer, 660; 11 L. O., 287. See also *Lynch vs. Henderson*, 10 Abb., 345, note. See, however, *Miller vs. Mather*, 5 How., 160; 2 C. R., 101.

When a party applies under the Revised Statutes, and makes out a case as provided by the rules, he has a right to the discovery, though the court will exercise its discretion, as to the manner in which it should be made. *Hoyt vs. American Exchange Bank*, 1 Duer, 652; 8 How., 89.

Discovery to enable a defendant to prepare a bill of particulars was granted, in *Brevoort vs. Warner*, 8 How., 321. As to a similar remedy granted to a plaintiff, see *Prince vs. Currie*, 2 How., 119. So also it has been held, that a defendant could not properly deny information as to the contents of an instrument executed by him. His proper course was to apply for an inspection and a sworn copy. *Wesson vs. Judd*, 1 Abb., 254.

A defendant so applying must, however, show the existence of some defence. He cannot ask for an examination, to see whether he has one or not. *Mora vs. McCredy*, 2 Bosw., 669.

Where the plaintiff sought to recover moneys from the defendants as his agents, he was held entitled as of right to a sworn copy of their account, or to a copy of all entries in their books, but not to a general inspection. *Ruberry vs. Binns*, 5 Bosw., 685.

An application for discovery was held not to be debarred by a previous offer to allow judgment on the part of the defendant, where the plaintiff avowed his object to be an amendment of the complaint, in consequence of his having found out that he had not claimed an amount that was due to him. *Merchant vs. The New York Life Insurance Company*, 2 Sandf., 669; 2 C. R., 66.

(d.) 2. DISCOVERY TO PREPARE FOR TRIAL.

This is the more usual and important form of application, and lies more peculiarly under the provisions of the Code, though a similar remedy was existent under the Revised Statutes.

The proper period for an application of this nature, is after the final joinder of issue. As a general rule, it is inappropriate at any earlier period. See, however, *Miller vs. Mather*, 5 How., 160; 2 C. R., 101, above referred to.

Even before the last amendment of the rules, which puts the question beyond a doubt, it was held that section 388 of the Code, and the general remedy conferred by it, was wholly unaffected by any of the restrictions contained in the former practice. *Exchange Bank vs. Monteath*, 4 How., 280; 2 C. R., 148.

In the same decision it is likewise laid down, that, where the applica-

tion is *bond fide*, the order for discovery will be considered almost as of course. "It is true," says the learned judge, "that the application is addressed to the discretion of the court or judge; but, in the exercise of that discretion, no officer would feel himself justified in withholding such a discovery, when satisfied that the application is made in good faith, and that the party against whom it is made, has the ability to comply with the order, and that the books, &c., of which a discovery is sought, contain material evidence."

As to the general right to a discovery when a proper case is made out under the Code or the rules, or under either, see *Hoyt vs. American Exchange Bank, supra*; *Lovell vs. Clarke*, 7 How., 158.

The power of the court to compel a discovery, is asserted in its fullest extent, in the case of *Powers vs. Elmendorf*, 4 How., 60; 2 C. R., 44, where it was held, that that power is unfettered by the restrictions imposed upon it, whilst exercised by the Court of Chancery, or by the Supreme Court, under the provisions of the Revised Statutes. The discovery now obtainable is not confined to the evidence which the party seeking it requires for his own title, but it extends to the enabling each party to ascertain what documentary evidence his adversary holds, and upon which such adversary is relying to maintain himself upon the trial.

These broad principles have been, however, considerably qualified by more recent decisions.

A mere fishing examination into the books and papers of the adverse party, will not be allowed by way of mere discovery. To obtain an order, the applicant must state the nature of the documents which he desires to inspect, and, if he seeks for a discovery of specific entries or other portions of books or documents, he must point out and specify such entries or portions, and show some *prima facie* right to their production existent in himself. If he seeks more than this, he must take a different course, and examine the adverse party as a witness, so that his deposition may be used for as well as against him. *Hoyt vs. American Exchange Bank, supra*; *People vs. Rector, &c., of Trinity Church*, 6 Abb., 477; *Brevoort vs. Warner*, 8 How., 321; *Commercial Bank of Albany vs. Dunham*, 13 How., 541; *Stalker vs. Gaunt*, 12 L. O., 132; *Terry vs. Rubel*, 12 L. O., 138; *Cassard vs. Hinman*, 6 Duer, 695; *Ruberry vs. Binns*, 5 Bosw., 685; *Jackling vs. Edmonds*, 3 E. D. Smith, 539; *Gray vs. Kendall*, 10 Abb., 343, note; *Bradstreet vs. Bailey*, 4 Abb., 233; *Davis vs. Dunham*, 13 How., 425; *Mora vs. McCredy*, 3 Bosw., 669; *Pegram vs. Carson*, 18 How., 519; 10 Abb., 340; *Van Zandt vs. Cobb*, 12 How., 544. Nor will the delivery of a copy of a printed book be compelled where only part is material. *Lynch vs. Henderson*, 10 Abb., 345, note.

On such an examination the applicant may compel the production of the documents of which he seeks a discovery, either at the actual trial, or on a preliminary examination of the adverse party. See *Stalker vs. Gaunt*, 12 L. O., 132; *Terry vs. Rubel*, 12 L. O., 138; *Jarvis vs. Clark*, 12 L. O., 129. See also *Bonestell vs. Lynde*, 8 How., 226; affirmed, *Ibid.*, 352; overruling *previous case*, *Trotter vs. Latsen*, 7 How., 261. See likewise *Gaughe vs. Laroche*, 14 How., 451; 6 Duer, 685; 6 Abb., 284, note; *Commercial Bank of Albany vs. Dunham*, 13 How., 541; *Higgins vs. Bishop*, 12 L. O., 127 (128); *Brett vs. Bucknam*, 32 Barb., 655; *Mitchell's Case*, 12 Abb., 249.

Where, however, the applicant shows in himself a general right, or general interest in the whole of any particular book or class of books or papers, he will be entitled to a general inspection and discovery, which may be ordered accordingly. See *Brevoort vs. Warner*, 8 How., 321 (325). *Higgins vs. Bishop*, 12 L. O., 127; *Stalker vs. Gaunt*, 12 L. O., 132 (135).

Where the applicant is himself able to obtain access to the books or papers sought to be discovered, without the necessity of any order, his application will be denied. *Charlick vs. Flushing Railroad Company*, 10 Abb., 130. See also *McAllister vs. Pond*, 6 Duer, 702; 15 How., 299. Nor, as a general rule, will discovery be compelled of documents on record. *Meakings vs. Cromwell*, 1 Sandf., 698. But not so as to an order of the court, when not entered with the clerk. *Lovell vs. Clarke*, 7 How., 158.

It will not be safe to rely upon the production by the adverse party, on the trial, of documents brought forward by him in his own behalf. He may exercise his own election as to reading them in whole or in part. The opposite party must procure a discovery before trial, or else be prepared with parol evidence of their contents, on a refusal to produce. *Edmonstone vs. Hartshorne*, 19 N. Y., 9.

An administrator suing in his own name, may obtain an order for discovery of books and papers tending to show the state of accounts between the defendant and his intestate. 2 Abb., 387. An application against an administrator seeking for general information, will, however, be strictly scrutinized. See *Jackling vs. Edmonds*, 3 E. D. Smith, 539.

Discovery is the proper mode of obtaining an inspection of the papers of a corporation, which the plaintiff is entitled to use as evidence. Their production cannot be compelled under a subpoena *duces tecum*, served on one of its officers. *La Farge vs. La Farge Insurance Company*, 14 How., 26; 6 Duer, 680.

An application for discovery must be *bond fide*, and not merely for the purpose of delay. If the applicant is chargeable with bad faith or

gross negligence, it may be refused. *Hooker vs. Matthews*, 3 How., 329; 1 C. R., 108. Or if the application itself be not made in good faith. *Van Zandt vs. Cobb*, 12 How., 544. See also, as to an application seemingly unnecessary, and made after the decease of the other party to an account. *Jackling vs. Edmonds*, 3 E. D. Smith, 539.

But, where made *bonâ fide*, the time at which the application is made is no bar to it. Thus, where, during the course of trial before a referee, matter was introduced in evidence, of which the adverse party had no previous knowledge, a discovery was granted. *Mechanics' Bank vs. James*, 2 C. R., 46. See, as to the granting a similar order on the certificate of a referee, that the production of books or papers was necessary for the purposes of a trial pending before him, on application grounded on that certificate, *Fraser vs. Phelps*, 3 Sandf., 741; 1 C. R. (N. S.), 214. Or where the reference is clearly for the purpose of taking an account, similar powers may be granted to the referee in the first instance, and obedience to his orders enforced by attachment. *Fraser vs. Phelps*, 4 Sandf., 682; *Higgins vs. Bishop*, 12 L. O., 127.

§ 202. *Mode of Application.*

Before the revision of the rules in 1858, petition was the form clearly prescribed in cases where the application was made under the rules, and was admissible under any circumstances. See *Follett vs. Weed*, 3 How., 303; 1 C. R., 65; *Stanton vs. Delaware Mutual Insurance Company*, 2 Sandf., 662; *Gelston vs. Marshall*, 6 How., 398; *Lovell vs. Clark*, 7 How., 158; *Cassard vs. Hinman*, 6 Duer, 695; *McAllister vs. Pond*, 6 Duer, 702; 15 How., 299; *The People vs. The Rector of Trinity Church*, 6 Abb., 177.

It was even held, in some cases, that a duly verified petition was the only proper form, and that, unless the requisites of the rules, in this respect, were strictly complied with, the application could not be granted, even though made under section 388. *Dole vs. Fellows*, 5 How., 451; 1 C. R. (N. S.), 146. See also *Jackling vs. Edmonds*, 3 E. D. Smith, 539. In the *Exchange Bank vs. Monteath*, 4 How., 280; 2 C. R., 148, the contrary was, however, maintained, and an application held entertainable on affidavit only, without any petition.

Since the revision of 1858, it is clear that the presentation of a petition is no longer indispensable, or even necessary. The substitution of the term "moving papers" for that of "petition," previously employed in rule 15 (9), seems rather to imply, if any thing, that the application should be made in the same way as other motions in the cause, viz., on notice and affidavit.

That rule does not, however, by any means, tend to relieve the appli-

cant from the burden of showing the necessity of the discovery which he seeks to obtain. It is, on the contrary, more stringent, and certainly more extensive in its application than it was previous to the revision.

In all cases the moving party must show, to the satisfaction of the court or judge, the materiality and necessity of the discovery sought, and the particular information which he requires.

And this he must now do, whatever may be the purpose for which discovery is sought, without any of the distinctions previously taken between discovery in order to plead, and discovery for the purposes of trial.

The only portion of the former requisites from which he has been relieved, is that as to subjoining a technical statement as to the advice of counsel, as to the necessity of the discovery sought, and belief in that advice. Even that relief is more seeming than real. A statement to that effect should never be omitted, and may probably be still required when the applicant is in a position to make it, in order to the satisfaction of the court. See *McAllister vs. Pond*, below cited.

The state of the pleadings, and whether issue has or has not been joined, is of course material, and should be shown on the face of the moving papers.

Mere general allegations of materiality or necessity, will be wholly insufficient. To satisfy the court, facts must be stated, tending to show both these requisites, and to produce the conviction of both in the mind of the judge. Such was the case before, on an application under the rules, and it is now equally necessary, if not more so. Whether the relief be sought on petition or affidavit, the moving papers must be specific and not general in their allegations, a clear case must be shown, and the particular documents or items sought to be reached must be distinctly pointed out. See *Jackling vs. Edmonds*, 3 E. D. Smith, 539; *McAllister vs. Pond*, 6 Duer, 702; 15 How., 299; *The People vs. Rector, &c., of Trinity Church*, 6 Abb., 177; *Stanton vs. Delaware Mutual Insurance Company*, 2 Sandf., 662; *Pegram vs. Carson*, 10 Abb., 340; 18 How., 519; *Davis vs. Dunham*, 13 How., 425; *Lynch vs. Henderson*, 10 Abb., 345, note; *Cassard vs. Hinman*, 6 Duer, 695. See also other cases above cited, on the point that a party is not entitled to make a random or fishing investigation into the books or papers of his adversary. It is not sufficient for a party to say he thinks a discovery is necessary. He must show how and why, or his motion will not be granted. *Wilkie vs. Moore*, 17 How., 480. See also *Gelston vs. Marshall*, 6 How., 398.

It is not indispensable, though usual, that the facts warranting the application should be shown by the oath of the party himself. They may be proved by that of another. *Exchange Bank vs. Monteath*, 4

How., 280; 2 C. R., 148. See also, as to a suit by the people, *The People vs. Rector, &c., of Trinity Church*, 6 Abb., 177.

Nor is it essential for the party to make a negative allegation, that the documents required are not in his own possession. It is enough for him to show what the statute requires, that they are in the possession or under the control of the adverse party; and, in this respect, it is sufficient if he shows a state of facts which satisfies the court or officer that the party, against whom the application is made, has the ability to comply with the order for discovery. *Exchange Bank vs. Monteath*, *supra*.

Sufficient must be stated, however, to satisfy the court that in reality the discovery is necessary, and that the party applying has not in his own possession the information applied for, or, if he has, then that he has not the means of establishing the facts of which he is so informed, by other available proof, without compelling the adverse party to furnish it. *McAllister vs. Pond*, 6 Duer, 702; 15 How., 299; *Charlick vs. Flushing Railroad Company*, 10 Abb., 130; *Pegram vs. Carson*, 10 Abb., 340; 18 How., 519; *Stalker vs. Gaunt*, 12 L. O., 132. See also, as to an application made unnecessarily, and seemingly in bad faith, *Van Zandt vs. Cobb*, 12 How., 544.

The notice of motion must, of course, be based upon the case as shown on the moving papers, and must ask for the specific relief which that case as shown will warrant, never omitting the usual general demand at the conclusion. Any petition or affidavit, on which the motion is grounded, must of course be served with the notice. The pleadings should in all cases be referred to on that document.

(a.) OPPOSITION TO MOTION.

The opposing party, if he impeaches the statements of the applicant, by the allegation of counter-facts, must bring them forward by affidavit, in the usual manner. If he merely relies on defects patent on the face of the moving papers, none will of course be necessary.

A positive and unqualified denial by him, of having the books, papers, or entries demanded, in his possession, or under his control, will be conclusive; and, if made, will defeat the application. *Hoyt vs. American Exchange Bank*, 1 Duer, 652; 8 How., 89; *Ahoyke vs. Wolcott*, 4 Abb., 41; *Bradstreet vs. Bailey*, 4 Abb., 233.

Where, however, the party has been in possession of a paper, a bare denial of having it, without sufficient diligence in searching, or an adequate reason shown for inability to find it, will be insufficient. *Southart vs. Dwight*, 2 Sandf., 672; 2 C. R., 83. Especially so, if such denial appear to be evasive. *Hicks vs. Charlick*, 10 Abb., 129.

Nor where the applicant has a right to, or interest in, the books or

papers, will a denial that they contain the particulars stated in the application be sufficient. The party, under these circumstances, has a right to examine them and judge for himself. *Higgins vs. Bishop*, 12 L. O., 127.

(b.) ORDER ON MOTION.

If the application be refused, the prevailing party will, of course, enter and serve an order to that effect in the usual manner, in order to get rid of the stay of proceedings provided for by rule 17.

If it be granted, the applicant, in framing the order, must take especial care to comply exactly with the requisites prescribed by rule 16.

That order must specify on its face :

The mode in which the discovery is to be made ;

The time within which it is to be made ;

When a deposit is ordered, the time for which that deposit is to continue ;

And it must also declare the consequences of an omission to comply with it, which should be stated according to the nature.

If the order be against a plaintiff, he may be nonsuited ;

Or, he may be excluded from giving the paper in evidence.

The former course is more peculiarly applicable, when the omission to produce goes to the whole merits. The latter, when it merely tends to proof, or failure of proof, of a portion of the case.

If against a defendant,

His defence may be stricken out ;

He may be debarred from a particular defence ;

Or, he may be similarly excluded from giving the paper in evidence.

The last of these courses is applicable when the omission only goes to a partial failure of proof.

The second, when its operation is confined to one particular defence without affecting others.

The first, when the defect occasioned by the omission goes to the whole merits of the case.

Or, in either case, the party may be punished as for a contempt.

This course is applicable when the refusal or omission to produce is wilful.

Which of these remedies will be extended, and, if so, to what extent, is a matter which, of course, rests entirely in the discretion of the judge. The point is one that requires careful attention at the time of the motion, and on the settlement of the order, as, under the rule as it now stands, the question as to the ulterior relief to be granted is to be settled at that time, and not on a subsequent motion.

Under the provisions of the Code, inspection of the book or paper

produced appears to be a matter of right. See *Hoyt vs. American Exchange Bank, supra*.

In case of discovery of entries, it will be confined, however, to the portions to which the applicant shows a right, the remainder of the books being sealed up, so as to prevent any examination into them. *Higgins vs. Bishop*, 12 L. O., 127 (128). As to the extent to which a discovery of entries will be compelled, see *Brevoort vs. Warner*, 8 How., 321.

As to the duty of an officer of the court temporarily in possession of papers, neither to make nor to permit a general inspection, see *Hergman vs. Dittlebach*, 11 How., 46.

The party ordered to produce books or papers must either deliver a sworn copy, or permit the other party to take one. *Hoyt vs. American Exchange Bank*, 1 Duer, 652 ; 8 How., 89. Where sworn copies are delivered they must be duly and sufficiently verified. *Same case*. As to the right of a principal to demand a sworn copy of his agent's accounts, see *Ruberry vs. Binns*, 5 Bosw., 685.

In some cases, where not necessary for protection of the applicant, a personal inspection has been refused, on sworn copies being ordered. *Hoyt vs. American Exchange Bank, supra* ; *Stanton vs. Delaware Mutual Insurance Company*, 2 Sandf., 662.

When granted, a deposit is generally for the purpose of insuring the production of the documents in court. As to the mode and the extent to which it may usually be required, see *Moore vs. Pentz*, 2 Sandf., 664. When fraud is apprehended, a demand for it will, of course, be proper. If unnecessary, it may be refused, and an order providing for a reasonable opportunity to inspect it, substituted. *Pindar vs. Seaman*, 33 Barb., 140.

Where the applicant's right is clear, and a discovery unreasonably refused, costs of the motion may be given. *Brevoort vs. Warner*, 8 How., 321.

An order of this nature, resting in the discretion of the court, is not appealable. *White vs. Monroe*, 33 Barb., 650 ; 12 Abb., 357.

(c.) COURSE ON NEGLIGENCE OR REFUSAL.

This is now clearly pointed out by rule 16, as above cited. The default in compliance must be proved by affidavit in the usual manner. An application must be then made to the court, at special term, grounded on that proof, and the court may, as of course, grant a rule absolute, giving effect to the consequences stated on the face of the previous order. This proceeding is evidently *ex parte*. The absolute order must be duly entered and served, and, when served, the proceeding is complete, and those consequences will be carried out.

There can be little doubt, however, but that it is competent to the court, if it so think fit, to grant the defaulting party an opportunity of being heard, either by directing the motion to be brought on on notice in the first instance, or on a subsequent application to vacate.

Prior to the making of the above special provisions in the rule in question, the striking out of a defendant's answer was held to be a proper remedy, in a case where the omission to discover went to the general merits. *Gould vs. McCarty*, 1 Kern., 575. See likewise *Bone-steel vs. Lynde*, 8 How., 226 ; affirmed, 8 How., 352, on a similar failure to produce under a subpoena *duces tecum*. See likewise, as to an order for exclusion, granted previous to that revision, *Powers vs. Elmendorf*, 4 How., 60 ; 2 C. R., 44.

The punishment by way of proceeding by contempt, is, of course only applicable to cases of clear contumacy. As a general rule, sufficient relief will be afforded by means of one or more of the other modes prescribed. See course pursued in *Pindar vs. Seaman*, 33 Barb., 140

Prior to the revision of the rules, it was held that the power to take ulterior proceedings on a refusal or neglect to produce, was vested in the court alone. It had no power to order a reference for the purpose of making a more efficient examination. *Hoyt vs. American Exchange Bank*, 1 Duer, 652 ; 8 How., 89.

But, in the same case, it was held that, in the event of a discovery by sworn copies manifestly incomplete, the proper course was to apply to the court for further copies. And there is little doubt, but that such an application will still be admissible.

The power of the court, in case of a refusal to produce, does not extend, however, to compel the defendant to make any admission of the plaintiff's case beyond what would be implied from a neglect to plead. *Follett vs. Weed*, 3 How., 360. The plaintiff is, under such circumstances, "to be placed in the same situation in which he would have been, if the defendants had suffered default for want of a plea."

CHAPTER V.

EXAMINATION OF PARTIES, AND RULES OF EVIDENCE.

§ 203. *Statutory and Other Provisions.*

THE portion of the Code which prescribes and regulates the practice in these matters is contained in chapters VI. and VII., title XII., part II.

These two chapters run as follows :

CHAPTER VI.

Examination of Parties.

§ 389. (343.) No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter.

§ 390. (344.) A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission.

§ 391. (345.) The examination, instead of being had at the trial, as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court, or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

A mere verbal correction made in 1849.

§ 392. (346.) The party to be examined, as in the last section provided, may be compelled to attend, in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial.

§ 393. (348.) The examination of the party, thus taken, may be rebutted by adverse testimony.

The previous order of this and the next section altered, and a slight verbal change made in 1849.

§ 394. (347.) If a party refuse to attend and testify as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer, or reply, may be stricken out.

Dates from 1849. In 1848, the arrangement of the sections, and the wording of this provision, were different.

§ 395. (349.) A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, in respect to any matter pertinent to the issue. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf, in respect to such new matter, and shall be so received.

Dates from 1849. In 1848, the latter part of the section was less definitely worded

§ 396. (350.) A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination as if he were named as a party.

§ 397. A party may be examined on behalf of his co-plaintiff or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in the behalf of the party examined. And whenever in the case mentioned in sections 390 and 391, one of several plaintiffs or defendants, who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action, or defence, and shall be so received.

Was not in the Code of 1848. Was first inserted on the amendment of 1849, but dates, as it stands, from 1852.

In 1849, the first two sentences formed one only, and that much less explicit, as regards details. In 1851, they assumed their present form, with some slight verbal difference, the present third sentence being expunged. In 1852 that sentence was restored.

CHAPTER VII.

Examination of Witnesses.

§ 398. (351.) No person offered as a witness shall be excluded by reason of his interest in the event of the action.

Before entering on the subject of the next section, it may be remarked generally that, in the original Code, provision was made by sections 353 to 356, for taking the examination of witnesses, residing more than one hundred miles from the place of trial, by means of a proceeding analogous to that for taking an examination *de bene esse*. On the revision of 1849 the whole of these provisions were stricken out, and have never been restored.

§ 399. (352.) A party to an action or special proceeding, including proceedings in surrogates' courts, and proceedings for the summary recovery of the possession of land, may be examined as a witness on his own behalf, or in behalf of any other party, in the same manner, and subject to the same rules of examination as any other witnesses; provided, however, that the assignor of a thing in action shall not be examined in behalf of said party, nor shall a party to an action be examined in his own behalf, in respect to any transaction or communication had personally by said assignor, or said party, respectively, with a deceased person, against parties who are the executors, administrators, heirs-at-law, next of kin, or assignees of such deceased person, where they have acquired title to the cause of action immediately from said deceased person, or have been sued as such by the executors, administrators, heirs-at-law, next of kin, or assignees. But where such executors, administrators, heirs-at-law, next of kin, or assignees, shall be

examined on their own behalf in regard to any conversation or transaction had between the deceased person and said assignor, or said party, respectively, then the said assignor or the said party may be examined in regard to such conversation or transaction, but not in regard to any new matter.

Amended, as it now stands, in 1862, that amendment restoring to some extent the restrictions imposed previous to 1860, and omitting altogether the provision then made with reference to the law of husband and wife.

The changes in this section have been so numerous and so radical that it may be expedient to notice them with a little more detail than usual. The course pursued will be to trace backwards the principal standing points assumed by the legislature from time to time, in gradually widening the powers of parties in this respect.

In 1860 the provision was more sweeping and conclusive, running thus :

"A party to an action, or special proceeding, including proceedings in surrogates' courts, and proceedings for the summary recovery of the possession of land, may be examined as a witness on his own behalf, or in behalf of any other party, in the same manner, and subject to the same rules of examination as any other witness, except that a party shall not be examined against parties who are representatives of a deceased person, in respect to any transactions had personally between the deceased person and the witness; and except, also, that neither husband nor wife shall be required to disclose any communication made by one to the other."

In 1859 the section stood :

"§ 399. (352.) 1. A party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness, but such examination shall not be had, nor shall any other person, for whose immediate benefit the same is prosecuted or defended, be so examined, unless the adverse party or person in interest is living, nor when the opposite party shall be the assignee, administrator, executor or legal representative of a deceased person.

"2. And when, in any action or proceeding, the opposite party shall reside out of the jurisdiction of the court, such party may be examined by commission issued and executed as now provided by law.

"3. And whenever a party or person in interest has been examined under the provisions of this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received.

"4. When an assignor of a thing in action or contract is examined as a witness on behalf of any person deriving title through or from him, the adverse party may offer himself as a witness to the same matter in his own behalf, and shall be so received, as to any matter that will discharge him from any liability that the testimony of the assignor tends to render him liable for.

"5. But such assignor shall not be admitted to be examined in behalf of any person deriving title through or from him against an assignee or an executor or administrator, unless the other party to such contract or thing in action, whom the defendant or plaintiff represents, is living, and his testimony can be procured for such examination, nor unless at least ten days' notice of such intended examination of the assignor shall be given in writing to the adverse party."

The next standing point in the backward history of the section is 1857. By chapter 353, of the Laws of that year, volume I., p. 744, it was generally remodelled from its previous purport. The numerous heads of 1859 were omitted, but the purport was much the same.

The portion No. 1, stood in the same words, but after it were added the following :

"Nor unless ten days' notice of such intended examination of the party or person interested, specifying the points upon which such party or person is intended to be examined, shall be given in writing to the adverse party, except that, in special proceedings of a sum-

mary nature, such reasonable notice of such intended examination shall be given as shall be prescribed by the court or judge."

Head No. 2, commenced thus: "And when notice of such intended examination shall be given in an action or proceeding in which the opposite party shall reside," &c., the rest of the head being the same.

Heads No. 3 and 4 were in the same words. So also, was head No. 5, except that the words, "specifying the points upon which he is intended to be examined," stood at the close between "intended examination of the assignor," and "shall be given in writing to the adverse party."

In 1858, the section of 1857 was amended, by inserting after the words "ten days' notice," wherever they occur, the following words: "if the action be in a court of record, and, in all other cases, four days' notice."

As will be seen, the amendment of 1859, does away with the necessity of notice in all cases except on the examination of an assignor, and that of 1860 abolished it altogether.

From 1851 to 1857 the section stood thus. It commenced—

"The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended."

It then proceeded with heads No. 1, 4, and 5 of the section of 1859, exactly as that part of the clause stood in 1857, omitting the previous portions of the section altogether.

It will be seen, therefore, that the radical change of admitting the testimony of parties, on their own behalf, took place in 1857. Prior to that the old rules prevailed, and they were excluded.

In 1849 and 1848 the section stood simply thus:

"The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended, nor to any assignor of a thing in action assigned for the purpose of making him a witness."

The effects of these different amendments, and the different stages in progress which they have worked out from time to time, will be considered in the appropriate section of the present chapter.

§ 204. *Examination of Parties.*

(a.) GENERAL REMARKS.

The provisions of the Code, in this respect, are an amplification of an original measure upon the subject (chapter 462 of the Laws of 1847), the most important provisions of which are incorporated in the present enactments.

The views of the commissioners, in submitting those provisions to the legislature for their approval, are thus stated by them, in pp. 244 and 245 of their report: "One of the great benefits to be expected from the examination of parties is the relief it will afford to the rest of the community, in exempting them, in a considerable degree, from attendance as witnesses, to prove facts which the parties respectively know, and ought never to dispute, and would not dispute, if they were put on their oaths. To effect this object, it should seem necessary to permit the examination beforehand, that the admission of the party may save the necessity of a witness."

The recent amendments in section 399 have now carried out to its full extent the principle of which the germ is contained in the above remarks.

(b.) SUBSTITUTE FOR BILL OF DISCOVERY.

This intention is declared, by unavoidable implication, in section 389, as above cited; and the present provisions, in connection with those considered in the preceding chapter, and in connection with the power to compel the production of documents, by means of a subpoena *duces tecum*, afford, by means of their separate or their conjoint operation, as the case may require, an available substitute for the former chancery practice.

In *Merritt vs. Thompson*, 3 E. D. Smith, 283, it is expressly laid down that it is only the form, not the nature of the relief, formerly obtainable by bill of discovery, that is altered, and that the remedy can be as efficiently obtained, by this means, under the present, as under the former practice. See likewise *Leeds vs. Brown*, 5 Abb., 418.

And a complaint may, it seems, be sustainable, for the express purpose of obtaining such an examination. *Van Rensselaer vs. Layman*, 10 How., 505.

The general principle above stated, that the remedies now provided by the Code afford, in their conjoint operation, a complete substitution for those under the former practice, is expressly laid down in the following cases, cited in the preceding chapter: *Brevoort vs. Warner*, 8 How., 321; *Stalker vs. Gaunt*, 12 L. O., 124; *Same case*, 12 L. O., 132; *Terry vs. Rubel*, 12 L. O., 138; *Higgins vs. Bishop*, 12 L. O., 127. See likewise, as to the applicability of a subpoena *duces tecum*, under such circumstances, *Bonesteel vs. Lynde*, 8 How., 226; affirmed, 8 How., 352; *Mitchell's case*, 12 Abb., 249.

And the practice thus introduced has been held to amount to a practical abolition of the former power, in this state, of tendering the books of a party as evidence, in his own favor. He must now go upon the stand and tender his evidence as a witness, referring only to the books when necessary to refresh his recollection. *Conklin vs. Standler*, 2 Hilt., 422; 17 How., 399; 8 Abb., 395. See, however, *Tomlinson vs. Borst*, 30 Barb., 42; *Hauptman vs. Catlin*, 1 E. D. Smith, 729.

The above practice has no effect upon the examination of a party in an accounting taken by the direction of the court. The party, in such a case, does not stand in the position of a mere witness, and his examination is regulated by the former practice. *Wiggins vs. Gans*, 4 Sandf., 646.

The prohibition in section 389 has no effect whatever on the class of suits in the nature of the former creditor's bill. It only refers to the

ordinary discovery sought by bill, and made by answer. See *Dunham vs. Nicholson*, 2 Sandf., 636; *Quick vs. Keeler*, 2 Sandf., 231.

(c.) GENERAL CONSIDERATIONS.

These provisions are wholly confined to the courts whose practice is regulated by the Code. They do not extend to proceedings in the Courts of Sessions. *The People vs. Duell*, 16 How., 43; 6 Abb., 285.

As to the right of a defendant to require a statement of the residences and occupations of plaintiffs, in order, among other things, to enable him to take proceedings of this nature, see *Vincent vs. Vanderbilt*, 10 How., 324.

These provisions of the Code have no application whatever to the case of testimony required for the purposes of a motion, nor can such testimony be compelled, either on examination within this state or on commission. *Huelin vs. Ridner*, 6 Abb., 19; *Meyer vs. Lent*, 7 Abb., 225 (Court of Appeals); reversing *same case*, 16 Barb., 538; *Stake vs. Andre*, 18 How., 159; 9 Abb., 420; *Palmer vs. Adams*, 22 How., 375.

Nor can it be compelled on a special statutory proceeding; as, for instance, on an application to perpetuate testimony. *Keeler vs. Dusenbury*, 1 Duer, 660; 11 L. O., 287.

In *Brockway vs. Stanton*, 2 Sandf., 640; 1 C. R., 128, it is laid down (as is indeed clear from section 390), that a party residing out of the state can be compelled to testify on a commission, the same as any other witness. See also *Suydam vs. Suydam*, 11 How., 518.

The examination of an adverse party, under these proceedings, is a matter of right, and cannot be denied, and an order refusing or limiting the exercise of that right is appealable. *Green vs. Wood*, 15 How., 338; 6 Abb., 277; 6 Duer, 702. See also *Leeds vs. Brown*, 5 Abb., 418; *Partin vs. Elliott*, 2 Sandf., 667; 2 C. R., 66; *Anderson vs. Johnson*, 1 Sandf., 713; 2 C. R., 95.

In *Draper vs. Henningsen*, 1 Bosw., 611, it is held that the court have no power to compel the adverse party to attend before a referee, and submit to be examined under these provisions.

(d.) WHEN EXAMINATION MAY BE HAD.

As a general rule, the examination of the adverse party will only be appropriate after issue joined.

But, when the examination is rather for the purposes of discovery than for the taking of testimony, strictly considered; or when the adverse party is examined, under the same circumstances in which a witness would be examinable, *de bene esse*, at an earlier stage of the cause (as, for instance, in the event of sickness, impending absence from the

state, or the like), it is competent for the applicant to take such testimony before issue joined. See *Miller vs. Mather*, 5 How., 160; 2 C. R., 101; *Suydam vs. Suydam*, 11 How., 518. The same rule is also recognized in *Chichester vs. Livingston*, 3 Sandf., 718; 1 C. R. (N. S.), 108. And the existence of the option is incidentally admitted in *Brevoort vs. Warner*, 8 How., 321 (322). It has, however, been held that a strong case of necessity must be shown, to warrant such an examination at the outset of the suit, before the complaint is drawn, and the examination must be taken in the same manner, and with the same incidents, as that of a witness *de bene esse*. See *Keeler vs. Dusenbury*, 1 Duer, 660; 11 L. O., 287; *Roche vs. Farran*, 12 L. O., 121. And similar views are entertained in *Chichester vs. Livingston*, above referred to. See also *Watson vs. Gage*, 12 Abb., 215.

The decisions above referred to clearly overrule the early cases of *Balbani vs. Grasheim*, 2 C. R., 75; and *Bennett vs. Hughes*, 1 C. R., 4, holding positively to the contrary.

Though admissible, a resort to an examination at this stage will necessarily be comparatively infrequent. There is no provision in this portion of the Code for a repetition of the examination, when once had, and a party obtaining it for the purposes of mere discovery, may possibly do so at the risk of losing the benefit of portions at least, if not of the whole of his adversary's testimony for the purposes of trial. See *Partin vs. Elliott*, 2 Sandf., 667 (668).

Whenever the examination is had for the purposes of evidence, and not of mere discovery, the proper, and, it may safely be said, the only admissible period for it is after the actual joinder of issue; save only in the exceptional instance above stated of an examination in the nature of one *de bene esse*, under impending risk of losing the testimony altogether. It is obvious that testimony material to the issue to be tried in the cause cannot be taken with either propriety or advantage whilst the nature and extent of that issue, and possibly its very existence, remain uncertain. See *Chichester vs. Livingston*, 3 Sandf., 718; 1 C. R. (N. S.), 108; *Suydam vs. Suydam*, 11 How., 518; *Watson vs. Gage*, 12 Abb., 215.

The right of examination after issue is absolute, and cannot properly be denied or interfered with: see *Green vs. Wood*, 15 How., 338; 6 Abb., 277; 6 Duer, 702, and other cases above referred to; and the rights of both parties acquired under it will be guarded and provided for in the event of an attempted discontinuance: see *Cockle vs. Underwood*, 3 Duer, 676 (679).

Whether such examination be had before or at the trial is entirely a matter of option. *Suydam vs. Suydam*, 11 How., 518; *Taggard vs. Gardner*, 2 Sandf., 667; 2 C. R., 82. This option is positive and ex

press, and was given for the purpose of aiding the parties to prepare for such trial, by narrowing the matters to be controverted, and saving time and expense in the attendance of other witnesses. *Leeds vs. Brown*, 5 Abb., 418; *Partin vs. Elliott*, 2 Sandf., 667; 2 C. R., 66; *Anderson vs. Johnson*, 1 Sandf., 713; 2 C. R., 95.

(è.) MODE OF PROCEDURE.—NOTICE TO PARTY.

When the examination of the party is taken under the same circumstances and for the same purposes as the examination of a witness *de bene esse*, the same course should be substantially followed. See this proceeding fully considered in the next chapter. An order should be issued in the first instance, and a summons issued and served in the manner prescribed by the Revised Statutes: see *Draper vs. Henningsen*, 1 Bosw., 611.

But, when that examination is claimed to be had after issue joined, in exercise of the option given by section 391, no order will be necessary previous to or for the purpose of laying ground for the proceeding, when the full notice prescribed by the section is given. *Draper vs. Henningsen, supra*. That the giving of notice is all that is in strictness necessary to the validity of the proceeding, without the necessity of any order, see *Taggard vs. Gardner*, 2 Sandf., 667; 2 C. R., 82; *Leeds vs. Brown*, 5 Abb., 418; *Gaughe vs. Laroche*, 14 How., 451; 6 Duer, 685; 6 Abb., 284, note.

If it be desirable to curtail the period of the prescribed notice, then, but not otherwise, an order will be necessary. It must be applied for on good cause, shown by affidavit, for shortening the notice; and a copy must be served with the latter. See, as to the construction of this branch of section 391, *Leeds vs. Brown*, 5 Abb., 418; *Green vs. Wood*, 15 How., 338; 6 Duer, 702; 6 Abb., 277.

Under ordinary circumstances, notice alone will be all that is requisite. Unless shortened, as above, it must be for the full period of at least five days. It must require the party to attend at a time and place, and before an officer specified on its face. That officer must be either a judge of the court in which the action is pending, or a county judge; and the county in which the witness is required to attend must be that of his residence, or that in which he is served with a summons for his attendance. As to the power of taking an examination on service within a district different from that of the residence of the party, see *Anderson vs. Johnson*, 1 Sandf., 713; 2 C. R., 95.

And, as a general rule, and except in cases where it is clear that the party summoned will attend voluntarily, a summons must accompany and be served together with the notice. He cannot be compelled to attend without it. See *Hewlett vs. Brown*, 1 Bosw., 655; 7 Abb., 74.

But, by means of that summons, he can be so compelled to attend, in the same manner as a witness summoned to attend and be examined conditionally. Section 392. See the next chapter.

The summons must distinctly specify the time, the place, the manner, and the purpose of the examination, and likewise the consequences of a refusal to attend. Whether such a notification on the face of the notice, when served alone, without a summons, be available for any purpose, is more than doubtful. See *Hewlett vs. Brown*, 1 Bosw., 655; 7 Abb., 74. The summons must be signed by the judge or officer before whom the attendance of the party is required. See, on these points, *Gaughe vs. Laroche*, 14 How., 451; 6 Duer, 685; 6 Abb., 284, note, where the form of such a notice is given in full. An ordinary subpoena will be wholly inefficient as ground for any subsequent proceedings. *Bleecker vs. Carroll*, 2 Abb., 82; *Jarvis vs. Clark*, 12 L. O., 129. These cases overrule, *pro tanto*, the early decision in *Taggard vs. Gardner*, 2 Sandf., 667; 2 C. R., 82, holding that the service of an ordinary subpoena is appropriate. Nor is an order, if made, of any effect for this particular purpose; its office is not to procure the attendance of the witness, but to lay ground for the proceeding in the suit, where the examination is taken conditionally, or, if otherwise, then to justify the shortening of the prescribed period of notice. See *Draper vs. Henningsen*, *supra*.

Where the examination is for the purposes of discovery, and where for that purpose, or generally for the purposes of testimony, an examination into any books, papers, or documents in the possession of the party to be examined, is either necessary or desirable, the summons should be accompanied by the ordinary subpoena *duces tecum*, requiring their production at the time and place, and before the officer by whom the examination is to be taken. See, as to the propriety and applicability of this course, *Jarvis vs. Clark*, 12 L. O., 129; *Stalker vs. Gaunt*, 12 L. O., 132; *Terry vs. Rubel*, 12 L. O., 138; *Bonesteel vs. Lynde*, 8 How., 226; affirmed, *Ibid.*, 352; and overruling *previous case*; *Trotter vs. Latson*, 7 How., 261. See likewise *Gaughe vs. Laroche*, *supra*; *Commercial Bank of Albany vs. Dunham*, 13 How., 541; *Higgins vs. Bishop*, 12 L. O., 127 (128); *Mitchell's case*, 12 Abb., 249.

The notice of examination and the summons, and the subpoena *duces tecum*, if also used, being all proceedings tending to bring a party into contempt (see Code, section 418), they must all be served personally upon the party whose attendance is required. If the time has been shortened by order, a copy of the order had better be served with them.

The notice must also be served in due time upon any adverse party. Where an order has been made, a copy of that order should accompany

it. These services, being for the purpose of notice only, need not be personal, but may, and in fact should, be made on the attorney in the usual manner. When an order has been made it may also be prudent, and can never be inexpedient, to serve a copy of that order on the attorney for the party whose testimony is to be taken, to affect him in his character of party, but not of course in that of witness. The ordinary witness fees must be paid or tendered to the party to be examined, at the time of service on him, in the same manner as on service of a subpoena. *Anderson vs. Johnson*, 1 Sandf., 713; 2 C. R., 95. See also *Bleecker vs. Carroll*, 2 Abb., 82; *Hewlett vs. Brown*, 1 Bosw., 655; 7 Abb., 74.

The several offices of the summons and of the notice are thus defined in *Draper vs. Henningsen*, 1 Bosw., 611, above referred to: "A notice to the party, and that alone, is necessary to give the right to examine, and a summons is necessary to compel attendance, and lay the foundation for ulterior proceedings, in case of non-attendance in obedience to it."

(f.) COURSE AND EFFECT OF EXAMINATION.

In theory, the proceeding is had in the presence, and under the personal superintendence of the officer before whom the examination is taken.

In practice, however, that examination is rarely taken by the judge in person, in the strict acceptation of the term. When not taken before a judge or county judge, at his own residence, which is of course admissible, it is more usually conducted at the chambers of the court, often whilst other business is going on, or even elsewhere, by consent of the parties. The common course is for the evidence in chief and the cross-examination to be each taken down by the counsel conducting that branch of the examination, any questions which may arise, pending the examination, being from time to time submitted to the judge for his decision, either each *pro re nata*, or several at one time, as may be most convenient. The admissibility of questions asked, is clearly a matter proper for decision at the time: the admissibility of the evidence given in answer to those questions, will, as a general rule, be reserved for consideration, when the deposition comes to be made use of at the trial, and not passed upon during the actual examination, the objection being simply noted on the deposition.

In *Draper vs. Henningsen*, 1 Bosw., 611 (616), the same principles are thus laid down: "The examination is to be the same as any other witness, and the matters as to which he shall be examined are to be determined either by the judge before whom the examination is had (unless upon cause shown he decides that the examination shall not

then be taken), or at the trial, when the testimony is offered in evidence.”

When an adjournment takes place, pending the examination, it should be noted on the deposition, or, more usually, on the notice or order under which the party attends, and the judge's signature should be obtained to it. At the close of each day's proceedings, the party should sign that portion of the deposition, and be sworn to it, so far. The same ceremony must, of course, be observed at the conclusion of the deposition, whenever completed. The party must necessarily be sworn in the first instance, and the only correct practice will be that, before his final signature, the deposition should be read over to or by him, and any errors corrected, before he signs it. The judge should append to the close of the deposition a formal certificate of its having been taken before him.

The judge has no power to appoint a referee to take an examination of this nature. *Draper vs. Henningsen, supra*. This objection is, however, one of that description which is capable of waiver by mutual agreement of the parties.

It is, of course, equally competent for those parties to waive, in like manner, any other of the formal requisites above prescribed, as by taking the deposition at the office of one of the parties, swearing to it before a commissioner, &c., if they choose to do so. In practice, however, the attendance before a judge will be usually found the more convenient, as it is, in fact, the more correct course, on account of the probability of questions arising as to the nature and course of the examination, which he, and he alone, will be competent to dispose of.

It follows, from the very nature of the examination thus taken, and from the positive right of rebuttal given by section 393, that the examination of a party, under these provisions, differs from that of an ordinary witness in this particular, *i. e.*, that the examining party is not positively bound by the answers he may receive, but is entitled to conduct the proceeding in the nature of a cross-examination, and may ask any questions which, on actual trial, might be put to an adverse witness. This consequence, though not expressly provided for, follows of necessity, from the very nature of this remedy, and from the admitted principle, that it is intended to stand in the place of, and is the only substitute for a discovery under the old practice.

When completed, the examination is to be filed by the judge, in like manner as on a conditional examination. That filing must take place within ten days, and must be made in the office of the clerk of the court in which the action is pending. In the Supreme Court, this is, of course, the clerk of the county of venue for the time being.

The party by whom the deposition is taken should, of course, see that

this filing takes place in due time. It is not unusual for him, though possibly irregular, to take charge of the deposition himself for that purpose. It is likewise a matter of obvious convenience, and not unfrequent practice, to detain the deposition for the purpose of making copies for use, either filing it before, or producing at the trial. Of course, all these matters of mutual convenience rest entirely in good feeling and the spirit of mutual accommodation, so desirable in matters of mere practice. The better course will be to make them a matter of written stipulation in all cases, to avoid any possibility of future misunderstanding.

The legal effect of an examination taken under these provisions, appears to be precisely that of an answer in chancery, under the old practice. It is conclusive upon the party examining unless and until it is disproved. *Sheldon vs. Weeks*, 7 L. O., 57.

A deposition of this nature is to be treated precisely as that of any other witness. The party offering it is not bound to read the whole on his own behalf, but his adversary may bring forward any omitted portions, if relevant and competent, as evidence in his own favor. *Gelatty vs. Lowery*, 6 Bosw., 113.

(g.) RIGHT OF REBUTTAL.

As above noticed, this right is expressly given to the adverse party by section 393.

The principle was acted upon, with reference to evidence given on the actual trial, in *Armstrong vs. Clark*, 2 C. R., 143, a decision expressly based on this section.

By calling his adversary, a party makes him so far his own witness that he cannot introduce evidence for the mere purpose of directly discrediting him. His right in that respect only extends to disproving the facts to which he testifies. *Pickard vs. Collins*, 23 Barb., 444. See also, generally, *Thompson vs. Blanchard*, 4 Comst., 303, 311, there referred to; and *Parsons vs. Suydam*, 3 E. D. Smith, 276.

(h.) RIGHT OF ADVERSE OR INTERESTED PARTIES TO TESTIFY.

The powers to testify, and the limitations and qualifications of those powers, for which special regulations are made by sections 395, 396, and 397, seem, for present purposes, to be merged in the general and sweeping facilities afforded by section 399, as amended in 1860. Any party or person interested, being now competent to testify for any purpose, and under any circumstances, with the exceptions stated in the section itself, the whole of the former distinctions are now practically swept away. It will therefore be superfluous to enter into any lengthened consideration of these distinctions. The innovation being, how-

ever, so recent, a glance at them may not be unprofitable. As to the power of examining either husband or wife under the section as it now stands, see *Barton vs. Gledhill*, 12 Abb., 246.

The rule as to what was or was not new matter brought forward by a defendant, entitling the adverse party to testify on his own behalf in rebuttal, under section 395, was liberally applied in *Myers vs. McCarthy*, 2 Sandf., 399.

In *Chamberlain vs. Hamilton*, 18 Barb., 324, a stricter construction was put. So also in *Richardson vs. Wilkins*, 19 Barb., 510, which lays down the principle that where, for the most part, the defendant's testimony is merely responsive or explanatory, the plaintiff can only offer his own evidence in rebuttal, as regards any excess, in its nature strictly affirmative.

A defendant, testifying to a counter-claim, was held to let in the plaintiff's evidence on that point. *Harpell vs. Irwin*, 3 E. D. Smith, 565; 1 Abb., 144; *Anon.*, 3 Abb., 102.

The doctrine that co-defendants could not be examined in each other's favor, without the express leave of the court, as held under the Code of 1848, in *Roberts vs. Thompson*, 1 C. R., 113; and *Taylor vs. Moirs*, 1 C. R., 123, is clearly obsolete.

§ 205. *Refusal to Testify.*

The consequences of such a refusal are clearly pointed out by section 394.

The party refusing may be punished as for a contempt;

And his complaint, answer, or reply may be stricken out.

Whether both of these remedies will be enforced, rests necessarily in the discretion of the court. Neither is necessarily imperative; either may be adopted, according to the peculiar circumstances of the case.

If the requisition be in its nature vexatious, the court may refuse to inflict any penalty. Where, therefore, a defendant had arranged to sail for California on Monday, and a summons for his attendance on Tuesday was served on the Saturday preceding, a motion to strike out his defence was denied. *Bennett vs. Hall*, 10 L. O., 191.

The penalty of striking out the recusant's pleading may also be denied, on good reason shown for not inflicting it, even in case of actual disobedience. *Anderson vs. Johnson*, 1 Sandf., 713; 2 C. R., 95. And, under such circumstances, a joint defence cannot properly be stricken out, on the ground of the default of one only of the parties. *Same case.*

Under ordinary circumstances, and especially when the testimony refused to be given is only partial in its nature, and does not tend to

decide the whole issue between the parties, the court will probably stop short at the enforcement of process of contempt as in the case of a contumacious witness. See *Anderson vs. Johnson*, *supra*; *Taggard vs. Gardner*, 2 Sandf., 667; 2 C. R., 82. The doubts as to the powers of the court in this respect, in the early case of *Bennett vs. Hughes*, 1 C. R., 4, seem clearly unfounded.

The nature of the process of contempt by which a deposition can be enforced under these circumstances, will be considered in the next chapter, under the head of depositions *de bene esse*. See also, *Gaughe vs. Laroche*, 14 How., 451; 6 Duer, 685; 6 Abb., 284, note. The process must be by way of warrant, under the hand of the judge, not by ordinary attachment. *Bleecker vs. Carroll*, 2 Abb., 82.

In a case of gross contumacy, however, as, for instance, where a party had surreptitiously obtained the possession of important papers, and refused to produce them on a subpoena *duces tecum*, the full penalty will be enforced, and his pleading stricken out. *Bonesteel vs. Lynde*, 8 How., 226; affirmed, 8 How., 352.

To bring the adverse party into contempt, and especially to induce the court to take the extreme measure of striking out his pleading, the party moving must pursue strict practice.

Full and complete service should be made of the original summons and notice, by which the attendance of the adverse party is required, and his fees as a witness paid. See above, under the head of *Notice to Party*, and cases cited. And on the face of the summons itself, or on an order, if one be obtained, the consequences of his failure to attend must be clearly pointed out. See *Anderson vs. Johnson*, and *Gaughe vs. Laroche*, above referred to.

If the moving party be not himself in attendance at the time and place appointed, the whole proceeding falls to the ground, even although the party summoned fail to appear. Nor will any subsequent stipulation between the attorneys avail to cure the defect, or tend to bring the party into contempt. *Gardiner vs. Peterson*, 14 How., 513.

The moving party cannot sustain proceedings for contempt on the original notice to appear and be examined, even though it point out the consequences of neglect. Before his adversary can be drawn into contempt, he is entitled to an opportunity to be heard, and to full notice of motion after actual default. *Hewlett vs. Brown*, 1 Bosw., 655; 7 Abb., 74.

The motion should, therefore, be noticed accordingly, asking first the same relief as was previously notified in the summons or notice, with the usual further clause, and a demand for costs of motion. It should be grounded on the papers originally served, and upon proof of their service, of attendance at the time and place appointed, and of default

there made ; and copies of these latter proofs should be served with the notice.

As to the consequences and effect of a refusal to answer a specific question, see, generally, *Burnett vs. Phalon*, 19 How., 530 ; 11 Abb., 157.

§ 206. *Rules of Evidence under Code Generally Considered.*

It would, of course, be neither practicable nor desirable, in a mere work on practice, to enter, or even attempt to enter, in detail, into the subject of the law of evidence, generally considered.

The observations in the present section will, accordingly, be strictly confined to the changes in that branch of the law effected by the provisions* of the Code as contained in chapter VII., title XII., part II., above cited ; and this in their practical rather than their theoretical aspect.

Those changes may be reduced under two general heads, thus :

Any witness, however interested in the controversy, is now admitted to testify without measure or distinction ;

And any party is equally competent to testify, even on his own behalf, on any matter in issue in the cause.

This last rule is, however, subject to the limitation imposed by section 399, prohibiting a party, and also his assignor, from being examined on his own behalf, in respect to transactions or communications had with a deceased person, as against parties representing or deriving title under such deceased person, unless in rebuttal, in the event of such last mentioned parties tendering their own evidence.

And, from 1860 to 1862, to the further limitation that husband and wife could not be required to disclose communications made by one to the other, but which was stricken out on the last revision.

With the above exception, all the former refinements and distinctions as to admissibility or non-admissibility of evidence, on the ground of interest, are entirely abolished.

But, of course, this abolition does not tend to impeach or to abridge the existent rights of a party to object to the testimony of any witness, whether a party to the record or not, on other and distinct grounds, such as infamy of character, or the like. See, as to the disqualification by reason of a conviction, and its extent, *The People vs. Shay*, 18 How., 358 ; 10 Abb., 413 ; 22 N. Y., 317. See likewise, as to disqualification of a referee, *Morss vs. Morss*, 11 Barb., 510 ; 1 C. R. (N. S.), 374 ; 10 L. O., 151. But not, it seems, of an arbitrator. *Cole vs. Blunt*, 2 Bosw., 116. See also, below, as to the question of the evidence of husband or wife. As to the privilege of a witness, when asked to criminate himself, see *Byass vs. Smith*, 4 Bosw., 679.

Nor does it, in the slightest manner, affect any considerations regarding the credibility of testimony when given, as distinguished from its admissibility. See *Roberts vs. Gee*, 15 Barb., 449; *Boyd vs. Colt*, 20 How., 384.

The above radical alteration in the previous rules of evidence is, in its full extent, so recent, dating from the amendment of 1860, and is also so entirely clear in its terms, and so sweeping in its general effect, that the reports contain, as yet, comparatively few decisions on the subject.

In view of the completeness and probable permanency of that change, it seems unnecessary to enter into any detailed examination of the different phases of construction which have accompanied the corresponding phases of legislation upon the same subject since 1848. Still, inasmuch as for some little time the different points which have been decided are liable to come up for revision or application in cases in which appeals have been taken, a cursory notice of them may be desirable, arranging them into general and broad classes, rather than seeking to draw minor distinctions.

It may be convenient, for this purpose, to draw attention to the different epochs which have marked the course of legislation on this subject, as regards the evidence of parties or privies to the record.

As respected mere witnesses, the disqualification, on the ground of interest, was abolished by the original Code.

The first epoch consists of the period from 1848 to 1857:

During this time a party to the record was excluded in all cases;

So also was a person for whose immediate benefit the action was prosecuted or defended.

From 1848 to 1851, an assignor of a chose in action was likewise excluded from testifying, when the assignment was made for the purpose of making him a witness. See 1 C. R., 55, for notice of English decisions, under similar rules, as there established by statutes 7 and 8 Vict., ch. 85.

In 1851 this rule was relaxed, and the testimony of such an assignor admitted, but under restrictions. If he gave evidence, the adverse party was allowed to testify on his own behalf, *pro tanto*. And his evidence could not be received against a party standing in a representative capacity, unless the other party to the original contract or transaction was living, and his testimony procurable. Notice of such examination, specifying the points of testimony, was also required to be given.

The second epoch dates from the amendment of 1857, and extends down to that of 1860.

In the former year, the grand and radical change took place of sub-

verting the former rules of evidence, and admitting the testimony of parties in their own behalf.

This privilege was, however, restricted as follows :

Such examination could not, nor could that of a party for whose immediate benefit the suit was prosecuted or defended, be had, unless the adverse party or person in interest was living.

Nor could it be had against the assignee or legal representative of a deceased person.

Power was given to examine the opposite party out of the state by commission.

And, whenever a party or person in interest had been examined under the powers conferred, the adverse party became entitled to tender his own testimony. The clauses as to the examination of an assignor, remained substantially as established by the amendment of 1851.

From 1857 to 1859, ten days' notice of the intended examination, specifying the points of testimony, was made a prerequisite. In 1859 this was dispensed with.

The third, and now existent epoch, commenced in 1860. It is characterized by a sweeping abolition of all previous restrictions, one only excepted, under the section as finally amended in 1862.

It is proposed shortly to run over the decisions applicable to each of these several epochs, *seriatim*, reserving any observations of general application for the third and last period.

§ 207. *Late Rules of Evidence.*

First Epoch.

(a.) EXCLUSION OF PARTIES AND PRIVIES.

The strictness of the rule as it stood, in this respect, was qualified by the previous sections 395, 396, and 397. Under these provisions, an interested party, though generally excluded, might still testify on his own behalf :

1. When called by his adversary as a witness ; and
2. In reply to new matter, to which his adversary had testified, under the power thus conferred (section 395).

A party interested in the action might be examined adversely, with all the incidents of the examination of an ordinary witness (section 396).

One co-plaintiff or co-defendant might be examined by another, and compelled to give testimony as to any matter in which he was separately interested, and as to which a separate and not joint verdict or

judgment could be rendered. But he could not use his examination on his own behalf.

And, whenever a party jointly interested was examined adversely, those interested with him might offer themselves as witnesses (section 397).

(b.) Co-DEFENDANTS.

The great test of competency or incompetency, as regarded defendants sought to be examined on behalf of their co-defendants, under these rules whilst subsisting, was whether a separate judgment could, or could not, be rendered in favor of the plaintiff, against the defendant sought to be examined. If such a judgment could be rendered, he was competent; if the liability sued upon was purely joint, and not several or severable, he was not.

A co-defendant in tort was, therefore, held to be, as a general rule, examinable for his co-defendant, in support of a separate defence, or where such defendant had himself made default. But, where his evidence tended to discharge himself, or to reduce the general measure of damages, it could not be received. See *Thompson vs. Blanchard*, 4 Comst., 303 (311); *City Bank of Columbus vs. Bruce*, 17 N. Y., 507 (513); *Robinson vs. Frost*, 14 Barb., 536; *Eno vs. Del Vecchio*, 4 Duer, 53; *Leach vs. Kelsey*, 7 Barb., 466; *Carpenter vs. Sheldon*, 5 Sandf., 77; *Parsons vs. Pierce*, 8 Barb., 655; 3 C. R., 177; *Munson vs. Hegeman*, Seld. Notes, 12th of April, 1853, p. 26; reversing *same case*, 10 Barb., 112; 5 How., 223; *Finch vs. Cleveland*, 10 Barb., 290; *Labar vs. Koplin*, 4 Comst., 547; *Selkirk vs. Waters*, 5 How., 296; 1 C. R. (N. S.), 35; *Holman vs. Dord*, 12 Barb., 336; 1 C. R. (N. S.), 331; *Beals vs. Finch*, 1 Kern., 128; 9 How., 385; *Lefever vs. Brigham*, 10 How., 385; *Montford vs. Hughes*, 3 E. D. Smith, 591; *Gardner vs. Finley*, 19 Barb., 317. This series of decisions overruled *Dodge vs. Averill*, 5 How., 8, and *Johnson vs. Wilson*, 1 C. R. (N. S.), 40, note.

But, on a defence clearly joint, a co-defendant could not be examined. *Ward vs. Woodburn*, 27 Barb., 346; *Dean vs. Thornton*, 3 Kern., 266.

The principle that a co-defendant in contract was examinable, when the contract was joint and several, or severable in its nature, and that the true test of admissibility was whether a several judgment could be rendered, was maintained in the following cases: *City Bank of Columbus vs. Bruce*, 17 N. Y., 507 (513); *Merrifield vs. Cooley*, 4 How., 272; *Mechanics' and Farmers' Bank vs. Wilbur*, 2 C. R., 33; *Selkirk vs. Waters*, 5 How., 296; 1 C. R. (N. S.), 35; *Mayor of New York vs. Price*, 4 Sandf., 616; 9 L. O., 255; 1 C. R. (N. S.), 85; *The People vs. Cram*, 8 How., 151; *President of Farmers' and Mechanics' Bank vs. Rider*, 5 How., 401; 1 C. R. (N. S.), 161; *Ladue vs. Van Vechten*,

8 Barb., 664; *Sweet vs. Tuttle*, 4 Kern., 465; 10 How., 40; *Finn vs. Gustin*, 4 E. D. Smith, 382; 2 Abb., 191; *Gilbert vs. Averill*, 15 Barb., 20. A co-defendant in default might also be examined, though, had he defended, he would have been excluded. *Shufelt vs. Power*, 10 How., 286.

But, as in tort, wherever the testimony of a co-defendant tended, in any manner, to establish a defence in which he had a joint interest, it was inadmissible. *Finn vs. Gustin*, *supra*; *City Bank of Columbus vs. Bruce*, 17 N. Y., 507. So also, as to the defence of usury. *Ely vs. Miller*, 1 Abb., 241; *Blodget vs. Morris*, 4 Kern., 482; supporting the views of Parker, J. (diss.), in *President of Mechanics' and Farmers' Bank vs. Rider*, 5 How., 401; 1 C. R. (N. S.), 61; and overruling *Bank of Auburn vs. Waller*, 23 Barb., 441. See also *Frost vs. Hanford*, 1 E. D. Smith, 540; *King vs. Lowry*, 20 Barb., 532; *Newell vs. Salmons*, 22 Barb., 647; *Fort vs. Gooding*, 9 Barb., 388; *Warden vs. Buell*, 18 How., 256.

In a case where the interests of a co-defendant were balanced between the parties, he was admitted to testify. *Cannon vs. Van Wagner*, 2 E. D. Smith, 590; 2 Abb., 106. See likewise generally, *Dobson vs. Racey*, 4 Seld., 216.

A co-plaintiff was inadmissible, under any circumstances. *Brahms vs. Joyce*, 5 Duer, 16.

So also was a party generally, though merely technically, joined as a guardian or next friend. *Hahn vs. Van Doren*, 1 E. D. Smith, 411. See generally, as to disqualification of a party, *Doughty vs. Busteed*, 3 C. R., 187. A party improperly joined was not, however, disqualified. *Keteltas vs. Penfold*, 4 E. D. Smith, 122.

But the rule did not affect that class of cases in which, under the practice before the Code, a party had been allowed to testify on his own behalf, *ex necessitate*. *Taylor vs. Monnot*, 5 Duer, 16; 1 Abb., 325; *McMullin vs. Grannis*, 10 L. O., 57. See, however, strict view on this doctrine, generally considered, in *Garvey vs. Camden and Amboy Railroad Company*, 1 Hilt., 280; 4 Abb., 171.

The above rules, however, did not apply to those cases where a joint defendant was first called by his adversary. Under these circumstances, his evidence, and also that of his co-defendants, became generally admissible. *Buchanan vs. O'Hara*, 1 Bosw., 601; *Comstock vs. Doe*, 2 C. R., 140; *Combs vs. Bateman*, 10 Barb., 573.

A defendant in the same interest as the plaintiff was held an incompetent witness in his behalf. *Hollenbeck vs. Van Valkenburgh*, 5 How., 281; 1 C. R. (N. S.), 33.

As to what was or was not to be considered as an interest in the result sufficient to work a disqualification, see *Fitch vs. Bates*, 11 Barb.,

471. The objection was capable of waiver, if not taken at the proper time. *Leach vs. Kelsey*, 7 Barb., 466; *Combs vs. Bateman*, 10 Barb., 573.

(c.) PARTIES INTERESTED IN EVENT OF ACTION.

The second main ground of exclusion, prior to 1857, was that of interest in the result of the action. A person for whose immediate benefit such action was prosecuted or defended, though not technically a party to the record, was excluded. The limits of this exclusion were made the subject of considerable discussion. The grand principle elicited seemed to be this: To be sufficient to exclude the testimony of a third person, not a party to the record, the interest of that party in the result must be direct, certain, and immediate. If it fulfilled these requisites, it was sufficient for exclusion, without regard to its amount. But if such interest was, in any wise, indirect, collateral, or contingent, the witness, though eventually he might be affected, might still be examined.

And, to work a disqualification, on the ground of an interest in the result of the suit, the interest of the witness objected to must be such as to entitle him to control the proceedings. The section (399) applies only to a "person into whose hands the money collected by the suit will necessarily go when it is received, or who might take it from the sheriff or the attorney as his own. It does not apply where the money cannot immediately, though it may ultimately, go into his hands." *Bank of Charleston vs. Emeric*, 2 Sandf., 718; *Freeman vs. Spalding*, 2 Kern., 373 (375); *Quin vs. Moore*, 15 N. Y., 432 (438); *Butler vs. Patterson*, 3 Kern., 292; *Gildersleeve vs. Martine*, 19 N. Y., 321 (322); *Davidson vs. Minor*, 9 How., 524; *Bridges vs. Hyatt*, 16 N. Y., 546. And, until disproved, the presumption lies in favor of the competency of a witness, not a party to, or apparently connected with, a proceeding or issue. *Van Alstyne vs. Erwine*, 1 Kern., 331. See also *Staples vs. Fairchild*, 3 Comst., 41, there referred to. Also *Hollenbeck vs. Van Valkenburgh*, 5 How., 281; 1 C. R. (N. S.), 33. And the party objected to might himself be examined to repel the assumption, or to rebut evidence given to establish it. *Requa vs. Requa*, 22 N. Y., 254.

It will be the simplest way to reduce the cases falling within this definition into a few comparatively simple classes.

Stockholders and corporators, though indirectly interested in a controversy, were held nevertheless to be competent witnesses for the corporation. The suit was not prosecuted or defended for their immediate benefit. *Washington Bank of Westerly vs. Palmer*, 2 Sandf., 686; 8 L. O., 92; also note, 2 Sandf., 690; *Bank of Charleston vs. Emeric*, 2 Sandf., 718; *New York and Erie Railroad Company vs.*

Cook, 2 Sandf., 732; *New York and Virginia State Stock Bank vs. Gibson*, 5 Duer, 574; *Montgomery County Bank vs. Marsh*, 3 Seld., 481; affirming *same case*, 1 Barb., 645; *Pack vs. The Mayor of New York*, 3 Comst., 489; *Bank of Lansingburgh vs. McKie*, 7 How., 360; *Conro vs. Fort Henry Iron Company*, 12 Barb., 27 (61); *Troy and Rutland Railroad Company vs. Kerr*, 17 Barb., 581 (601); *Hamilton and Deansville Plank Road Company vs. Rice*, 7 Barb., 157; 3 How., 401; 1 C. R., 108; 7 L. O., 139. These decisions overrule *The President of Bank of Ithaca vs. Bean*, 7 L. O., 225; 1 C. R., 133; and likewise, on that point, *Place vs. Butternuts Woollen and Cotton Manufacturing Company*, 28 Barb., 503.

The evidence of an acting co-executor or co-administrator was excluded. *Fort vs. Gooding*, 9 Barb., 388; *Wilcox vs. Smith*, 26 Barb., 316. But an executor who had formally renounced was held to be competent to testify. *Burritt vs. Silliman*, 3 Kern., 93; reversing *same case*, 16 Barb., 198.

Legatees or parties interested in the residue were, however, held admissible. *Mesick vs. Mesick*, 7 Barb., 120; *Weston vs. Hatch*, 6 How., 443; *Megaray vs. Funtis*, 5 Sandf., 376; *Walkley vs. Griffith*, 4 E. D. Smith, 343; *Lisk vs. Sherman*, 25 Barb., 433; *Freeman vs. Spalding*, 2 Kern., 373; *Butler vs. Patterson*, 3 Kern., 292; *Quin vs. Moore*, 15 N. Y., 432. See, however, *Mesick vs. Mesick*, *supra*. as to a legatee who had actively intervened in the cause. But a *cestui que trust* entitled to a definite portion of a specific amount, was held incompetent in *St. John vs. American Mutual Life Insurance Company*, 2 Duer, 419; 12 L. O., 265; affirmed, 3 Kern., 31.

The principal on a statutory undertaking was not a competent witness for or against his sureties. *Strong vs. Grannis*, 26 Barb., 122; *Mitchell vs. Weed*, 6 How., 128; 1 C. R. (N. S.), 196; *Thompson vs. Dickerson*, 12 Barb., 108; 1 C. R. (N. S.), 213. Nor was an attaching creditor a competent witness for his trustees. Note, 3 C. R., 24. Or an execution plaintiff in an action by his receiver under supplementary proceedings, *Levy vs. Cavanagh*, 2 Bosw., 100; or an indemnitor for a party whom he had indemnified, *Catlin vs. Hansen*, 1 Duer, 309; *Howland vs. Willetts*, 5 Seld., 170; *Ely vs. Carnley*, 3 E. D. Smith, 489 (507). But a mere collateral indemnitor has been held not disqualified, where, even without such indemnity, the party would equally have contested the claim. *Farmers' and Mechanics' Bank vs. Paddock*, 1 C. R., 81; *Van Wyck vs. McIntosh*, 2 Duer, 86. So also, an agreement to pay a small sum to an assignor in the event of success, was held not to disqualify. *Davidson vs. Minor*, 9 How., 524. Or a covenant that an assigned claim was fully due, *Winthrop vs. Meyer*, 4 E. D. Smith, 177. See likewise *Hale vs. Boardman*, 27 Barb., 82; *Bridges vs. Hyatt*, 2

Abb., 449. Or a guaranty of payment of a mortgage, given upon its assignment. *Grosvenor vs. Atlantic Fire Insurance Company of Brooklyn*, 1 Bosw., 469.

An insolvent assignor for creditors has been held competent in the following cases: *Davis vs. Crabtree*, 2 Sandf., 690, note; *Davies vs. Cram*, 4 Sandf., 355; *Allen vs. Franklin Fire Insurance Company*, 9 How., 501; *Symonds vs. Peck*, 10 How., 395; *Allen vs. Hudson River Mutual Insurance Company*, 19 Barb., 442; *Jones vs. East Society M. E. Church of Rochester*, 21 Barb., 61; *Legee vs. Burbank*, 2 E. D. Smith, 419. See also where conspiracy was charged, *Cuyler vs. McCartney*, 33 Barb., 165. This series of cases overrules *Fitch vs. Bates*, 11 Barb., 471, and *Hoffman vs. Stephens*, 2 C. R., 16. Likewise, *Van Duzen vs. Worrall*, 18 Barb., 409.

A discharged bankrupt was also held a competent witness for his sureties in *Morse vs. Cloyes*, 11 Barb., 100. But not until he had released his interest in the surplus of his effects. *Morse vs. Crofoot*, 4 Comst., 114.

A creditor of the estate was also held a competent witness in a controversy under such an assignment. *Davies vs. Cram*, 4 Sandf., 355; *Brahms vs. Joyce*, 5 Duer, 16.

A partner, whilst he remained such, was held incompetent, even when he had personally made default. *Rich vs. Husson*, 4 Sandf., 115. But a partner has been held competent to testify after actual dissolution in *Bean vs. Canning*, 2 E. D. Smith, 419, note; 10 L. O., 248. So likewise, after an absolute release of interest, *Wilmot vs. Richardson*, 6 Duer, 328. But not in a suit to dissolve in respect of a liability previously incurred. *Kapp vs. Barthan*, 1 E. D. Smith, 622.

A prior holder or indorser of commercial paper, whether negotiable or not, was also held a competent witness in a suit by a transferee, even although he himself might be held in some other form of proceeding. *James vs. Chalmers*, 1 C. R. (N. S.), 413; *Neass vs. Mercer*, 15 Barb., 318; *Bump vs. Van Orsdale*, 11 Barb., 634; *Hastings vs. McKinlay*, 1 E. D. Smith, 273. But a party who has been once jointly sued, has been held incompetent, even after he had made default. *Austin vs. Fuller*, 12 Barb., 360. An accommodation indorser was, however, held incompetent in a suit defended for his benefit. *Gildersleeve vs. Martine*, 19 N. Y., 321. See also *Prall vs. Hinchman*, 6 Duer, 351.

A party under contract to purchase, was held incompetent to testify in support of his vendor's title. *Stafford vs. Williams*, 12 Barb., 240. But, after conveyance, the grantor might be admitted to testify in an action by his grantee for future rents. *Van Wicklen vs. Paulsen*, 14 Barb., 654.

The confessor of a judgment was held an incompetent witness in an

action to set it aside, brought against the confessee. *Henry vs. Henry*, 8 Barb., 588.

Agents who have made a contract in their own names were held competent witnesses against their principal. *Fenley vs. Stewart*, 5 Sandf., 101; 10 L. O., 40. See also *Gilbert vs. Averell*, 15 Barb., 20. So also, as to an attorney transacting business in the ordinary form. *Little vs. Keen*, 1 C. R., 4.

The captain of a vessel was held examinable in a case of collision, though to disprove his own negligence, for which, in another proceeding, he might be held chargeable. *Crary vs. Marshall*, 1 E. D. Smith, 530.

A sub-contractor was also held examinable on proceedings by his employee against the owner, to enforce a mechanic's lien. *Cusack vs. Tomlinson*, 1 E. D. Smith, 716.

The fact that the defendant had signed a note in suit as surety for the wife of the professed witness, was held insufficient to exclude him in *Deck vs. Johnson*, 30 Barb., 283.

(d.) ASSIGNOR OF CHOSE IN ACTION.

Even prior to 1851, whilst a party standing in this position was excluded, when the assignment was made for the purpose of making him a witness, a liberal construction had prevailed, and his evidence was admitted, when he clearly retained no interest. See *Hamilton and Deansville Plank Road Company vs. Rice*, 7 Barb., 157; 3 How., 401; 1 C. R., 108; 7 L. O., 139; *Everts vs. Palmer*, 7 Barb., 178; 3 C. R., 51; *Davis vs. Cram*, 4 Sandf., 355.

By the amendment of 1851 the formal disqualification was removed, though not that of a direct interest in the result of the action, commented upon in the preceding subdivision, and subject to the same qualifications. See *Davidson vs. Minor*, 9 How., 524.

But, as above noticed, his testimony was inadmissible where the original adverse party in interest was not living, or his testimony was not procurable.

And full notice of such intended examination, with a specification of the points on which the assignor was intended to be examined, was made a prerequisite.

This state of things extended from 1851 to the close of the first, and also through the whole of the second of the periods above referred to, down to the recent and sweeping amendment of 1860, except as to the necessity of specifying points on the notice prescribed to be given, from which the party examining was relieved in 1859.

And, when an assignor was so examined, the examination rendered the adverse party admissible as a witness in his own behalf on the same

matter, or in discharge of any liability affected by the testimony thus taken.

Pending these provisions, the courts were disposed to put a strict construction upon the term assignor, so as to limit the restrictions imposed by the section, and to admit the evidence on general grounds, in cases where the transfer of interest was general and unqualified, and not made for the mere purpose of rendering the testimony admissible.

Thus, it was held that the prescribed notice was not necessary in the case of a general assignment in trust for creditors. *Allen vs. Franklin Fire Insurance Company*, 9 How., 501; overruling *Knickerbocker vs. Aldrich*, 7 How., 1.

An absolute vendor of chattels was held not to be an assignor within the meaning of the rule. *McGinn vs. Worden*, 3 E. D. Smith, 355; *Crosby vs. Nichols*, 3 Bosw., 450. Nor was a carrier suing for the recovery back of a sum paid by him for damages on a misdelivery of goods. *Hudson River Railroad vs. Lounsberry*, 25 Barb. 597. Nor an assignor of a claim to be applied in part payment of a debt due to his assignees. *Bridges vs. Hyatt*, 16 N. Y., 546.

So likewise as to a party transferring negotiable paper before maturity. *Watson vs. Bailey*, 2 Duer, 509; *Hicks vs. Wirth*, 4 E. D. Smith, 78; 10 How., 555; *Calkins vs. Packer*, 21 Barb., 275; *Anderson vs. Busteed*, 5 Duer, 485; *Porter vs. Potter*, 18 N. Y., 52, approving *Hicks vs. Wirth*, and *Calkins vs. Packer*, *supra*. In *Gardner vs. Gordon*, 3 Bosw., 369, the same principle is applied to an indorser after maturity.

This series of decisions overrules *Bump vs. Van Orsdale*, 11 Barb, 634, and *Potter vs. Bushnell*, 10 How., 94, following it, though otherwise inclining to the contrary conclusion.

The contrary had been held, however, as to paper non-negotiable in itself, or transferred after maturity. *Jagoe vs. Alleyn*, 16 Barb., 580; *Tulloss vs. Rapelje*, 3 Abb., 93. See, however, *Gardner vs. Gordon*, *supra*. So, likewise, with reference to a new promise after discharge in bankruptcy. *Clark vs. Atkinson*, 2 E. D. Smith, 112.

The question as to whether notice was, or was not, requisite to be given, is necessarily involved in most of the foregoing cases.

In the following, the necessity of giving notice was restricted to those cases in which an assignor was sought to be examined against an assignee, or an executor or administrator. In all cases where the adverse party was able to offer his own testimony in rebuttal, it was not requisite. *Bidwell vs. Astor Mutual Insurance Company*, 16 N. Y., 263; *Burtnett vs. Gwynne*, 2 Abb., 79; *Farley vs. Flanagan*, 1 E. D. Smith, 313; *Collins vs. Knapp*, 18 Barb., 532 (see text, not marginal note); *Allen vs. Franklin Fire Insurance Company*, 9 How., 501; *Allen vs.*

Hudson River Mutual Insurance Company, 19 Barb., 442; *Clement vs. Adams*, 12 How., 163; *Burgart vs. Stork*, 12 How., 559; *Goble vs. Kinney*, 11 How., 248; *Doyle vs. Daniels*, 2 E. D. Smith, 385; *Matthews vs. Festel*, 2 E. D. Smith, 90; *Vassar vs. Livingston*, 3 Kern., 248; *Freeman vs. Newton*, 3 E. D. Smith, 246. See also *Warren vs. Helmer*, 8 How., 419; *Seymour vs. Bradfield*, 35 Barb., 49. This series of cases overruled the less extended construction of the section as taken in *Knickerbocker vs. Aldrich*, 7 How., 1; *Jagoe vs. Alleyn*, 16 Barb., 580; *Falon vs. Keese*, 8 How., 341; *Pelham vs. Bryant*, 10 How., 60; *Benham vs. New York Central Railroad Company*, 13 How., 198; and *Butler vs. New York and Erie Railroad Company*, 22 Barb., 110.

But where a demand has been assigned for the purpose of making the original plaintiff a witness, the court refused to allow a substitution, except upon the terms that he should not be examined. *Harris vs. Bennett*, 6 How., 220; 1 C. R. (N. S.), 203; *Murray vs. General Mutual Insurance Company*, 2 Duer, 607.

As to the right of the adverse party to testify on his own behalf under such cases, and the extent to which it was secured or restricted, as regards the matter of his testimony, *Cowing vs. Geib*, 16 N. Y., 600; *Ward vs. Ingraham*, 1 E. D. Smith, 538; *Angel vs. Solis*, 2 E. D. Smith, 240; *Parsons vs. Suydam*, 3 E. D. Smith, 276; *Gardner vs. Clark*, 17 Barb., 538; *Carpenter vs. Sweet*, 4 E. D. Smith, 333; 2 Abb., 150; 11 How., 403; *Evans vs. Burbank*, 12 How., 73. But see *per contra*, *Burgart vs. Stork*, 12 How., 559. It has been held, however, that, though his evidence is only partially admissible, it may be tendered generally in the first instance. *Potter vs. Bushnell*, 10 How., 94; *Brown vs. Richardson*, 20 N. Y., 402; reversing *same case*, 1 Bosw., 402. The examination of the wife of an assignor, gives no right to the adverse party to tender his own evidence. *Hanford vs. Higgins*, 1 Bosw., 441. But she is examinable in his behalf. *Prince vs. Down*, 2 E. D. Smith, 525.

As to the general competency of an assignor as witness for both parties, see *Allen vs. Smith*, 16 N. Y., 415. See likewise, generally, *Willis vs. Underhill*, 6 How., 396.

An assignor may be examined as against a corporation. It is not an adverse party whose testimony cannot be procured, within the meaning of the exception. *Wright vs. New York Central Railroad Company*, 28 Barb., 80. See, also, cases below cited, as to evidence of a party.

The mere fact that an assignment is voluntary, or without sufficient consideration, was not, *per se*, sufficient to deprive it of validity, and prevent the assignor from being called. *Burnett vs. Gwynne*, 2 Abb., 79; *Beach vs. Raymond*, 2 E. D. Smith, 496. But otherwise, if the

assignment appears to be merely colorable or fraudulent. *Bell vs. Drew*, 4 E. D. Smith, 59. But the objection might be waived, by making use of the testimony of such assignor, when called, on other points. *Briggs vs. Evans*, 1 E. D. Smith, 192.

The testimony of an assignor for the purpose of rendering his evidence available, though admissible, was, of course, open to comment on the score of credibility. See *Watkins vs. Cousall*, 1 E. D. Smith, 65; *Nelson vs. Smith*, 3 Abb., 117. As to its general admissibility, see *Requa vs. Requa*, 22 N. Y., 254.

The duty of the courts to render the provisions for giving testimony of this nature fully available, is recognized in *Rourke vs. Story*, 4 E. D. Smith, 54.

Second Epoch.

(c.) RESTRICTED ADMISSION OF PARTIES OR PRIVIES TO TESTIFY FOR THEMSELVES.

The purport of this great and radical change has been above noticed. Where both parties were living, and *sui juris*, it was complete, and the right of either to be examined in his own behalf absolute.

But when the adverse party was dead, or stood merely in a representative capacity, that right was still denied.

Liberty was given to examine non-resident parties by commission.

And the adverse party was secured in terms the right of rebuttal.

These provisions, being at once simpler and wider than those of the preceding period, gave rise to far less discussion.

Although, strictly speaking, a corporation fulfils a representative character, still it is not an adverse or opposite party within the meaning of the section, so as to exclude the evidence of its opponent. His examination was held fully admissible, precisely as in the case of a natural party. *La Farge vs. Exchange Fire Insurance Company*, 3 Bosw., 157; affirmed, 22 N. Y., 352; *Mott vs. The Mayor of New York*, 2 Hilt., 358; *Wallace vs. The Same*, 2 Hilt., 440; 18 N. Y., 169; 9 Abb., 40; *Field vs. New York Central Railroad Company*, 29 Barb., 176; *Johnson vs. McIntosh*, 31 Barb., 267; see also *Wright vs. New York Central Railroad Company*, 28 Barb., 80, before cited, as to the evidence of an assignor in similar cases. See, likewise, as to who was or was not an assignee within the scope of the section, *Penny vs. Black*, 6 Bosw., 50.

Nor did the death of one of several parties jointly interested, avail to exclude the evidence of an opponent, whilst any one in the same interest survived, and was examinable against him. *Bissell vs. Hamlin*, 3 Bosw., 383; *Bigelow vs. Mallory*, 17 How., 427.

These provisions have, it seems, abolished the former practice under

which a party was, in this state, allowed to make use of his own books as evidence. It is no longer necessary, as he is now admitted to testify. *Conklin vs. Stamler*, 2 Hilt., 422; 17 How., 399; 8 Abb., 395. See, however, *Tomlinson vs. Borst*, 30 Barb., 42; also *Hauptman vs. Catlin*, 1 E. D. Smith, 729.

On giving his evidence, a party cannot be impeached otherwise than as an ordinary witness. *Varona vs. Sacarras*, 8 Abb., 302. Nor can his general moral character be attacked for the purpose of impeaching his books, if he introduce them. *Tomlinson vs. Borst*, *supra*. But if effectually contradicted, he should not be credited. *Boyd vs. Colt*, 20 How., 384.

From 1857 to 1859, notice^a was necessary to be given in all cases by the party tendering his evidence. As to its necessity, see *Warden vs. Buell*, 18 How., 256. It was required to be full and specific; as clear in that respect as a bill of particulars; and a mere general reference to the facts put in issue was held insufficient. *Pattison vs. Johnson*, 15 How., 289. Signature by the party or his attorney was essential to its validity. *Demelt vs. Leonard*, 19 How., 182. And the full period of service was also a prerequisite. Such period, however, had reference to the time of actual examination, and not that of the commencement of the trial. *Bissell vs. Hamlin*, 3 Bosw., 383.

But no notice or specification of points was necessary on the examination of the adverse party in rebuttal. He was generally examinable. *Burling vs. Ogden*, 14 How., 75; 6 Duer, 681. See, as to the power of recalling such parties to give testimony in rebuttal, *Rushmore vs. Hall*, 12 Abb., 420.

A non-resident party could not, it was held, be examined on his own behalf, by commission issued on his own motion, under the section as it stood before the amendment of 1859. He could not adopt this course unless forced to do so by the service of notice on the part of his adversary. *Fairbanks vs. Tregent*, 17 How., 258; 8 Abb., 66; reversing *same case*, 16 How., 187; 7 Abb., 21. See also *Hull vs. Wheeler*, 7 Abb., 411. The contrary conclusion was, however, come to in another district, in *Bigelow vs. Mallory*, 17 How., 427. See also, *Burling vs. Ogden*, 14 How., 75; 6 Duer, 681; *Shufelt vs. Power*, 10 How., 286. The amendment of 1859 was held to have removed the difficulty in *Block vs. Haas*, 8 Abb., 335.

During the above epoch, and until the amendment of 1860, which expressly provides upon the subject, the section was held not to be applicable to evidence in a Surrogate's Court. *Ferry vs. Dayton*, 31 Barb., 519; *Wilcox vs. Smith*, 26 Barb., 316; *Talbot vs. Talbot*, 23 N. Y., 17; or to summary proceedings, *Marseilles vs. Bulger*, 19 How., 34.

§ 208. *Present Rules of Evidence—Including General Considerations.*

The amendment of 1860 has swept away most of the distinctions above insisted on. A party is now clearly examinable as a witness on his own behalf, for any purpose, in any manner, and at any stage of the cause, without any necessity of notice whatsoever.

The only remnant of the former restriction is this :

He cannot, nor can his assignor be examined against representatives of, or parties deriving title under a deceased person, in respect to any transaction or conversation had personally between the deceased person and the witness.

It is obvious that the objection on this ground does not lie to the admissibility of the witness or to his evidence generally, but only to such portions of it, if any, as may fall within the restriction. *Pro tanto*, his examination, if attempted, may, probably, be held to be void, the prohibition being absolute. On other points it will stand.

And the examination of the adverse party, on his own behalf, will now remove the restriction altogether, as regards such conversation or transaction.

Under the clause, as it stood from 1860 to 1862, when the term “representatives” was employed, instead of the present detailed enumeration of classes, comprised within the scope of the section, that term was held to be strictly confined to parties standing in the position of executors or administrators, and not to extend to an heir, a guardian in socage, a dowress, or the like. *McCray vs. McCray*, 12 Abb., 1. And also, that it was confined to representatives within this state. An executor under a will proved in another, was held not to be within the scope of the section. *Buckingham vs. Andrews*, 34 Barb., 434 ; 12 Abb., 322.

From 1860 to 1862 a second restriction was specified, viz., that neither husband nor wife should be required to disclose any communication made by one to the other.

That rule, whilst existent, was permissive rather than imperative. It is clear that, if the objection were taken, the witness could not be required to depose further on points embraced within it, and that to proceed with that branch of the examination would be error ; but whether, in the absence of objection, the evidence would not stand, seems to have been questionable.

There seems little doubt but that the intention of the legislature, in passing that branch section as it stood, was to do away with the former restrictions, rendering the evidence of husband and wife inadmissible,

either for or against each other, and to enable their testimony to be taken in all such cases. See *Barton vs. Gledhill*, 12 Abb., 246.

It was equally clear that, whenever husband and wife were parties to the record, their testimony (with the exception above noticed) was admissible on behalf of any party.

What may be the effect of expunging the above restriction on the question of the admissibility of their testimony, in a general point of view, remains to be settled. There are, as yet, no reported decisions upon the subject, since the passage of the amendments in question.

Prior to the amendment of 1860, the above question was much discussed; and here, again, it may be more convenient to classify the decisions according to the three epochs above laid down.

During the first epoch it was abundantly settled that the former rules remained unchanged, and that, in ordinary cases, such testimony was wholly inadmissible in suits where husband and wife were parties, or where either was sought to be examined for or against the other. See *Pillow vs. Bushnell*, 5 Barb., 156; 4 How., 9; 2 C. R., 19; *Erwin vs. Smaller*, 2 Sandf., 340; *Hasbrouck vs. Vandervoort*, 4 Sandf., 596; 9 L. O., 249; 1 C. R. (N. S.), 81; affirmed, 5 Seld., 153; *Arborgast vs. Arborgast*, 8 How., 297; *Main vs. Stephens*, 4 E. D. Smith, 86; *Draper vs. Henningsen*, 1 Bosw., 611. And the same rule prevailed where marriage had been *prima facie* established, but was denied by the parties themselves. *Scherpf vs. Szadeczky*, 4 E. D. Smith, 110; 1 Abb., 366. Similar rules prevailed in criminal cases. *The People vs. Carpenter*, 9 Barb., 580. See also, as to the admissions of the wife, in an action against the husband, *Logue vs. Link*, 4 E. D. Smith, 63. Or her declaration in favor of a third party, *Armstrong vs. McDonald*, 10 Barb., 300. See, however, as to a question of agency on the part of the wife, *McLean vs. Jagger*, 13 How., 494.

But this rule was held not to extend to a question affecting the wife's separate estate, where her assignee had been substituted as plaintiff with the husband's assent. *Hastings vs. McKinley*, 1 E. D. Smith, 273; affirmed by Court of Appeals, Seld. Notes, 7th of October, 1853, p. 19. So also, in a suit relating to such estate, where the husband had been joined, but was not a necessary party. *Willis vs. Underhill*, 6 How., 396.

The above disqualifications did not extend to the case of the husband or wife of an assignor who retained no interest. *Farley vs. Flanagan*, 1 E. D. Smith, 313; *Prince vs. Down*, 2 E. D. Smith, 525; *Hanford vs. Higgins*, 1 Bosw., 441. See also *McGinn vs. Worden*, 3 E. D. Smith, 355.

Proceeding to the second epoch, the courts in several instances continued to uphold the principle of the general exclusion of the testimony

of husband and wife, for or against each other, on the authority of the previous decisions above cited, it being laid down that, although the amendment of the section was sufficient by its terms to render the evidence admissible, still it did not affect the broad ground of public policy on which it had hitherto been excluded. *Macondray vs. Wardle*, 26 Barb., 612; 7 Abb., 3; *Smith vs. Smith*, 15 How., 165. See also collaterally, *Sweet vs. Sweet*, 15 How., 169. See likewise, as to the general rule that a witness, originally incompetent to testify, cannot become so merely by being made a party to the record, *Symonds vs. Peck*, 10 How., 395. See, however, *Marsh vs. Potter*; *Shoemaker vs. McKee*, and *People vs. Chamberlain*, below cited.

The same principle, however, that, where the suit related exclusively to the wife's separate estate, and the husband was merely joined for the sake of conformity, his evidence was admissible, continued to be maintained. *Draper vs. Henningsen*, 16 How., 281. So, likewise, where the wife was a merely formal party in respect of an inchoate right of dower. *Babbott vs. Thomas*, 31 Barb., 277.

In *Marsh vs. Potter*, 30 Barb., 506, the subject is fully discussed, the cases minutely examined, and *Macondray vs. Wardle*, and *Smith vs. Smith*, above cited, dissented from, and it is laid down that, by the amendment of 1857, husband and wife were rendered competent witnesses for or against each other, in all cases where they are parties to the record; but that, in actions between either of them and a third person, one is not a competent witness either for or against the other. Likewise, that the former law with respect to confidential communications between them is unchanged. The same rule as to admissibility is also maintained, and *Sweet vs. Sweet* included in the dissent, in *Shoemaker vs. McKee*, 19 How., 86.

The doctrine held in *Marsh vs. Potter* is approved, and the principle that, in a suit between themselves, the testimony of husband and wife is generally admissible, save only as to matters on which such testimony was prohibited for reasons of public policy, such as proof of the fact of non-intercourse, may be considered as settled by *Chamberlain vs. The People*, 23 N. Y., 85.

And the conclusion come to in that case, being drawn under the section of 1857, seems to be unaffected by the change in 1862 from the section of 1860 above noticed.

The amendment of 1860 seemed to have removed the remaining disqualification as to this description of evidence, and to render it admissible in all cases where either husband or wife is a party to the record. It likewise embodied by way of specific provision the former rule as to confidential communications.

See as to the application of this rule, whilst that amendment remain-

ed unaltered, *Owen vs. Cawley*, 22 How., 10; 13 Abb., 13. And whether the change of 1862 has effected any real alteration in the law, beyond the removal of the specific restriction, seems more than questionable. It may probably be held that the testimony is generally admissible (see *Chamberlain vs. The People*, *supra*), subject to such restrictions, with reference to grounds of public policy, as were before existent in law, but to no others.

It has been held that, under the present law of evidence, by which a party is now competent to testify on his own behalf in all cases, the former rule that an attorney could not be called upon to testify as to communications between him and his client is abolished, and that this privilege can no longer be claimed. *Mitchell's case*, 12 Abb., 249. See, however, *Williams vs. Fitch*, 18 N. Y., 546. As to what was or was not a privileged communication, *Vide Woodruff vs. Husson*, 32 Barb., 557. Likewise, as to the production of papers, *Peck vs. Williams*, 13 Abb., 68.

CHAPTER VI.

OF ADMISSIONS AND DEPOSITIONS.

§ 209. *Admission of Writing.*

THE Code provides the following remedy for facilitating the proof of documents upon the trial :

§ 388. (341.) Either party may exhibit to the other or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained on the trial, shall be paid by the party refusing the admission; unless it appear, to the satisfaction of the court, that there were good reasons for such refusal.

This provision stood by itself, as section 341, in 1848. In 1849, section 342 of 1848 was added to, and now forms part of it. This portion relates to discovery, and has been already cited and commented upon in chapter IV., *supra*.

This provision is simple in itself, and has not given occasion to any reported controversy.

Although not prescribed in terms, the more convenient course will

be to accompany the exhibition of the document with a written notice and request for an admission as above ; the proof of the giving of which notice will, in case of refusal, be more convenient and more satisfactory to the court, than the adduction of exclusively verbal evidence. In ordinary cases, a refusal is not to be anticipated, and the party applied to will consider well before he gives one ; as, if he take that course, he does so at the risk of the imposition of costs. Where, however, any real question exists as to the genuineness of the document of which an admission is sought, such admission would clearly be imprudent ; and many other cases might be suggested, in which, on a *bond fide* refusal, on adequate grounds, the court would never impose costs.

Questions extending merely to the construction or purport of the instrument adduced, apart from any as to its genuineness, or where, as must frequently be the case, the genuineness of it is not in question, though its real effect is, may easily be guarded against, by a special form of admission ; and, indeed, no properly drawn request will require more than a mere dispensation from the necessity of giving technical evidence of the existence of such an instrument.

In the event of an admission being refused without good reason, and expenses being incurred in consequence of that refusal, counsel should be careful to be prepared with a statement, and to ask for them at the trial itself, as this course is expressly prescribed by the section ; and, if omitted, it is very doubtful whether those expenses can afterwards be allowed in the taxation of costs. It seems, indeed, clear that they cannot.

§ 210. *Depositions De Bene Esse.*

(a.) STATUTORY PROVISIONS.

The Code makes no provision whatever on the subject of this proceeding, though incidentally referred to in sections 390 and 392. It is regulated exclusively by the provisions of the Revised Statutes, as contained in article I., title III., chapter VI., part III., 2 R. S., 391 to 393 ; amended as to section 3, by chapter 472 of 1851, p. 871. By chapter 324 of 1852, p. 471, the benefit of these provisions is extended to the district courts in the city of New York.

The provisions in question are as follows :

Section 1 prescribes that, in any pending action in a court of record, commenced by service of process, or by appearance of the defendant, "either party may have the testimony of any witness taken conditionally, to be used in the cases, and under the circumstances hereinafter prescribed."

Section 2 runs thus :

The party desiring the examination of a witness, may apply to any judge of the court, upon an affidavit which shall state :

1. The nature of the action and the plaintiff's demand ;
2. If the application be made by the defendant, the nature of his defence ;
3. The name and residence of the witness ;
4. That the testimony of such witness is material, and necessary for the party making such application, in the prosecution or defence of such suit, as the case may be ; and,
5. That such witness is about to depart from this state, or, that he is so sick and infirm, as to afford reasonable grounds for apprehension that he will not be able to attend the trial of such suit.

Section 3, as amended in 1851, is as follows :

If the officer, to whom such application is made, shall be satisfied that the circumstances of the case require the examination of such witness, in order to attain justice between the parties, he shall make an order requiring the adverse party to appear before such officer, and attend the examination of such witness, at such time or place as shall be therein specified ; which time shall not exceed twenty days from the date of such order, and shall be as much shorter as the exigency of the case may require, and the residence of the adverse party or his attorney will allow, in order to afford sufficient opportunity to attend such examination ;

Or may, in his discretion, make an order requiring the adverse party to show cause, on a day in such order to be named, why such testimony should not be taken by a referee to be appointed by him, and, in such order, shall direct the time and mode of service thereof, upon the adverse party ; such officer shall have power, upon proof of the due service thereof, if no sufficient cause shall be shown against the same, to appoint a referee to take such testimony, who shall take, certify, and file the same, in the same manner, and with the like effect, as is provided in this article for the examination of such witness, by a judge of the court.

Section 4 provides thus :

The adverse party may show cause against proceeding in such examination, by proof that such witness is not about to depart from this state, or that he is not sick, or infirm, or that the application for his examination is made collusively, to avoid his being examined on the trial of the cause, and upon any such cause being shown, the officer shall dismiss such application.

Section 5 thus :

If no sufficient cause be shown, upon due proof of the service of such order, and a copy of the affidavit upon which the same was granted, the officer granting the same shall proceed to the examination of such witness, and shall take his deposition ; in which deposition shall be inserted any answer or declaration of the witness, which either of the parties shall require to be included therein.

Section 6 as follows :

Such deposition shall be carefully read to, and subscribed by, the witness, shall be certified by the officer taking the same, and, within ten days thereafter, shall be filed in the office of the clerk of the court in which such action shall be depending.

Section 7 provides, that such deposition, or a certified copy thereof, may be given in evidence by either party on the trial, or assessment of damages, “after it shall have been satisfactorily proved, that such witness is unable to attend such trial or assessment of damages personally, by reason of his death, insanity, sickness, or settled infirmity ; or, that he has continued absent out of this state, so that his attendance at such trial or assessment of damages, could not be compelled by ordinary process of law.”

Section 8 provides, that the adverse party may prevent the reading of the deposition, by proof that sufficient notice was not given to him, to enable him to attend the examination, or that such examination was not, in all respects, fair and regularly conducted.

Under section 9, the deposition, when read, has precisely the same effect, and is subject to precisely the same incidents, as an oral examination on the trial.

And section 10 provides, that the officer granting the order, may, upon the application of the moving party, compel the attendance of such witness, by issuing a “summons for that purpose,” and enforcing the same by the usual process of contempt.

Under section 44 of the same title, such summons is to be served by showing the original to the witness, delivering to him a copy or a ticket, containing its substance, and paying to him the usual witness fees.

Under section 45, a witness so summoned is bound to attend, and is responsible for non-attendance, in the same manner as on an ordinary subpoena. (See next chapter.)

In case of such failure, the judge or officer may, on due proof of service and failure, issue his warrant to the sheriff to apprehend the witness and bring him before the judge or officer to be examined (section 46).

Under section 47, if any witness summoned or brought before a judge or officer, as above, “shall, without reasonable cause, refuse to be examined, or to answer any legal or pertinent question, or to subscribe his deposition after the same has been reduced to writing,” the officer issuing the summons is to commit him for contempt, till he does what is required, or is discharged according to law.

And, under section 51, a person so summoned is entitled to the usual privileges of a witness.

The analogous practice, by which a witness may be compelled to make his deposition for the purposes of an interlocutory application, has been already considered in book IV., section 77.

Under the Code of 1848, sections 353 to 356 inclusive, a similar, but absolute, authority was given, to take the testimony of a witness residing more than one hundred miles from the place of trial. This provision was, however, positively repealed in 1849, and without any saving clause, so as to enable a deposition, previously taken, to be read on a trial after the amendment. See *McCotter vs. Hooker*, 4 Seld., 497; affirming *same case*, 1 C. R. (N. S.), 217, also 213.

It seems, however, to be still competent for the parties to a cause, by means of an agreement in writing, to take the testimony of any competent witness within this state, on interrogatories to be agreed upon. See judiciary act, chapter 280 of 1847, sections 78, 79. The testimony is to be taken before a judge of any court of record, a county judge, or justice of the peace, and the attendance of witnesses may be compelled. So far the proceeding is analogous to the above, but, as regards the mode of taking the testimony, filing of the return, and its absolute admissibility, subject only to all legal exceptions, without any necessity to prove inability to attend, it bears a closer analogy to an examination on commission.

The proceeding is, of course, special, and the terms of the section must be strictly followed. It is essential that the stipulation and the interrogatories should be signed by the parties or their attorneys, and that both should be filed with the return. But no order of the court appears to be required.

The proceeding, if admissible, is unusual, and no reported decision appears upon the subject.

(b.) PROCEEDINGS ON EXAMINATION.

The party requiring to take the examination of a witness under these provisions must prepare, in the first instance, the affidavit required by section 2, stating the particulars therein required. Generally, it is sworn to by the party, but this is not, in strictness, necessary, if the attorney is equally well acquainted with the facts.

Especial care must be taken to see that every branch of the section is satisfied; and the inability of the witness to attend must, in particular, be clearly shown. If his sickness be dangerous, or his proposed departure near, the affidavit should be specific on these points, to show the necessity of taking the deposition on short notice. It should also be unqualified as to the materiality and necessity of the testimony, and, when made by the party, it will be as well to state, in the ordinary form, that he is so advised by counsel, and so believes.

The form of order should be simultaneously prepared. If the witness is able to attend before the judge without inconvenience, it should be a positive order, in that form, specifying time and place. The place is generally at chambers or before the judge out of court; the time is, of course, matter of discretion, as the necessities of the case may require. Usually, especially in cases of impending departure, it is very short, but, where practicable, a longer notice should be given. See section 8.

If the witness be infirm or confined to his residence by sickness, or if he resides at a distance, the more usual course will be to appoint a referee under the powers conferred by section 3, as amended in 1851. The order to be submitted, under these circumstances, will be in the form of an order to show cause. It is, it would seem, a prerequisite to the validity of this order, that the time and mode of service upon the adverse party should be specified upon its face; and this precaution should never be omitted.

A summons must also be prepared, requiring the attendance of the witness at the time and place specified in the order. The form of such a summons will be found in *Gaughe vs. Laroche*, 14 How., 451 (453); 6 Duer, 685; 6 Abb., 284, note. The only alteration necessary will be to strike out the reference to sections 390 and 391 of the Code, when the examination is not that of a party to the record, and the necessary adaptation of the form to attendance before a referee, when the order so provides.

On an application for examination before the judge himself, the affidavit, order, and summons must all be submitted, and his signature obtained to the two latter.

On an application for an order to show cause, the summons should not, of course, be presented in the first instance.

If the order be absolute, a copy of it, and of the affidavit, must be served on the adverse attorney. The service must be made with all practicable dispatch, especially when the time prescribed for the examination is short. Any want of good faith, in this respect, may form ground for a motion to exclude, under section 8.

The summons should also be served upon the witness, in the manner prescribed by section 44, and his fees paid. It is equally essential that this service should be made with all due diligence. In the event of undue delay, the non-attendance of the witness may possibly be excused. See *Chalmers vs. Mellville*, 1 E. D. Smith, 502.

Each service is independent in its nature, but both are equally essential. The one is for the purpose of giving notice to the adverse party, and enabling him to attend and protect his interests; the other, to compel the attendance of the witness, who is not affected by the order. See *Draper vs. Henningsen*, 1 Bosw., 611.

If the application be for a reference, the affidavit and order must be served upon the adverse party. The moving party then attends upon the return of the order to show cause, prepared with proof of service as above.

If his adversary fail to attend, the moving party takes his order for a reference as of course. If practicable, the summons may, at the same time, be submitted to the judge for his signature, specifying the time and place for attendance before the referee. It may, however, be signed subsequently, after communication with the latter. It seems more than doubtful whether, under section 10, a summons issued by the referee himself would be of any avail as a ground for subsequent proceedings.

Having obtained the order, the moving party must serve it upon his adversary, and must serve the summons, when signed, on the witness, in the manner above prescribed. See *Draper vs. Henningsen, supra*. If the order do not itself prescribe the time and place of attendance, a notice of that time and place must accompany it. Both services must be made in good faith, and with all practicable dispatch, for the reasons above given.

The adverse party may, however, oppose the examination. Where the application is for an order of reference, the time for doing so will be on the return of the order to show cause: if the order is absolute, he must appear and do so at the time and place appointed for examination. And, having taken his objection, he must rely on it. If he proceed to cross-examine the witness, it will be waived. *Rushmore vs. Hall*, 12 Abb., 420.

The particular grounds of opposition are pointed out by section 4. He must be prepared with an affidavit substantiating those grounds or one of them, not by way of mere traverse, but by clear and substantive allegations of fact. If he succeeds in doing so the application will be dismissed.

But, if he fail to show such cause, the examination will of course proceed, either immediately before the judge, or on a subsequent occasion before the referee. Whether an order for a reference can be granted, on opposition made on the return of an order absolute, has been doubted. See *MacDonald vs. Garrison*, 18 How., 249 (250); 9 Abb., 34.

The duty of the officer taking the examination is pointed out by section 5. Every answer or declaration of the witness must be taken down by him, if required. It has been doubted, however, whether he is bound to take down questions clearly irrelevant or illegal, or whether he has not, on the contrary, the power to exclude them, involving, of necessity, the exclusion of any answer thereto. See *Gibson vs. Pearsall*, 1 E. D. Smith, 90.

Nor is it absolutely necessary that the deposition should be taken down in the handwriting of the judge himself, or incumbent upon him to order a reference. He may employ an amanuensis for that purpose, and the deposition, if taken in his presence, may be taken whilst other business is going on before him. He must administer the proper oath; must see that every answer or declaration required by either party is inserted; that the deposition is carefully read to the witness, and that the witness subscribes it; but these objects can be accomplished by his presence and general superintendence, without the necessity of his personal attention during the whole time. *McDonald vs. Garrison*, 18 How., 249; 9 Abb., 34.

This done, he must add his own certificate, showing compliance with the requirements of sections 5 and 6, on which, the deposition will then have been regularly taken pursuant to the statute. *Same case*. As to the presumption that a deposition has been correctly taken, when objected to on purely technical grounds, see *Sheldon vs. Wood*, 5 Bosw., 267.

The examination is subject to the same incidents as one taken *vivâ voce* at the trial. If the adverse party omit to object to the introduction of incompetent evidence at the time it is tendered, and to have his objection noted, he cannot raise it when the deposition is read. *Ward vs. Whitney*, 4 Seld., 442.

And any technical objection to the taking of the deposition will be waived, if the party objecting subsequently appears and cross-examines the witness. *Rushmore vs. Hall*, 12 Abb., 420.

The course to be pursued before a referee is substantially the same; it may be doubtful, however, whether, under these circumstances, the referee is not bound to take the evidence down in person, or, at the least, to bestow his personal attention to it during the whole proceeding. The same considerations as to inconvenience, which are dwelt upon in *McDonald vs. Garrison*, *supra*, do not apply under these circumstances.

When complete, the deposition must be filed within ten days, as required by section 6. This precaution should never be omitted. It is, however, directory, and, under proper circumstances, the court may relieve against the omission. *Burdell vs. Burdell*, 1 Duer, 625; 11 L. O., 189.

It is clear that the usual power of adjournment exists, where the examination cannot be completed in one sitting (see *MacDonald vs. Garrison*, *supra*); and that if the adverse party fails to attend, the mover may proceed in his absence.

If the witness himself fail, or neglect to attend at the time or place appointed, his attendance may be enforced.

The moving party should, under these circumstances, apply to the judge or officer who made the original order, on proof of due service of the summons and of the witness's failure to attend; and such judge or officer may issue his warrant to the sheriff to apprehend the witness and bring him up to be examined. That warrant must be signed by the judge. Section 46. It can scarcely be contended that it will be competent for a referee to issue such a warrant. The powers conferred on him, under section 272 of the Code, are only those of the court upon a trial, not those of a judge in a special proceeding.

Where a warrant so issued is executed, the adverse party should be served with notice to attend the examination, specifying time and place, and the person before whom it is to be taken or continued.

Any contumacy on the part of the witness, when in attendance, may be punished as a contempt, under the powers conferred by section 47. The witness is, however, secured his usual privileges by section 51, as above noticed.

To charge the witness in contempt, the moving party must, of course, pursue strict practice throughout, as necessary in all similar cases.

A deposition might, it seems, be suppressed, for the refusal of a witness to answer a question in cross-examination. See *Burnett vs. Phallon*, 19 How., 530; 11 Abb., 157. See also below, under head of *Depositions on Commission*. Mere technical defects must be objected to in this form; if delayed until the trial, the defect may be held to be waived. *Sheldon vs. Wood*, 2 Bosw., 267.

A deposition taken before the death of a party, is not deprived of its effect, but may be read in the suit when duly revived. *Markoe vs. Aldrich*. 1 Abb., 55.

(c.) READING ON TRIAL.

To enable the deposition to be read on the trial, proof must be given of the particulars required by section 7.

A party is now clearly competent to prove the absence of the witness from the state, and was held so before the recent amendment. *Harris vs. Ely*, Seld. Notes, Dec. 30th, 1852, p. 35; *Nixon vs. Palmer*, 10 Barb., 175. But, before that amendment, the adverse party could not, it seems, testify to exclude it. *Nixon vs. Palmer*, *supra*. Not affected by the general reversal, 4 Seld., 398.

Where absence from the state is the ground relied on, that absence must be proved to have continued, and to be then existent, so that the attendance of the witness cannot be procured by ordinary process. Such proof must be by direct evidence, for which purpose the wife of the witness might be called. Proof of her mere declaration to that

effect has, however, been held insufficient, without other testimony in corroboration. *Fry vs. Bennett*, 4 Duer, 247; 1 Abb., 289.

Mere proof of a return to the state will not, however, avail to exclude the deposition, unless it be proved that the witness was within it at a period immediately antecedent to the trial. *Markoe vs. Aldrich*, 1 Abb., 55. And proof of residence in another state creates a presumption of absence, which it will lie on the adverse party to rebut. *Nixon vs. Palmer*, *supra*. See also, generally, as to what will be sufficient *prima facie* proof, *Donnell vs. Walsh*, 6 Bosw., 621.

Proof of absence or inability will be sufficient, if given satisfactorily, as of the time that the deposition was actually tendered in evidence, in due course, without regard to the ulterior progress of the trial. *Sheldon vs. Wood*, 2 Bosw., 267.

Proof of diligent endeavor to find the witness, but without success, will also be sufficient. *Roberts vs. Carter*, 28 Barb., 462.

If a new trial be had, the fact that the deposition was read upon the former occasion will not be sufficient to render it admissible. Fresh proof must be tendered as to the inability of the witness to attend at that time. *Weeks vs. Lowerre*, 8 Barb., 530. And it is also laid down that, under these circumstances, nothing short of the death of the witness will suffice, if the ground of inability be absence from the state. If so absent, his evidence must then be taken by commission. See cases there cited, especially *Wilbur vs. Selden*, 6 Cow., 162.

When produced and read, the deposition is subject to the same incidents as evidence actually given on the trial. If the adverse party allow incompetent evidence to be given at the time of the original examination, without having his objection noted, he cannot raise it on the subsequent reading. *Ward vs. Whitney*, 4 Seld., 442.

So also as to documentary evidence. The mere fact that a paper is technically proved, on a deposition *de bene esse*, does not entitle the adverse party to read it, or offer evidence of its contents, without giving notice to produce, or procuring a discovery in the ordinary manner. *Edmonstone vs. Hartshorne*, 19 N. Y., 9.

A witness, examined *de bene esse*, cannot be impeached on the trial, in respect of statements made subsequent to his deposition, unless he be called, and interrogated as to those statements, either *viva voce* or on commission. *Stacey vs. Graham*, 4 Kern., 492; affirming *same case*, 3 Duer, 444.

§ 211. *Proceedings to Perpetuate Testimony.*

Proceedings for this purpose are substantially of the same nature as those noticed in the last section. They may be taken in a suit either

actually pending or expected to be brought. In the latter case, they are strictly a special proceeding, but, in the former aspect, they fall within the province of this work.

They are regulated exclusively by the Revised Statutes, article V., title III., chapter VII., part III.; 2 R. S., 398 to 400, inclusive.

The first section (33) of the title provides that

Any person who is a party to a suit pending in any court of this state, or who expects to be a party in any suit about to be commenced, may cause the testimony of any witness material to him in the prosecution or defence of such suit to be taken conditionally, and to be perpetuated.

The next section (34) runs thus :

Upon producing to any justice of the Supreme Court, or to any officer authorized to perform the duties of such justice at chambers, or to the first judge of the county courts of any county, due proof by affidavit,

1. That the applicant is a party to a suit actually pending in some court of record in this state, or that such applicant has good reason to expect to be made a party to a suit in such court of record ; and,

2. That the testimony of any witness within this state is material and necessary to the prosecution or defence of such suit ; and,

3. If such suit be not actually commenced, that the party expected to be adverse to the applicant resides within this state, and is of full age :

Such officer shall appoint a place within the county where such witness resides, and a time not less than fourteen days from the date of such order, for the examination of such witness.

N. B.—The original section also provides for proceedings before a master in chancery. This portion of it is, of course, obsolete.

Under section 41, express power is given to the officer to whom application is made, to order the examination to be had before any other officer, competent to act under section 34, residing in the same county with the witness, and the officer so nominated has the same powers as if the order had been originally made by him.

Under this section, it has been held that, in proceedings in the Superior Court (and consequently in any other court of special or limited jurisdiction), a judge of the Supreme Court may make the order, and may order the deposition to be taken before the county judge of the county where the witness resides. Such county judge has also jurisdiction to make the order, on application to him. *Sheldon vs. Wood*, 2 Bosw., 267.

The entitling of the affidavit may be in either court, and any error in this respect is immaterial. *Same case*.

But the affidavit, when presented, must show on its face, not merely that the testimony is material and necessary, but that the object of the

application is to perpetuate it, and that such perpetuation is necessary. See *Paton vs. Westervelt*, 5 How., 399.

The next section (35) provides for the issuing of a summons to the witness, by the officer applied to, similar to that in the case of a conditional examination. It must, of course, be framed with reference to this particular statute, and must be duly served, as on a conditional examination.

The order directing the examination must be served on the adverse parties, or on the parties named in the affidavit as expected parties, if no suit be pending. Such service must be in the usual form. If no suit be pending, it must be personal on the expected party; if otherwise, it may be made in the usual manner. But, in either case, it must be made at least ten days before the time appointed for the examination.

Satisfactory evidence must be given to the officer applied to that service has been made as above. On such proof being given, he may then proceed, on the day appointed, and such other days to which the matter shall, from time to time, be duly adjourned, as may be necessary, to take the deposition of the witness conditionally. Section 36.

The regulations as to taking the deposition are the same as those on an examination *de bene esse* (section 37). It must, under the same section, be filed in the office of the clerk of the county in which it was taken, together with the original order for examination, the original affidavit, and those proving the service. In this particular it differs from an examination *de bene esse*, nor is there any provision to authorize its being taken by a referee.

It likewise differs further, inasmuch as no provision is made for allowing the examination to be opposed by the adverse party. If the application be objectionable, he must therefore proceed by way of independent motion, either to prevent the taking of the deposition, or to suppress it, when taken. Such application, if made, should be grounded on affidavits, showing the absence of good faith in the transaction, or irregularity in the proceedings. It does not seem as if any objection can be made on the ground of the precaution being unnecessary. Cases may be supposed, however, where the tender of a stipulation might render it virtually so.

Under section 38, the original affidavits or certified copies of them are presumptive evidence of compliance with the provisions of the statute.

Section 39 provides for the reading of the deposition of the witness, taken in the manner above prescribed, on the trial of the actual or expected suit, if brought.

To enable it, due proof must be given of the death or insanity of the

witness, or of his inability to attend, by reason of old age, sickness, or settled infirmity.

But absence from the state, not being mentioned in the section, will not form ground for admission of the deposition. Under these circumstances the deposition must be taken after the suit is absolutely commenced, either conditionally, and not under these provisions, or by commission.

It will be observed that no provision is made for the examination of a witness by commission, for the purpose of perpetuation only. This course cannot, therefore, be taken in view of an expected suit. And, in one pending, the examination should be had in the ordinary form, and not under these special provisions.

Under the same section, a certified copy of the deposition may be given in evidence. This provision was peculiarly necessary, as, unlike a deposition *de bene esse*, the filing does not take place in the county of venue, but, on the contrary, in that wherethe examination is taken.

The deposition may be given in evidence by either party (§ 39), and, when read, is subject to precisely the same general incidents as one taken *de bene esse*, in the ordinary mode. See section 40.

Any objections on the score of regularity would seem, by the terms of the article, to be raisable on the deposition being tendered in evidence. It may, however, be more prudent to do so by a previous motion, especially when technical in their nature. See *Sheldon vs. Wood*, 2 Bosw., 267, referred to in last section.

As to the mode of compelling the deposition of the witness, when summoned, see sections 45 and 46, cited under preceding head.

§ 212. *Depositions for Use in Other States.*

This branch of practice is provided for by article IV. of the title of the Revised Statutes above referred to; 2 R. S., 397, 398.

The proceeding falls properly without the scope of the present work. A glance at it may, however, be convenient. As to the power to enforce the delivery of an account, or the production of books in such a case, see *Eldridge vs. Chapman*, 13 Abb., 68, note.

In the title, depositions to be used in other countries seem to have been contemplated, but the enactments only refer to suits pending in the courts of some other state of the United States. Section 29.

The attendance of witnesses on a commission issued by the courts of another country may, however, be enforced by means of proceedings in the nature of an answer to letters rogatory issued by the Supreme Court, by virtue of its general jurisdiction, but not by a tribunal of

limited powers. See in the matter of a foreign commission, 5 Sandf., 674, and note, p. 680.

When a commission to take testimony for the purposes of such a suit has been issued, application may be made to a judge of the Supreme Court, circuit judge, Supreme Court commissioner, or county judge, for a summons requiring the witness to attend before the commissioners. The application must be founded on proof that the testimony is material. Section 30.

The summons must specify time and place; the place to be within the county where the witness resides, or within forty miles of his residence, if out of the county. Section 31.

Under section 32, a summons may also issue, without an actual commission, on proof that it will be admissible in the state where it is to be used.

Under chapter 191 of 1831, upon similar proof being given, a justice of the peace may summon and may take the deposition, for similar purposes, of a witness residing in the same town.

§ 213. *Depositions on Commission.*

This important branch of procedure is merely recognized, but not provided for by the Code. The practice is wholly regulated by the Revised Statutes, article II., title III., chapter VII., part III., 2 R. S., 393 to 396 inclusive.

(a.) STATUTORY PROVISIONS.

The following is the effect of these provisions:

The first of them (section 11) confers the general authority in the following terms:

Whenever an issue of fact shall have been joined in any action in a court of law, being a court of record, and it shall appear on the application of either party, that any witness not residing within this state, is material in the prosecution or defence of such action, the court may, upon such terms as it shall think proper, award a commission to one or more competent persons, authorizing them, or any one of them, to examine such witness on oath, upon the interrogatories annexed to such commission; and to return the same according to the directions given with such commission.

The next two sections (12 and 13) provide for the issuing of a commission by a judge of the Supreme Court, in vacation, on a ten days' notice to the adverse party. In other tribunals, and in the Supreme Court in term time, it is clear that the application can only be made to the court as such, on the ordinary notice of motion.

Section 14 provides for the settlement of the interrogatories thus:

The interrogatories to be annexed to such commission, shall be settled by a judge of the court in vacation, or, if the action be in the Supreme Court, by a justice thereof, a circuit judge, or any Supreme Court commissioner, or other officer authorized to perform the duties of such commissioner, upon such notice as shall be established by the practice of the court.

The settlement to be so made is thus provided for by section 15 :

In setting such interrogatories, either party shall be allowed to insert any question pertinent to the cause, which he shall propose. The officer settling the same, shall indorse his allowance thereof, and annex them to the commission. Upon the commission he shall direct the manner in which it shall be returned, and may, in his discretion, direct the same to be returned by mail, addressed to the clerk of the court, out of which it shall issue ; or, if issued out of the Supreme Court, addressed to the clerk of the county in which the venue in such action shall be laid, designating the name of such clerk, and his residence.

The following facilities are, however, given with respect to the return of the commission, by section 21, allowing the parties to regulate it by stipulation :

The parties, or their attorneys, may, in writing, agree on the manner in which a commission for the examination of witnesses may be returned ; and, on filing such agreement with the clerk of the court, the attorney for the party suing out the same, may indorse thereon a direction according to such agreement ; and such commission shall be returned accordingly.

The mode in which the commission, when issued, is to be executed, is thus prescribed in detail by section 16 :

The persons to whom such commission shall be directed, or any one of them, unless otherwise expressly directed therein, shall execute the same as follows :

1. They or any one of them shall publicly administer an oath to the witnesses named in the commission, that the answers given by such witnesses to the interrogatories proposed to them, shall be the truth, the whole truth, and nothing but the truth ;

2. They shall cause the examination of each witness to be reduced to writing, and to be subscribed by him, and certified by such of the commissioners as are present at the taking of the same ;

3. If any exhibits are produced and proved before them, they shall be annexed to the depositions to which they relate, and shall in like manner be subscribed by the witness proving the same, and shall be certified by the commissioners ;

4. The commissioners shall subscribe their names to each sheet of the depositions taken by them ; they shall annex all the depositions and exhibits to the commission, upon which their return shall be indorsed ; and they shall close them up under their seals, and shall address the same, when so

closed, to the clerk of the court from which the commission issued, or to the clerk of the county in which the venue shall be laid, as shall have been directed on the commission, at his place of residence ;

5. If there is a direction on the commission to return the same by mail, they shall immediately deposit the packet so directed in the nearest post-office ;

6. If there be a direction on the commission to return the same by an agent of the party who sued out the same, the packet so directed shall be delivered to such agent.

A copy of this section shall be annexed to every commission authorized by this article.

Section 17 prescribes that if the packet be delivered to an agent, he shall deliver it to the clerk to whom it is directed, or to a judge of the court, who shall receive and open it on the agent making affidavit that he received it from the commissioners, and that it has not been since opened or altered ; and section 18 provides for a similar delivery by another person in the event of the death, sickness, or inability of the agent.

Section 19 provides thus :

The clerk or judge receiving and opening such commission and return, shall immediately file the same in the office of the clerk of the court from which it issued, or, if the action be pending in the Supreme Court, in the office of the clerk of the county in which the venue in the action is laid.

Section 20 as follows :

If the packet containing such commission and return be transmitted by mail, the clerk to whom the same shall be addressed, shall receive the same from the post-office, and open and file it in his office.

Section 21, authorizing a different mode of return on agreement by the parties, has been above cited.

The disposition of the documents when returned, is thus provided for by section 22 :

The commission, returns, depositions, and exhibits thereto annexed, shall remain on file in the office of the clerk to whom the same were addressed, unless the court, by a special order, shall direct them to be filed in the office of some other clerk. They shall at all times be open to the inspection of the parties, who shall be entitled to copies of such parts thereof as they may require, on payment of the fees allowed by law.

Section 23 provides that the depositions taken as above, or an exemplification thereof, when the originals are filed in any other county than that of trial,

“ May be offered and used in evidence on the trial of the cause by either party ; and every objection to the competency or credibility of a witness so

examined, or to the competency or relevancy of any question put to him, or of any answer given by him, may be made in the same manner, and with the like effect, as if such witness were personally examined at such trial."

The last section (24) provides in like manner for the issuing of a commission after interlocutory judgment, for the purposes of an assessment of damages.

By the amended judiciary act, chapter 470 of 1847, section 15, power was given to apply in vacation or term time, to any judge of the Supreme Court, or to any county judge at chambers, in the county of his residence, even out of the county of venue. The general powers thus conferred upon a county judge seem, however, to be restricted by the subsequent provisions of the Code. See *Erwin vs. Voorhies*, 26 Barb., 127.

The present rules of the court are wholly silent as to the period or form of notice to be given for the settlement of interrogatories, notwithstanding the direction in section 14. The period of four days was, however, prescribed by the previous rules on the subject. See former common-law rule 65, and chancery rule 87, and there can be no doubt of such practice being to be treated as established. See Code, section 469, rule 93.

(b.) NATURE OF APPLICATION.

The appropriate period for this proceeding is on the final joinder of issue, and it will be expedient to take it as soon after as practicable, with a view to obtaining the necessary stay of proceedings, so as to prevent the adverse party from forcing on the cause before the testimony is taken.

The proper period for the application is within twenty days after such final joinder, and, if then made, both the issuing of the commission, and the granting of a stay of proceedings until its return, will be almost a matter of course. *Bank of Charleston vs. Hurlbut*, 1 Sandf., 717; 1 C. R., 96. Nor will the service of notice of trial by the adverse party within that time affect the application. *Brokaw vs. Bridgman*, 6 How., 114; 1 C. R. (N. S.), 407. If delayed further, the payment of costs may be imposed, unless it be clearly shown that there has been no unnecessary delay. *Same case*. Or, if due diligence be shown, they may be merely ordered to abide the event. *Foster vs. Agassiz*, 3 C. R., 150.

It is, however, by no means to be assumed that, if delayed till a later period, the application, or even a stay of proceedings, may not be granted. The matter rests entirely in the discretion of the court, which will be exercised according to the circumstances. Usually the commission will be issued, with or without a stay, as the case may require, terms being imposed if necessary for the protection of the adverse party.

See *Ring vs. Mott*, 2 Sandf., 683. And unless the application is shown not to be made in good faith, it is very much a matter of course to grant it, on a *prima facie* case being shown. *Shufelt vs. Power*, 10 How., 286. See also *MacDonald vs. Garrison*, 2 Hilt., 510; 9 Abb., 178.

If unduly or unreasonably delayed, the application will be refused. *Forrest vs. Forrest*, 3 Bosw., 661; 9 Abb., 289. See also, as to *laches* in making it. *Wright vs. Jessup*, 3 Duer, 642.

Where, too, the object proposed was merely to obtain cumulative testimony on a contested point, and the cost of executing the commission would have exceeded the value of the matter in controversy, an application was refused. *Mitchell vs. Montgomery*, 4 Sandf., 676.

Under ordinary circumstances, the stay of proceedings, when granted, is absolute, until the actual return of the commission, however long may be the time necessary for that purpose. In extreme cases, however, the court will interfere. Thus:

Where sufficient time had elapsed, *prima facie*, to have obtained the return of a commission so issued with a stay of proceedings, the Superior Court, in *Voss vs. Fielden*, 2 Sandf., 690, laid down the rule to be pursued in future, in the following terms: "On considering the matter, we think the rule ought to be that the parties, in a case like this, have liberty to go to trial at the next term. If the commission be not then returned, it will be incumbent on the other party to apply for a further stay. This will give to the party desirous to go to trial an opportunity to answer the statements on which his adversary relies for continuing the stay of proceedings and obtaining further time to procure the testimony. Such will be the practice in future, where it appears that sufficient time, *prima facie*, has elapsed for the execution and return of the commission."

And an inquest, disregarding a stay actually granted, will be void, even although the order itself may be impeachable for irregularity. See *Blackmar vs. Van Inwager*, 5 How., 367; 1 C. R. (N. S.), 80.

Depositions may be taken on commission for the purposes of an interlocutory application. *Vide* 2 R. S., 554, sections 24, 25. But the testimony of a party cannot be taken for that purpose. *Slake vs. Andre*, 18 How., 159; 9 Abb., 420; *Huelin vs. Ridner*, 6 Abb., 19.

The testimony of parties, for the purposes of trial, may, however, be taken on commission, whether adverse, or on their own behalf. *Brockway vs. Stanton*, 2 Sandf., 640; 1 C. R., 128; *Shufelt vs. Power*, 10 How., 286; *Bigelow vs. Mallory*, 17 How., 427; *Burling vs. Ogden*, 14 How., 75; 6 Duer, 681; *Block vs. Haas*, 8 Abb., 335; supporting also *Fairbanks vs. Tregent*, 16 How., 187; 7 Abb., 21. The contrary decisions in *Fairbanks vs. Tregent*, at general term, 17 How., 258; 8 Abb., 66, and *Hull vs. Wheeler*, 7 Abb., 411, are now overruled. The

right is seemingly admitted, but its exercise, under the special circumstances, denied in the early case of *Merrifield vs. Cooley*, 4 How., 272.

A commission is issuable, after decree made, for the purpose of carrying out its provisions. See *Forrest vs. Forrest*, 3 Bosw., 661; 9 Abb., 289, *supra*. But not on supplementary proceedings. *Graham vs. Colburn*, 14 How., 52; 6 Duer, 678.

(c.) PROCEEDINGS ON APPLICATION.

The entry of an order for this purpose, by consent, is not unusual when the application is made in due season, and clearly admissible. The consent should, of course, contain all the requisites for an order; the names and residences of the witnesses proposed to be examined must be stated upon its face; it must authorize the entry of an order; and, if any special directions as to the return of the commission are considered desirable, they should be incorporated in it. It may also provide for a stay of proceedings. It is an usual, and will be a convenient practice, to prepare and submit the proposed interrogatories to the adverse party at the time when a consent is applied for, so as to enable him to judge of the propriety of giving it, and also with a view to completing the whole proceeding off-hand.

If a consent be not obtained, or not asked for, the application must be grounded on affidavit, satisfying the requirements of section 11. It must state the fact that an issue of fact has been joined in the action, giving the date of such joinder. It must also state the names and residences of the witness or witnesses proposed to be examined; and that each such witness is a material witness for the applicant in the prosecution or the defence of the action, as the case may be. It will likewise be better to go on with the formal statement, that the applicant is advised by his counsel, and verily believes, that the testimony of the witness is material and necessary, and that he cannot safely go to trial without it.

In moving for a commission, it is sufficient, if the materiality of the testimony sought to be obtained is positively sworn to. The applicant is not bound to state what he expects to prove by the witness whose testimony he seeks to procure. *Eaton vs. North*, 7 Barb., 631; 3 C. R., 234; and see *The People vs. Vermilyea*, 7 Cow., 369, there cited.

When the party has sworn to an affidavit of the above nature, he will be held to have established a *prima facie* case. *Shufelt vs. Power*, 10 How., 286. It should ordinarily be made by the party himself, but, in his absence, may be sworn to by his counsel or attorney. *Deshay vs. Persse*, 9 Abb., 289, note. In such case, or under similar circumstances, it may be better to state, on its face, the reason why the party himself does not make it.

The motion must be brought on upon the usual notice, stating fully the nature and terms of the order to be applied for, and when a stay is desired, asking for it in terms, with the usual demand for further relief. The provisions in sections 12 and 13, that ten days notice is to be given of an application, when made in vacation, may probably be held to be superseded by the Code.

The motion must also be made in the proper county, as prescribed by that measure; the provision of the Revised Statutes and amended judiciary act, importing the contrary, being repealed. *Sturges vs. Weed*, 13 How., 130; *Dodge vs. Rose*, 1 C. R., 123.

When practicable, such motion should be noticed for a special term; but, under the section of the amended judiciary act above noticed, it is competent for a judge to entertain the application at chambers. The county judge of the county of venue may make the order, on a written consent, but not otherwise, as he cannot hear a motion, as such. The county judge of another county is no longer competent; his powers in this respect being abolished by the Code. See *Erwin vs. Voorhies*, 26 Barb., 127.

The motion, when made, may be opposed by the adverse party. His case in opposition must, of course, be substantiated by affidavit, unless the objection be patent on the moving papers. Undue delay, obvious inconvenience, or want of good faith in the application will, of course, form grounds for opposition, and such opposition may be directed either to the denial of the application itself, or to the imposition of terms on its being granted. Obvious immateriality of the testimony proposed to be taken will form another ground, where it can be established, though, as a general rule, the party, if he applies in due time, is entitled as of right to take what testimony he chooses.

If the commission sought be one that will occasion great delay, the applicant may, on a proper case being shown, be required to state what he expects to prove under it, so as to give his opponent the opportunity of rendering it unnecessary by means of a stipulation. If that stipulation be given, the commission may then be refused.

It must, however, be complete, and must admit the facts which the applicant requires to prove, and not merely that foreign witnesses can testify to those facts, or the commission will be ordered. *Bank of Commerce vs. Michel*, 1 Sandf., 687.

The moving party must be prepared, at the time of the application, with the names of his proposed commissioners, and it may be better that they should appear on the face of his moving papers. The opposing party may object to the proposed nomination, on grounds shown, and may also suggest names on his own behalf, and, if there be any contest between them, the court may probably select one from each list, espe-

cially where both parties join in the commission, or may name a commissioner or commissioners of its own selection.

As a general rule, a commission will not be granted to examine witnesses, without naming them, or to examine any other witnesses than those named upon its face. This rule will never be departed from, unless under very special circumstances, and never, when, by reasonable diligence, the names might have been ascertained. *Wright vs. Jessup*, 3 Duer, 642. Unless the very strongest necessity be shown, a roving or open commission will not be granted, nor will the moving party be allowed to examine his witnesses orally, and not by means of interrogatories. It is evident that the statute (section 11) does not authorize any such proceeding. See *Forrest vs. Forrest*, 3 Bosw., 661 (668); 9 Abb., 289.

It seems, however, not to be beyond the power of the court to issue an open commission, under circumstances calling for that course. See *Accessory Transit Company vs. Garrison*, referred to 3 Bosw., 668; 9 Abb., 301. But, even there, the names of the witnesses were required to be furnished.

The court has no power to compel one party to part with a document in his possession, for the purpose of being annexed to a commission issued by the other, and produced to the witnesses examined under it. *Butler vs. Lee*, 19 How., 383; 32 Barb., 75.

When made, the order of the court or judge must be entered, and served upon the adverse party in due course. The entry of the order is essential. See *Whitney vs. Wyncoop*, 4 Abb., 370. The order should give the necessary directions as to the return of the commission when executed. Both parties may join in the commission, if thought expedient.

The moving party then proceeds at once to draw up his interrogatories, if not already prepared. He must serve a copy on the adverse party, together with a notice of settlement before a judge of the court. That notice must be a notice of four days, at the least. It seems more than questionable whether any county judge whosoever can act in this branch of the matter, under the provisions of the Code, the proceeding being one that is opposable. See *Erwin vs. Voorhies*, 26 Barb., 127.

In preparing his interrogatories, the moving party must take especial care not to put any question which, either in substance or in form, would be inadmissible if put to a witness, on the trial, on his examination-in-chief, as want of due care in this respect may involve the exclusion of the evidence which may be given under an interrogatory thus framed. Similar care must be taken by his adversary, though, of course, greater latitude will be allowed in putting questions on a cross-

examination. A general interrogatory is always added, to embrace matters not specifically inquired after.

There is the greater reason for this precaution, inasmuch as, under section 14, the judge has no power to exclude any question pertinent to the cause. He cannot reject it as being leading, or otherwise improperly put in form, though the objection may be of such a nature as to render it inadmissible on the trial. See *Fleming vs. Hollenbeck*, 7 Barb., 271.

On being served with the interrogatories, the adverse party prepares and serves his cross-interrogatories. In strictness, he should do so within two days, or, at least, two days before the time appointed for settlement; but, in practice, this rule is frequently disregarded. Where both parties join in the commission, each should serve his interrogatories-in-chief and his cross-interrogatories as an independent proceeding. Of course, it will be most convenient to do so simultaneously, or as nearly as possible, that the whole may be disposed of on one settlement.

In practice, interrogatories are rarely interfered with by the judge on settlement, as no pertinent question, however erroneously framed, can be excluded. See *Fleming vs. Hollenbeck*, 7 Barb., 271, *supra*. It is, of course, competent for the parties to state their objections, and if any question be shown to be grossly improper or irrelevant, it may be expunged. And, in such cases, it is clearly proper, and even necessary, to take the objection at the time, as otherwise it may be held upon the trial to be waived by the omission. A stipulation, when given, will effect a waiver of this description. *Cope vs. Sibley*, 12 Barb., 521; *Morse vs. Cloyes*, 11 Barb., 100.

If such objection be taken, it is the duty of the judge to look into the questions propounded, to see if they be really relevant. If the questions, upon that examination, appear to be clearly improper, and, especially, if they be scandalous, they should be disallowed. *Macdonald vs. Garrison*, 2 Hilt., 510; 9 Abb., 178; *Blaisdell vs. Raymond*, 9 Abb., 178, note.

On the allowance by the judge of each set of interrogatories or cross-interrogatories, he should sign a memorandum at the foot, to the effect that it is allowed, subject to all legal objections or exceptions.

It is, of course, a frequent practice to extend the time for the preparation or settlement of interrogatories or cross-interrogatories, when lengthy or difficult, either by stipulation or order for that purpose.

If, before the actual appointment, the parties are satisfied that, on settlement by the judge, the interrogatories or cross-interrogatories will not be interfered with, it is an usual and convenient practice to stipulate at the end of them, that they be settled and allowed subject

to all legal objections. Each set of interrogatories must be signed by the attorney or counsel of the party by whom they are propounded.

The giving of such a stipulation may, however, be held to be a waiver of all objections as to points of form. See *Cope vs. Sibley*, 12 Barb., 521; *Morse vs. Cloyes*, 11 Barb., 110. And if the parties frame their stipulation in specific, instead of in general terms, as above, they may be held to be confined to the objections specified, and to have waived all others. *Morse vs. Cloyes, supra*.

The present is also the appropriate time for entering into any stipulations as to the return of the commission. A very usual and convenient form is, that it be returned to the attorney of the moving party by mail; that, when received, it is not to be opened by him, except in the presence of the adverse attorney; that, after it is opened, it remain in the hands of the attorney for a time sufficient to enable all parties to take copies of the depositions, and that such copies be either furnished, or the parties allowed to make them; and that, after such copies have been taken, it be then filed in the proper office, or be even retained until the trial, to be then produced on the requisition of either party. See, as to the clerk of the county to whom it is to be returned in the absence of directions, *Whitney vs. Wyncoop*, 4 Abb., 370.

The above proceedings having been taken, the moving party then prepares the commission. He must take especial care that it is in exact accordance with the order, that the names and residences of the commissioners and witnesses are correctly inserted, and that the directions to the commissioners, as to its execution and return, are clear and unmistakable, and that section 16, *in totidem verbis*, forms part of those directions. A printed form is usually used, which contains all necessary particulars. It seems that, in a commission issued by a justice of the peace, a strict compliance with the rules prescribed will not be essential. See *Hall vs. Barton*, 25 Barb., 274.

The commission and interrogatories must then be made up, the latter being annexed to the former. Any documents to be produced to the witnesses on their examination, or copies of such documents, may also be annexed, but it is not necessary to annex the original, which may be produced to the witness at the time. *Commercial Bank of Pennsylvania vs. Union Bank of New York*, 1 Kern., 203; affirming *same case*, 19 Barb., 391.

When so made up, it is to be presented to the judge for his signature, accompanied by the order and by any stipulation, if any, entered into by the parties as to the mode of its return. The signature of the judge must be obtained as follows: to the commission itself; to the direction to return it; and, if not already obtained, or a stipulation substituted, to the allowance of each set of interrogatories or cross-interrogatories,

the form of which should be prepared beforehand. When signed, it must be taken to the clerk, and the seal of the court affixed.

The proceeding being statutory, all these signatures are essential, as is also the affixing of the seal of the court. The omission of any of them will be an irregularity, nullifying the whole. See *Tracy vs. Suydam*, 30 Barb., 110; *Whitney vs. Wyncoop*, 4 Abb., 370; *Crawford vs. Loper*, 25 Barb., 449. See also *Creamer vs. Jackson*, 4 Abb., 113; *Dwinelle vs. Howland*, 1 Abb., 87.

When complete, the moving party takes charge of the commission and forwards it to the commissioners or one of them. The mode of forwarding is not essential.

On receipt of the commission, notice must be given to all the commissioners named in it, if more than one, and a time and place appointed for the execution of it. One may act, but if the others do not, the fact that they have been or could not be notified, and the reasons for their not acting, should appear on the face of the return. Notice to the adverse party is not essential. Where, however, he has a local agent or counsel, a notification to him will be proper.

The witnesses should be summoned to appear, and such proceeding, if any, taken, as may, by the laws of the place of execution, be admissible to require or compel their attendance. The commissioners themselves have no authority to do so, but, in other states, as in the state of New York, a mode of procedure may probably exist for the purpose. The responsibility of taking these measures will rest upon the agent or counsel of the moving party, if one be employed; if not, upon the acting commissioner.

It is competent, but not necessary, for the commissioners to employ a clerk or amanuensis to take down the depositions. Where witnesses are to be examined who are ignorant of the English language, an interpreter must be procured, and sworn to interpret faithfully. In this case the deposition should be subscribed by the interpreter, as well as by the witness.

The duties of the commissioners, as to putting an oath to the witness—the form of that oath or affirmation, as the case may be—the reduction of the examination to writing—the subscription of the witness to the deposition—the certificate of the acting commissioners thereto—the annexation, subscription, and certifying of exhibits—the subscription of the acting commissioners to each sheet of the depositions—the final annexation of all the depositions and exhibits to the commission—and the indorsement of their return thereon, are clearly prescribed by section 15, above cited. Those directions must, in every respect, be strictly and literally followed, or the proceeding will be irregular and the deposition liable to be suppressed.

An omission to administer the oath or affirmation to the witness, or the administration of it in any form, other than that prescribed by the section, will be a fatal objection. *Whitney vs. Wyncoop*, 4 Abb., 370.

The parties have a right to appear by counsel. *Union Bank of Sandusky vs. Torrey*, 5 Duer, 626; 2 Abb., 269.

A witness will be entitled to claim protection from being obliged to answer improper inquiries. See *In re Tappan*, 9 How., 394.

But, with this exception, he must answer fully every interrogatory and every cross-interrogatory put to him; nor can any cross-interrogatory be withdrawn at the time. If the commissioner omits to put, or the witness refuses to answer, any pertinent question, the deposition will be liable to be suppressed *in toto*. If the omission to answer be partial only, the rule may be applied less rigidly, and only with reference to those portions of the deposition affected by the omission, which must be pointed out. The witness must, however, answer every question fully, and cannot do so merely by reference to an answer already given. See, on these different points, *Union Bank of Sandusky vs. Torrey*, 5 Duer, 626; 2 Abb., 269; *Valton vs. National Loan Fund Life Assurance Society*, 22 Barb., 9; *Same case*, 20 N. Y., 32 (the reversal being on other grounds). The rule will be applied more severely where a party is examined. See *Burnett vs. Phalon*, 19 How., 530; 11 Abb., 157.

Every answer that the witness gives must be taken down. If the examination be suspended, and he answers the same questions a second time, on a subsequent occasion, both answers must be returned. And, if any special circumstances exist, the proceedings as they actually occur should be returned by the commissioners. Nor can the witness give his answers from a written memorandum prepared by or in the handwriting of another person. If this be done, the deposition may be suppressed. *Creamer vs. Jackson*, 4 Abb., 113.

In *Commercial Bank of Pennsylvania vs. Union Bank of New York*, 1 Kern., 203; affirming *same case*, 19 Barb., 391, the rule was less rigidly applied, and the fact that the attorney for the party had, at the request of the witness, written down for him, at his dictation, the substance of what he afterwards testified to, was not considered to be sufficient ground for a suppression, no fraud being shown, though a legitimate subject of comment.

The depositions are usually taken on paper. The introductory statement should be clear and full, omitting no necessary particular. The fact that each witness or interpreter is duly sworn or affirmed, must appear, and each interrogatory and cross-interrogatory must be clearly disposed of. Each certificate should show all necessary particulars, and each exhibit should be properly identified. Any adjournments

taken should clearly appear, and, in short, the paper must contain a full and clear record of all that took place. The printed forms generally contain ample instructions on minor points, and those instructions should be strictly followed.

The return should be indorsed upon the commission itself, as required by the section. Where made upon a separate piece of paper, and annexed to the commission and depositions, the depositions were excluded. *Fleming vs. Hollenbeck*, 7 Barb., 271. See also *Creamer vs. Jackson*, 4 Abb., 113.

But, where the return was indorsed on the interrogatories, instead of upon the actual commission, and the whole secured together, so that it could not be detached, it was held a substantial compliance with the statute, and the deposition admitted. *McCleary vs. Edwards*, 27 Barb., 239. So, likewise, where the return was subjoined to the depositions, on the same sheet as a portion of them. *Hall vs. Barton*, 25 Barb., 274. And, when there was no room for such return on the same sheet, and it was added on a separate piece of paper, but so annexed to the commission and depositions that it could not be separated, the deposition was held admissible. *Pendell vs. Coon*, 20 N. Y., 134. This case impairs the authority of *Fleming vs. Hollenbeck*, *pro tanto*. There is no doubt, however, but that the indorsement of the return on the commission itself is the correct practice.

When complete, the commissioners must close up the packet under their seals, and must address it to the clerk, or otherwise, in strict compliance with the directions given. It is usual and proper to tie it round with tape, and fix their seal on the knot, so that it cannot be opened.

When mailed, it is also usual to indorse a certificate of the mailing, according to the printed directions. But this is not essential, when it appears from the postmark that it was actually mailed. The statute itself does not require it. *Brumskill vs. James*, 1 Kern., 294. The presumption will lie in favor of due compliance with the directions. See also *Hall vs. Barton*, 25 Barb., 274, *supra*.

The postage should, of course, be paid at the time, especially when the commission is returned to the clerk of the court. All proper disbursements will be allowed to the commissioners, and they will be entitled to charge their fees, and also any witness fees, apparently according to the law of the place where the commission is executed. But the expenses of an attorney attending to the execution of the commission are not taxable. See *Dunham vs. Sherman*, 19 How., 572; *Finch vs. Calvert*, 13 How., 13.

When directed to be returned by an agent, the directions of the statute must be strictly followed, both by the commissioners, and by the

agent after he has received the packet. The affidavit prescribed by section 17, will, under these circumstances, be indispensable, even though there be a direction authorizing the mode of transmission. So held with reference to an express company. *Dwinelle vs. Howland*, 1 Abb., 87.

If the commission be otherwise returned, pursuant to stipulation, the terms prescribed by that stipulation must be strictly followed. Both parties should take the earliest opportunity of making a strict examination into the proceeding, and it will, of course, be expedient for them to obtain copies of the depositions as soon as practicable.

If, on such examination, the adverse party discover any irregularity on the return, or on the depositions, affecting the mode in which the testimony has been taken, as contradistinguished from the legal effect of the testimony itself, his course will be to make a motion to the court to suppress the deposition. A motion of this nature may also be appropriate, where, by reason of a subsequent amendment of the pleadings, testimony already taken may have become wholly inapplicable. See *Vincent vs. Conklin*, 1 E. D. Smith, 203.

Where, too, the objection is of such a nature as, if taken in time, might be obviated, it will be proper to test the question by motion, instead of waiting to raise it till the time of actual trial. *Zellinger vs. Caffé*, 5 Duer, 87 (100).

This motion to suppress must be noticed in due form, and the irregularities complained of distinctly specified on the face of the notice. Where the objections arise in respect of matters patent on the face of the depositions or return, no affidavit will, of course, be requisite, though it is not unusual to make one containing a more detailed statement as to the objections. Where the defect arises in respect of matters external to the return, it must, of course, be substantiated in the usual manner. The motion will be grounded on the depositions and return, and on the affidavit, if any. It will be also expedient to refer to the pleadings in the notice, as a reference to them may possibly be requisite.

The motion should be made at once, as objections on these grounds will not be entertained by the judge upon the trial. *Union Bank of Sandusky vs. Torrey*, 5 Duer, 626 (628); 2 Abb., 269; *Zellinger vs. Caffé*, 5 Duer, 87 (100); *Sheldon vs. Wood*, 2 Bosw., 267.

If, on a motion of this description, the deposition be suppressed, the court will usually direct the issuing of a fresh commission as part of the order granted. Or, if then refused, it may be made the object of a substantive motion, which will likewise be admissible and proper where the moving party is conscious of defects in the proceeding which might constitute a defect on the trial, but which a second commission

would remedy. Such an application must, of course, be grounded on proper proof of the nature of the defects which render it necessary, and the possibility of their removal. See *Creamer vs. Jackson*, 4 Abb., 113 (118); *Zellinger vs. Caffé*, 5 Duer, 87 (100); *Commercial Bank of Pennsylvania vs. Union Bank of New York*, 1 Kern., 203 (210). Or, in case of a mere technical mistake, the commission may even be returned to the commissioners, with directions to re-examine the witnesses. *Keeler vs. Vanderpoel*, 1 C. R. (N. S.), 289.

Such a motion will be appropriate where the original issue may have been so changed by a subsequent amendment as to render the re-examination of a witness necessary. *Vincent vs. Conklin*, 1 E. D. Smith, 203.

But, where this is not requisite, such an amendment will not necessarily exclude the deposition, which may still be read, notwithstanding the technical change in the issue.

A second commission will not be granted on a mere suggestion of miscarriage in the testimony of a witness, and that, on a second examination, he would be enabled to swear more definitely. *Raney vs. Weed*, 1 Barb., 220.

The proper time for raising any questions as to the competency or credibility of a witness, or the competency or relevancy of any question put to him, or of any answer given by him, will be on the deposition being tendered in evidence on the trial. That class of objections will be competent and proper to be taken on that occasion, in the same manner as if the witness were then examined *vivâ voce*. See section 23 above cited.

The disposition of such objections rests in the discretion of the judge, in the same manner as if the witness were then produced in court. *Cope vs. Sibley*, 12 Barb., 521. And this is the proper time for objecting to a question as leading. *Same case*; *Fleming vs. Hollenbeck*, 7 Barb., 271. Or to an answer as non-responsive, *Lansing vs. Coley*, 13 Abb., 272.

But, where the objection goes to part of the testimony, or of any answer of a witness, it must be specifically taken, and the portions objected to pointed out, so that the court may dispose of the question. A mere general objection will not be available. *Valton vs. National Loan Fund Life Assurance Society*, 20 N. Y., 32; *Same case* below, 22 Barb., 9 (the reversal not affecting this question); *Commercial Bank of Pennsylvania vs. Union Bank of New York*, 1 Kern., 203; affirming *same case*, 19 Barb., 391; *Zellinger vs. Caffé*, 5 Duer, 87 (100).

(d.) LETTERS ROGATORY

Where the execution of a commission in a foreign country is forbidden by its laws, the proper course is to apply for letters rogatory or requisitory, addressed to the courts of that country, requesting them to take the deposition. See *The Republic of Mexico vs. Arrangois*, 3 Abb., 470, and authorities cited, as to relief of the same nature granted by the courts of this state. See *In the matter of the Execution of a Foreign Commission*, 5 Sandf., 674.

CHAPTER VII.

OF THE FORMAL PREPARATIONS FOR TRIAL

THE above matters having been severally disposed of, the formal preparations for trial demand consideration in the last place, before passing on to that branch of the subject.

§ 214. *Noticing and Setting Down Cause.*

STATUTORY AND OTHER PROVISIONS.

The Code provides thus upon these subjects :

§ 256. (211.) At any time after issue, and at least fourteen days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk, at least eight days before the court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served ; and the clerk shall thereupon enter the cause upon the calendar, according to the date of the issue.

In the first judicial district there need be but one notice of trial, and one note of issue from either party, and the action shall then remain on the calendar until disposed of, and when called may be brought to trial by the party giving the notice. In the same district the courts may direct the employment of a stenographer, in such cases as appear to them to require it, and may order the expense occasioned thereby to be paid by the parties, not exceeding, however, \$5 a day to each party.

The last clause relative to the first judicial district, was added to the section on the amendment of 1860.

The framing of the prior part dates from the original Code, but the following changes have been made :

Originally and down to 1858. the notice of trial was to be given ten days, and the note of issue to be filed four days, before the court.

In 1858 the latter period was changed from four to eight days, as it now stands.

In 1859 the period for giving notice of trial was changed from ten to fourteen days.

In 1859 a material amendment was made in section 412, in this connection. That section, as it stood before, merely provided that, where service was by mail, it should be double the time required for personal service.

These words were added :

Except service of notice of trial, which may be made sixteen days before the trial, including the day of service.

The effect of a notice of trial, when duly given, is thus prescribed by section 258 (213) :

Either party giving the notice may bring the issue to trial, and, in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict, or judgment, as the case may require.

This portion of the section dates from the original Code. It forms part of the chapter relative to trial by jury, but its operation has not been limited to that form of trial. In practice the same course has been universally allowed in cases set down for trial by the court, or on appeals or other matters noticed for the general term.

Section 272 prescribes that "the trial by referees shall be conducted in the same manner and on similar notice, as a trial by the court."

Appeals from justices' courts, in cases where a new trial is claimable as of right, are now to be brought on upon the ordinary notice of trial. Section 364, amendment of 1862.

The subject of notices of trial and notes of issue for the general term and the Court of Appeals, will not be entered upon in the present chapter, but considered hereafter in connection with those proceedings.

The following rules require attention in connection with this subject :

Rules 26 and 27 have been already referred to and cited, *in extenso*, in chapter II. of the present book, section 197. The former provides that, when the plaintiff has neglected to bring his cause to trial, and the defendant has not noticed it, the former may, on one occasion, tender a stipulation, and offer to pay costs up to that time. The latter gives the defendant a remedy by means of a motion for dismissal under like circumstances.

When notice is given by the plaintiff, it is essential that the intention to take an inquest should be expressed upon its face. Otherwise he cannot take one. Rule 29 (12).

For statement of the special rules in relation to notes of issue in different districts, see below, under that head.

§ 215. *Notice of Trial.*

This proceeding must be taken by the plaintiff in all cases. If he omits it, he cannot bring on the cause himself; and not only this, but he is also liable to have it brought on adversely on the defendant's notice, or on a motion, under section 274, to dismiss his complaint for want of due prosecution. See heretofore, section 197. Having noticed it, he is, however, bound to bring on the cause when it is reached. *Bishop vs. Morgan*, 1 C. R. (N. S.), 340.

It is equally important that, on the face of such notice, he should express his intention to take an inquest when admissible, otherwise he cannot do so. See Rule 29, above referred to.

The defendant should also notice the cause under ordinary circumstances. If he omit it, he places himself at a disadvantage by reason of his inability to move the case when it is reached (section 258), and he gives to the plaintiff the corresponding advantage of being entitled to stipulate under rule 26. See also, as to the plaintiff's right to countermand his notice under these circumstances, on payment of costs, if any, *Whipple vs. Williams*, 4 How., 28.

In preparing his notice, the defendant should, of course, strike out the usual clause as to an inquest, and substitute for it a notification that he will take a default, or, which is better, that he will move for a dismissal of the complaint with costs. If he omit to do so, the court may deny him leave to proceed by default, under the power given by the section. As to the right of a defendant to give such a notice, in an action commenced before the Code, see *Reynolds vs. Davis*, 5 Duer, 611; 2 Abb., 163.

Another reason why the defendant should always notice the cause himself, is that, unless he does so, and brings it on in its order, he cannot take any affirmative judgment or relief, to which, on a regular default, he will be entitled. On an independent motion he can take nothing more than a bare dismissal. See *Roy vs. Thompson*, 1 Duer, 636; 8 How., 253; *Wilson vs. Wheeler*, 6 How., 49; 1 C. R. (N. S.), 402; *Schroeder vs. Kohlenback*, 6 Abb., 66.

But if, having noticed the cause, he omit to bring it on in due course when reached, his right to move for a dismissal for the plaintiff's neglect to notice it for that particular term, will be gone. *McCarthy vs. Hancock*, 6 How., 28; 1 C. R. (N. S.), 188. A consent to a postponement will have the same effect. *Fuller vs. Sweet*, 9 How., 74. But not, it seems, on any subsequent occasion: see *Bowles vs. Van Hone*, 19 How., 346; 11 Abb., 84, noticed above under section 197.

And if, at the time, an order for security for costs is pending, the

defendant should not notice the cause himself. If he do so, he will be held to have waived the stay. *Boyce vs. Bates*, 8 How., 495.

When the defendant merely puts in a set-off or counter-claim, which the plaintiff does not contest, there is no real issue in the case, and it will not be either necessary or proper to notice or set down the cause. See *Pardee vs. Schenck*, 11 How., 500. The plaintiff should then apply for judgment under section 246.

In preparing a notice of trial in the first district, under the recent amendment, it seems better practice to add to the usual notification that the cause will be brought on on the first Monday of the next term, "or so soon thereafter as the same shall be reached, and called on in its order on the calendar of the said court," or words to the like effect. It is not, however, a matter of necessity, not being so prescribed. In the other districts the notice must be repeated every time the cause is on the calendar, unless a special order be made to the contrary.

Notice by either party must be given for the first day of the term at which the cause is proposed to be brought on. This is especially prescribed by the conjoint operation of rules 40 and 42, with respect to issues of law. It is equally imperative in practice, with regard to issues of fact. The whole period of a term or circuit is regarded but as one day, and all proceedings had relate to the first day of it. See *Manchester vs. Harrington*, 6 Seld., 164. And the profession are presumed to know, and are bound to take notice of the times appointed. *New York Central Insurance Company vs. Kelsey*, 13 How., 535.

Both parties are, of course, bound to serve their notices in due time and due form, or they risk losing the benefit of them. An obvious technical error, by which it is clear that the opposite party could not have been misled, may, however, be disregarded, when the paper served is retained by the adverse attorney. See *New York Central Insurance Company vs. Kelsey*, *supra*; *Silliman vs. Clark*, 2 How., 160. In case of any defect of this nature, the notice should be returned at once.

The usual course, on service of notice, is to obtain an admission from the adverse party. This is rarely refused. If not obtained, proof by affidavit, in the usual form, should be made in all cases, prior to, and so as to be ready on the call of the cause.

The time for service of notice is governed by the general provisions of the Code in that respect, in chapter XI., title XIII. of part II., above cited in book IV. *Easton vs. Chamberlin*, 3 How., 412; *Dayton vs. McIntyre*, 5 How., 117; 3 C. R., 164. That in relation to service by mail is provided for by the amendment in section 412, made in 1859. Before, it was subject to the usual rules. *Dorlon vs. Lewis*, 7 How., 132.

A party who notices the cause, pending the right of his adversary to amend, does so at his peril. *Cusson vs. Whalen*, 5 How., 302; 1 C. R.

(N. S.), 27. An amendment made in bad faith, and clearly for the purpose of delay, will not, however, be allowed. See *Allen vs. Compton*, 8 How., 251.

But if such adverse party, by giving counter notice of trial, or otherwise, waive his right to amend, the notice will be valid, and the cause must then be brought on. *Cusson vs. Whalen, supra*.

By giving notice of trial, a party waives his right to amend, or to make a motion for striking out irrelevant or redundant matter, under section 160. It is an admission that a sufficient issue is raised. *Same case; Esmond vs. Van Benschoten*, 5 How., 44.

But, where the joinder of issue has been delayed by an order of the latter description, it has been held that the cause cannot be moved by the adverse party, pending an appeal from that order. *Trustees of Penn Yan vs. Forbes*, 8 How., 285.

Notice of trial cannot be given properly, pending an abatement of the suit, and, if given, a default, predicated on that notice, will not be sustainable. See *Warren vs. Eddy*, 13 Abb., 28; *Jarvis vs. Felch*, 14 Abb., 46. Nor can either party properly serve notice of trial until issue is completely and finally joined, as to all parties who have appeared, or are entitled to appear. Nor can co-defendants make a notice served on the plaintiff a basis for an adjudication between each other. See *Ward vs. Dewey*, 12 How., 193; *Burnham vs. De Bevois*, 8 How., 159; *Tracy vs. New York Steam Faucet Manufacturing Company*, 1 E. D. Smith, 349. The power of giving notice as between co-defendants seems not to be contemplated by the Code. On an actual trial their mutual rights may be adjudicated upon under section 274, but there seems no provision for such an adjudication in the case of a default taken as against the plaintiff.

A defendant who has made an offer cannot move the cause during the ten days allowed to the plaintiff to make his election. *Walker vs. Johnson*, 8 How., 240. But such an offer, if served too late, will not impede the plaintiff's proceedings. If the cause be reached within the time, he may waive his election, and proceed. *Pomeroy vs. Hulin*, 7 How., 161.

A similar notice to that prescribed in calendar causes should be given on a trial before a referee, see section 272; and it is admissible, and is the proper course in order to bring the cause on and take judgment by default, where the adverse party omits to proceed. *Williams vs. Sage*, 1 C. R. (N. S.), 358. *Thompson vs. Krider*, 8 How., 248. See below, under the head of *Trial by Referee*.

This notice should be framed according to the circumstances, and according to the time appointed by the referee, irrespective of any term of the court. It must, of course, be given for the full period.

§ 216. *Note of Issue and Regulation of Calendars.*

The filing of a note of issue is a simple, but most important proceeding, by means of which the cause is formally placed upon the calendar of the court to take its turn for trial.

Appeals from justices' courts, in which a new trial is claimable of right, must now be placed on the general jury-calendar of the appellate tribunal in this manner. See section 364, amendment of 1862.

The nature of the note of issue is so clearly prescribed by section 256, that comment is almost unnecessary.

The following observations may, however, be made :

It is better, but not necessary, that it should appear upon the face of the note of issue, whether it is filed by the plaintiff or by the defendant. The fact may be important when the cause comes to be moved, in the event of a default being suffered by either. This has sometimes been specially prescribed (see rule of Superior Court of the 8th of September, 1860), and is always expedient.

It is also clear that it is not merely expedient, but necessary, to state on the face of the note the nature of the issue, and for which term of the court, whether the general, the special, or the circuit, or trial term, the cause is proposed to be set down. In the New York Superior and Common Pleas Courts this is required by special rules of the 6th of March, 1852, in the former, and of the 1st of December, 1858, in the latter. See also regulations in seventh district, reported 13 How., 343.

In the Common Pleas it is specially required by the rule of the 1st of December, 1858, that the note of issue should state on its face whether the issue is one of law or of fact ; and, if of fact, whether to be tried by a jury, or by the court without a jury. See likewise, rules of same court for 1861.

When the cause is triable by the court without a jury, it is equally essential to state on the face of the note of issue whether that issue is one of law or of fact, in order to secure the preference given to the former by section 255. The first district of the Supreme Court has now provided for this by a regulation in December, 1860, that notes of issue for the special term shall state on their face "whether demurrer or not demurrer."

In the same district of the Supreme Court, and in the New York Common Pleas, a calendar is made out for the January term, and continued through the whole year. No fresh note of issue need be filed for a cause once placed on this calendar ; but, in every succeeding term, a supplement is made out of those filed during the preceding month.

At the close of the year a fresh calendar is made out, and fresh notes of issue then become requisite.

In the Superior Court the calendar was similarly made out once every three months. Since June, 1860, this practice has been abandoned. No fresh calendar was made out for 1861, but the previous cases were continued. A supplementary calendar is made out every month in the same manner.

The supplementary act passed simultaneously with the Code, to facilitate the determination of existing suits, and amended on the revision of 1849, contains the two following sections :

§ 16. When a cause, placed upon the calendar of a court of record in the city of New York, shall be regularly called and passed, without a postponement by the court for good cause shown, it shall thenceforth take its place on the same or any future calendar, as if the date of the issue were the time when it was thus passed.

§ 17. In the case mentioned in the last section, it shall be the duty of the party placing a cause upon the calendar, for a subsequent term, to state the date of the issue, as above prescribed ; and, if he omit to do so, by reason whereof the issue retains its priority on the calendar, the court, on the application of the adverse party, or of its own motion, may strike the cause from the calendar.

This practice, as regards the date of the issue, is substantially retained in these tribunals.

A Supreme Court notice for the first district, directing the making out of a fresh calendar for January, 1861, prescribes thus : “ That the notes of issue for that calendar shall also state, whether the cause was on the calendar at the close of December term, 1860, and, if so, shall state the number of the cause on that calendar ; and notes of issue for other terms shall state whether the cause is then on the calendar, and the number thereof ; and, if the cause has been marked “ down ” on the calendar in 1860, it must be so stated on the note of issue, and the date thereof, which shall be the date of issue on the new calendar.

The clerk is directed not to enter any cause upon the calendar, unless the note of issue therein conforms to the foregoing directions.

The rules of the Common Pleas for 1861, continuing one previously made, on the 1st of December, 1858, contain a similar requirement, that the note of issue shall state the number of a cause on the calendar of 1860, and, if it has been marked down, when it was so marked, imposing a similar penalty.

By rule of the 6th of March, 1852, the Superior Court prescribed that when a cause is set down which has been on a preceding calendar, the note of issue shall specify its number on that calendar. See also tem-

porary rule of the 8th of September, 1860, prescribing that run-down causes shall be placed at the end of a previous calendar continued for a succeeding term.

In the other districts, a fresh calendar is usually made out for each term, and the foregoing requirements do not apply.

Such had heretofore been the practice, as regards the special terms held in the first district. The Supreme Court in that district has, however, by special regulation, made in December, 1860, prescribed that the special term calendar shall also be made out in January, and continued through the year.

In the first district, notices have been frequently given by the different courts, requiring notes of issue to be filed at times earlier than that appointed by the statute. In view of the crowded state of the calendars in that district, this practice has been uniformly and cheerfully assented to. Whether, if disputed, it is strictly legal, and whether the clerk might not be bound to put a case upon the calendar, in which the note of issue was filed within the period prescribed by section 256, seems very questionable.

If the note of issue be sent to the clerk by post, it must be mailed so that he may receive it on or before the last day appointed. It is not a service within section 412. The postage must, of course, be paid. As to the inexpediency of delaying this step till the very last day, see generally *Wilkin vs. Pearce*, 4 How., 26.

The defendant should file a cross note of issue, as, if he omit to do so, he may be unable to take a default when the cause is reached in its order. See *Browning vs. Paige*, 7 How., 487. But, if both parties are ready, and appear when the cause is called, it is immaterial by whom it is placed on the calendar.

If the cause has been placed on the calendar by a wrong number, or out of its order, or if, after note of issue filed, the clerk has neglected to put it on, the parties should attend in court, and apply to the judge to have the error rectified. In the first district, motions for this purpose may be made during the first week of the term; in the others, the parties should attend at the opening of the court, and make the motion before the general call of the calendar is commenced.

In the first district, where there is a continuing calendar, the parties, if it be inconvenient to bring on the cause when its call in order is approaching, may have it reserved generally, on filing with the clerk a consent signed by both attorneys. It is then passed on the call, but retains its place, and it may afterward be placed on the day calendar. In the Common Pleas, an application to have it so put on must be made at chambers on two days' notice to the adverse party. In the other courts, it is merely necessary to file a consent with the clerk.

See Supreme Court Regulations of December, 1860. If one party be ready, and the other refuses to give a consent, application may then be made to the court.

But, to enable a general reservation in this manner, the consent must be filed with the clerk before the cause is placed on the day calendar. Once put on, it is too late, and application must be made to the judge who has the control of it. It is competent for that officer either to reserve generally, if he think fit, or to mark the cause off for the term. This may be done either by handing in a written consent, or by oral application, when both parties appear and agree, or one of them presents a sufficient excuse for postponement. Or, if one only appears, and is unwilling to take the default of his adversary, he may make a similar application.

When a cause is marked off for the term, it is placed at the head of the calendar for the term next succeeding, taking precedence of all cases which have not yet been reached.

If the counsel in a cause be engaged in another court, the cause may be passed on the call, and held over, either until the counsel comes in, or sometimes for a future day, still retaining its place. If set down for a future day, it is liable to go down to the foot of the day calendar. It rests in the discretion of the judge to grant the same indulgence for any other sufficient excuse; but, as a general rule, when a case is not ready, it will be marked off for the term. The indulgence for the absence of counsel is usually restricted to an engagement in the same court, or in the Court of Appeals, or, in New York, in another cause pending in that city in a court of equal jurisdiction.

If, when the cause is reached, neither party appears and answers, it will be run down. When this is the case it loses its place altogether, and goes to the bottom of the calendar. It will, however, precede any cases in which notes of issue are afterwards filed. On special application to the court, a case may sometimes be reinstated and allowed to stand as if marked off for the term, but this privilege rests entirely in discretion.

And so, indeed, do all matters connected with the regulation of the calendar, when once made out, so soon as motions to correct are no longer in order. The general rule is, that that discretion rests exclusively with the judge holding the term at which the calendar is being called; and, except under special circumstances, an application will not be cognizable by another or at chambers. See *North vs. Sargeant*, 14 Abb., 223.

The above observations as to reserving, marking off, or running down cases, are chiefly applicable to the first district, where there is a continuing calendar from term to term; in the others, a cause run down is

off the calendar altogether, unless reinstated. Those made with reference to the postponement or passing of cases on the first call, but with intention to bring them on during the same term, are equally applicable to all.

The following cases are, by statute, entitled to a precedence on the calendar :

Issues of fact in actions in the nature of an action at law, brought against a corporation. *Vide* 2 R. S., 459, section 11.

Or, in actions brought by the attorney-general in the nature of a *quo warranto*, under the joint resolutions of the senate and assembly, of the 10th of April, 1848. See laws of 1850, chapter 128, p. 200.

Actions or proceedings, in which the people are a party, and the attorney-general a party to the record (chapter 37, of 1858, p. 65); but subject to the regulations as to giving notice, &c., imposed by section 1.

And by chapter 280, of 1854, p. 606, precedence is given to a specific class of suits between the state and one Kiersted and the corporation of Trinity Church.

The cases in which a similar precedence is claimable on the general term and Court of Appeals calendars, will be noticed hereafter *in loco*.

§ 217. *Affidavit of Merits.*

This proceeding is necessary on the part of the defendant, and must be carefully attended to, on or before the first day of the first term for which the action, when at issue, is noticed. If he neglect it, he is liable to have an inquest taken against him on the next or on any succeeding morning. See rule 29.

The best course is to attend to it, and see that such an affidavit is duly filed and served, immediately on the actual joinder of issue; and when the answer requires no reply, and is verified by the defendant, it is self-evident that it will be the simplest course to get him to swear to the affidavit of merits on the same occasion.

This proceeding is a relic of the former practice. It was specially provided for by rule 92, and also noticed in Nos. 86 and 31 of the common-law rules of 1847. By the former, rule 92, such an affidavit was required in actions "upon any written instrument or record, which shall be described in, or a copy of which shall be served with the declaration;" and the form of the affidavit was there prescribed to be as follows: *i. e.*, that the party making it had stated the case to his counsel, and that he had a "good and substantial defence upon the merits, to the plaintiff's demand, on the bill of exchange, promissory note, or other written instrument, or the judgment, recognizance, or

other record, on which the action is brought, as he is advised by his said counsel, and verily believes to be true."

Number 20 (36), of the present rules prescribes thus :

Whenever it shall be necessary, in any affidavit, to swear to the advice of counsel, the party shall, in addition to what has usually been inserted, swear that he has fully and fairly stated the case to his counsel, and shall give the name and place of residence of such counsel.

It has become usual to file and serve an affidavit of merits in all cases, and, perhaps, until some judicial determination upon the subject has been made, it is the safer practice never to omit it, when the case is noticed or set down for either the circuit or trial calendar of the courts. In a case triable by the court, it is not requisite, the proceeding being one that has come down from the common law, and not from the equity practice.

It may be fairly inferred from the terms of rule 92, as above cited, that, in those cases in which the action is not founded upon a written instrument or record, such affidavit is not necessary at all, and an inquest cannot be taken. Where, however, there exists any, even the slightest doubt upon the subject, so obvious, and, at the same time, so easy a precaution should never be omitted. An inquest was, however, sustained in a suit for ejectment in *Burger vs. Baker*, 4 Abb., 11.

The original affidavit of merits must be filed with the clerk of the court, in which the action is pending, on the first day of the term for which such action has been noticed, at the very latest ; and a copy of it, with the notice of the filing of the original indorsed, must be also served upon the plaintiff's attorney, so as to be received by him before the inquest is actually taken. It would, however, be improvident to wait till so late a period as that above mentioned, before taking this necessary measure. The more usual and advisable course is to make and serve such affidavit at an early period after issue has been joined.

As to the inexpediency but actual effect of an affidavit of merits, filed at the very last moment, but before inquest actually taken, see *Anonymous case*, noted in digest of cases, 6 Abb., 512.

Where practicable, such affidavit should always be made by the party himself ; but, if he be unable to do so, his attorney or counsel may make it, a sufficient excuse being shown on its face. See rule 92 of 1847, before referred to.

If sworn to by the attorney, or even by the agent of the party, the affidavit may be sufficient, provided it distinctly swears to merits and shows a sufficient excuse why it is not made by the party, such as absence beyond seas, or out of the state. *Johnson vs. Lynch*, 15 How.,

199. But, as a general rule, it must be made by the party himself, and an insufficient excuse will not be available.

The affidavit, when made, must be unqualified, as to the existence of a defence on the merits, and the advice on the case sworn to must be the advice of counsel, and not merely of an attorney, or it will be insufficient.

When duly made, it is *prima facie* conclusive, and cannot, as a general rule, be impeached or contradicted, except, possibly, in a very gross case, and when the excuse offered is shown to be false or frivolous. See *Johnson vs. Lynch*, *supra*. See, however, as to a case attended with suspicious circumstances, *Dix vs. Palmer*, and *Van Horn vs. Montgomery*, below cited.

Once made, filed, and served, such affidavit is available to prevent an inquest at any future time, until the cause has been finally disposed of. It should be made and filed separately, and not incorporated with other proceedings in the case. The affidavit of one of several defendants, having a joint defence, would seem to be sufficient to prevent an inquest, as against all. See *Johnson vs. Lynch*, *supra*, 15 How., 199 (201).

It was, at first, contended that a verified answer under the Code was sufficient to prevent an inquest, but the point was speedily settled to the contrary, and that the former practice upon the subject remained unaltered. See *Anderson vs. Hough*, 1 Sandf., 721; 6 L. O., 365; 1 C. R., 50; *Sheldon vs. Martin*, 1 C. R., 81; *Jones vs. Russell*, 3 How., 324; 1 C. R., 113; *Dickinson vs. Kimball*, 1 C. R., 83; *Hunt vs. Mails*, 1 C. R., 118.

The affidavit must be in strict compliance with the rules, in every part, or it will be unavailable. The following have been held insufficient:

An affidavit that the defendant had stated to counsel "the facts of his defence," instead of the facts of the case. *Rickards vs. Swetzer*, 3 How., 413; 1 C. R., 117. That he had stated "his case in the cause." *Ellis vs. Jones*, 6 How., 296. One omitting to state that he had "a good defence on the merits." *Tompkins vs. Acer*, 10 How., 309. So also an affidavit of a defence in the action, and that the answers were not put in for delay. *McMurray vs. Gifford*, 5 How., 14.

Or a statement that a note sued on had been paid, without giving particulars. *Hunter vs. Lester*, 10 Abb., 260 (but the affidavit in this case was not in strictness an affidavit of merits).

An affidavit that the defendant had stated to his counsel "the facts of this case," was, however, sustained in *Jordan vs. Garrison*, 6 How., 6; 1 C. R. (N. S.), 400, as importing what is required by the rule, and being, accordingly, sufficient.

It has been held that, where the defence is attended with suspicious

circumstances, the court may require the facts to be stated. *Dix vs. Palmer*, 5 How., 233 ; 3 C. R., 214 ; *Van Horne vs. Montgomery*, 5 How., 238. In the reports of these cases, it is said that several decisions had been cited, which held that the affidavit of merits, under the Code, should be special. None, however, appear upon the reports, and it seems difficult to conjecture on what ground this could have been held.

In cases where a demurrer is put in, an affidavit of merits may possibly be expedient. See *Appleby vs. Elkins*, 2 Sandf., 673 ; 2 C. R., 80, where leave to answer was refused, on judgment given on a frivolous demurrer, on the ground that there was no affidavit of merits.

Where the only defence put in by the defendant consists of a partial set-off, and the plaintiff omits to reply to that defence, an affidavit of merits will be superfluous. The plaintiff, under these circumstances, must allow that set-off, in the inquest to be taken by him ; and, if he omit to do so, that inquest will be set aside. *Potter vs. Smith*, 9 How., 262.

§ 218. *Preparations as to Evidence.*

When issue has been joined, and especially when the trial of the cause approaches, the prudent practitioner will of course communicate freely with his client, and obtain the fullest possible information as to the evidence which it will be competent for him to obtain on his own behalf, or to rebut any anticipated testimony on the part of his adversary. Too much importance cannot be attached to the fullest preparation being made on this subject, or on the precaution of communicating freely with his own witnesses where practicable, in order to ascertain as far as possible what evidence they may be likely to give when placed on the stand. The taking of full memoranda of the effect of these communications, when had, will be a most valuable precaution, above all where associate counsel are employed, with a view to their being fully possessed of the facts of the case before going into court to try it. The practice pursued in England of making a regular brief of the proposed evidence, and of the facts which the different witnesses may be expected to swear to, or of those on which it is desirable to cross-examine such as are likely to be called on the other side, will be found very convenient, and a great assistance, especially in complicated cases.

(a.) SUBPOENA.

When the call of the cause approaches, this proceeding must be carefully attended to in due time. The safe rule is that every necessary witness should be subpoenaed, at the very latest, on the day preceding

that on which the cause will be placed on the day calendar. This need not usually be done on an earlier day, nor, when the witnesses are resident, will it be expedient, as their fees cannot be charged for any day on which their attendance is not necessary, and to attend, when that is not the case, would be an useless trial of their patience.

But, if the subpoena is delayed too long, and so as not to give the witness reasonable time to prepare for his attendance, the party will be held in fault, and the witness may be excused. See *Chalmers vs. Melville*, 1 E. D. Smith, 502.

The power of issuing process of subpoena is conferred by statute upon all courts of record, whether of general or limited jurisdiction, and extends to requiring the attendance of any witness residing, or being, in any part of this state, to testify in any matter or cause. *Vide* 2 R. S., 276, section 1.

And by chapter 20 of 1855, p. 24, the same power is given to a committee of either board of the Common Council of New York. As to this last power, see *Briggs vs. Mackellar*, 2 Abb., 30 ; *Briggs vs. Matsell*, 2 Abb., 156 ; *Van Tine vs. Nims*, 3 Abb., 39.

The subpoena must distinctly inform the witness of every particular necessary, and of the consequence of non-attendance. Printed forms are universally used for both subpoena and tickets. The seal of the court is presupposed, but in practice is seldom actually affixed. It is subscribed with the names of the clerk of the court and the attorney for the party who issues it. No person not the law partner of the attorney or a clerk in his office, is at liberty to use his name. If it be so used, the process is void. *Yorks vs. Peck*, 31 Barb., 350.

The statute law in relation to this subject will be found in article VI., title III., chapter VII., part III. of the Revised Statutes ; 2 R. S., 400 to 403 inclusive.

The first section of that title (section 42) regulates the mode of service thus :

“The service of a subpoena issued out of any court, to compel the attendance of any witness, shall be made as follows :

1. The original writ, under the seal of the court issuing the same, shall be exhibited to the witness ;

2. A copy of such writ, or a ticket containing its substance, shall be delivered to the witness ;

3. The fees allowed by law to such witness for travelling to and returning from the place where he is required to attend, and the fees allowed for one day's attendance, shall be paid or tendered to such witness.”

The consequences of a failure to attend are thus pointed out by the next succeeding section (43) :

“Every person who shall be duly subpoenaed to attend, as a witness, any court within this state, or to attend any officer of any court of record empowered to receive evidence, or any commissioner appointed by such court to take testimony, or any referees appointed by such court to hear any cause or matter, shall be bound to attend, according to the command of such subpoena; and for every failure so to attend, without a reasonable excuse, shall be deemed guilty of a contempt of the court out of which such subpoena issued, shall be responsible in the proper action to the aggrieved party for the loss and hindrance sustained by such failure, and for all other damages sustained thereby; and shall forfeit to the aggrieved party the sum of fifty dollars, in addition to such damages, to be recovered in a separate action, or in the same action commenced for the recovery of such damages.”

The subject of process of contempt will be considered in a subsequent chapter. The warrant in this particular case is regulated by sections 48 and 49 of the same title, and must specify particularly the cause of commitment, and, if for refusing to answer any question, such question must be stated on it. As to the right of a witness to refuse to answer a question tending to criminate himself, see *Van Tine vs. Nims*, 3 Abb., 39.

The service of a subpoena, of whatever nature, must be proved by affidavit, stating in full the different particulars required by section 42. This had better be prepared beforehand, and should be ready in court, when there is any reason to anticipate the non-attendance of the witness.

The privileges of witnesses, when subpoenaed, are defined and provided for by sections 51 to 55 inclusive, of the same title. See, in relation to his privilege from service of process upon him whilst in attendance, *Seaver vs. Robinson*, 3 Duer, 622; 12 L. O., 120; *Merritt vs. George*, 23 How., 331.

The fees allowed, and which must be paid to the witness on the service of a subpoena, are prescribed, and will be found at 2 R. S., 643, section 49. They consist of travelling fees, at the rate of four cents per mile, going and returning, if the witness resides more than three miles from the place of attendance. Within that distance, he is only allowed the fee for his attendance, which is fifty cents for each day during which he is engaged. One day's fee must be always paid to him on service.

Any number of witnesses may be included in one subpoena, but a separate ticket must be made out and delivered to each.

A person deputed to serve a subpoena may enter the house of the witness, and, entering peaceably, may legally use necessary force to overcome any resistance he may subsequently meet with in his attempt at actual service, being liable only for excess of violence. *Hager vs. Danforth*, 20 Barb., 16; reversing *same case*, 8 How., 435.

(b.) HABEAS CORPUS AD TESTIFICANDUM.

If the witness whose attendance is required, be in prison for any cause except a sentence for a felony, application should be made for a writ of this nature. See title I., chapter IX., part III. of the Revised Statutes. This application may be made to the court in which the action is pending, or the writ may be issued by a justice of the Supreme Court, or any officer authorized to perform his duties. Sections 1 and 3.

Section 2 provides thus :

Every such application shall be verified by affidavit, and shall state—

1. The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired ; and,

2. That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel, and verily believes.

But the advice of counsel need not be sworn to when the application is by the attorney-general or the district-attorney.

The application should be made on verified petition to the effect above stated, and the form of writ should be prepared and tendered with it to the court or officer.

That writ must be under seal of the court by which it is awarded ; if by an officer out of court, then under the seal of the court to which it is returnable ; and if returnable before any other body than a court of record, then under the seal of the Supreme Court. 2 R. S., 574, section 74.

It may be made returnable at a day certain, or forthwith, and indorsed with a certificate that the same has been allowed, and the date of such allowance, to be signed by the presiding judge of the court, or by the officer awarding it out of court. Sections 75, 76.

When issued by the attorney-general, or district-attorney, the fact is to be noted on the indorsement. Section 77.

Section 78 provides that the writ can only be served by an elector of some county within the state, and the party serving must pay or tender to the officer holding the prisoner, the fees allowed by law. These fees are as follows : bringing up the prisoner, \$1 50 ; for travelling each mile from the jail, 12½ cents ; and for attending court with the prisoner, one dollar per day, besides actual necessary expenses. *Vide* 2 R. S., 646, section 38.

The applicant must also give bonds to such officer in a penalty of double the amount for which the prisoner is detained, if detained for any specific sum, or, if not, then in the penalty of one thousand dollars, conditioned to pay the charges of taking back the prisoner, and that he will not escape.

But this section does not apply to writs issued by the attorney-general or district attorney. Section 79.

Sections 80 and 81, prescribe the mode of service; section 82 makes it the duty of the officer to obey the writ when duly served; and section 85 provides as to the period within which it is to be returned, when not otherwise directed.

(c.) SUBPŒNA DUCES TECUM.

If the production of any documents be required which are in the hands of any witness, this form of subpœna must be employed. This is also a printed form, and, in its substance, is similar to the ordinary subpœna, save only that it commands the witness to bring with him the documents required to be produced. These documents must be specified upon the face of the writ, and care must be taken to make the specification sufficiently full and explanatory, so that what is required may clearly appear. See *Stalker vs. Gaunt*, 12 L. O., 124 (126). To this a general requisition may be advantageously subjoined, when a class of documents, such as correspondence or the like, are required, and there may possibly be other documents beside those which are specified.

When prepared, it must be signed and served in precisely the same manner and with the same incidents as an ordinary subpœna, save only that a copy must, in all cases, be served instead of a ticket.

This form of writ is equally available against a party to the action as against an ordinary witness, and may be issued for the purposes of his examination, either at the actual trial, or previously under the powers of the Code. See heretofore, chapters IV. and V. of the present book, sections 200 and 203, and cases there cited. It seems also to be clearly employable where a witness is examined *de bene esse*, in aid of, but not in substitution for, the summons required in such cases.

A party or witness served with this form of subpœna is as fully bound to produce the documents required, as he is to appear and give evidence. His mere appearance without producing them, will be wholly unavailing to prevent his being charged with a contempt and its consequences. *Lane vs. Cole*, 12 Barb., 680; *Bonesteel vs. Lynde*, 8 How., 226; affirmed, 8 How., 352; *Mitchell's case*, 12 Abb., 249. But, although obliged to bring the documents into court, it is within the discretion of the court to order that he be not compelled to discover them in evidence when so brought. See *Bonesteel vs. Lynde*, *supra*; *Stalker vs. Gaunt*, 12 L. O., 124. Nor can a witness be compelled to produce documents which are not under his personal control, or which he cannot be obliged to discover. As to the usual privilege of an attorney with reference to his client's papers, see *Mallory vs. Benjamin*, 9 How., 419. Not so, however, where there is a fraudulent combination between

the attorney and the client to prevent their production. *People vs. Sheriff of New York*, 29 Barb., 622; 7 Abb., 96. And it has recently been held that the privilege in question is no longer existent. See *Mitchell's case*, and *Peck vs. Williams*, above cited.

See also, as to the right of the officer of a corporation to refuse to produce the corporation books on a subpoena directed to him, *La Farge vs. La Farge Insurance Company*, 14 How., 26; 6 Duer, 680: likewise, as to the non-removal of records, chapter 129 of 1838, 2 R. S., 502, 3d edition.

The production of a chattel upon the trial cannot, it has been held, be compelled in this manner. See *Hunter vs. Allen*, 35 Barb., 42.

In the report of *People vs. Sheriff of New York*, 7 Abb., 96 (98), will be found a form of commitment for contempt for disobedience of a subpoena of this nature, given *in extenso*.

(d.) NOTICE TO PRODUCE.

This form of procedure is appropriate when documents necessary for the purposes of the trial are known to be in the possession of the adverse party. The effect of the notice is that if, after service of it, the adverse party refuses to produce those documents, the applicants may give secondary evidence of their contents.

The production of the documents themselves cannot be thus compelled. If that be required, a *subpoena duces tecum* must be served, or a preliminary discovery obtained. Documents merely required to be produced remain under the control of the holder, and he may do so or not in his discretion. The moving party, if he wishes to render his notice available in case of a refusal, and the production of the originals is not indispensable, must be prepared with parol or secondary evidence of their contents. *Edmondstone vs. Hartshorn*, 19 N. Y., 9.

Nor can a document, not in the actual possession of the party, be so called for, or secondary evidence given of its contents, in case of a refusal. The only course, under these circumstances, is to subpoena the actual holder, and, if he has lost or destroyed it, then offer such evidence. *Chaffee vs. Cox*, 1 Hilt., 78.

As in the case of a *subpoena duces tecum*, the notice should contain a full and specific description of the documents required to be produced. If too general in its terms, it may be unavailable. See *Stalker vs. Gaunt*, 12 L. O., 124. But, when a sufficient specification has been made, it will usually be advisable to add a general clause, including any others not specifically enumerated.

If this precaution be omitted, the adverse party cannot be compelled to produce documents, even if he may have them in court, nor can secondary evidence be introduced. The object of the notice is not

merely to obtain evidence as to the papers themselves, but also to enable the opposite party to be prepared to support or to impeach them. See *Grimm vs. Hamel*, 2 Hilt., 434.

(e.) EXCLUSION OF ADVERSE EVIDENCE.

This proceeding is admissible under special provisions of the Code: 1. With reference to evidence of an account, the particulars of which have been required under section 158, but have not been, or have been insufficiently, furnished; and, 2. With reference to a paper ordered, but refused to be produced, under section 388. With regard to the latter, it is expressly provided that such exclusion is to be made by the court, on motion. The mode of application, under the former state of circumstances, is left without special provision. In *Kellogg vs. Paine*, 8 How., 329, the question came before the court; and, although it was considered that the motion might possibly be made at the trial, it was held to be the better practice to apply previously for an order to that effect. It is clear that, under these circumstances, the obtaining of such an order is proper, and will be most advisable, at the present stage of the action. It should, of course, be made on the usual notice, the facts being shown by affidavit.

§ 219. *Other Preparations.*

(a.) SECURITY IN RESPECT OF LOST NOTE.

When negotiable paper, the subject of the action or defence, has been lost, the Revised Statutes provide the following remedy under which the suit may still be continued. *Vide* 2 R. S., 406, sections 75, 76.

These sections run as follows:

§ 75. In any suit founded upon any negotiable promissory note or bill of exchange, or in which such note, if produced, might be allowed as a set-off in the defence of any suit, if it appear on the trial that such note or bill was lost while it belonged to the party claiming the amount due thereon, parol or other evidence of the contents thereof may be given, on such trial; and, notwithstanding such note or bill was negotiable, such party shall be entitled to recover the amount due thereon as if such note or bill had been produced.

§ 76. But to entitle a party to such recovery, he shall execute a bond to the adverse party, in a penalty at least double the amount of such note or bill, with two sureties, to be approved by the court in which the trial shall be had, conditioned to indemnify the adverse party, his heirs and personal representatives, against all claims by any other person on account of such note or bill, and against all costs and expenses by reason of such claim.

But by chapter 85 of 1855, p. 123, the people are exempted from

giving the security prescribed by the latter of the foregoing sections, in suits in which they are interested. N. B. The reference in the enacting clause is not to the original number of the section, but to that in the third edition of the Revised Statutes.

The form of the bond to be given is so clearly prescribed by the section, that comment upon it is not required. It is obvious that it should be prepared before, so as to be ready for tender on the trial, for which reason it is noticed here. See, as to the inconvenience of delay till the last moment, *Jacks vs. Darrin*, below cited.

The statute is equally applicable where the loss has taken place after the action has commenced. *Jacks vs. Darrin*, 3 E. D. Smith, 548 ; 1 Abb., 148 ; *Jacks vs. Darrin*, 3 E. D. Smith, 557.

And the same cases decide that a lost check is equally within the meaning of the statute.

The giving such a bond is an essential prerequisite to any recovery under these circumstances, and, if not shown to be given, a judgment cannot be sustained. *Desmond vs. Rice*, 1 Hilt., 530.

But a destroyed bill or note is not within the statute, so far as the obligation to give a bond is concerned, and, on proof of its actual destruction, the action will be maintainable without one. *Des Arts vs. Leggett*, 16 N. Y., 582 ; affirming *same case*, 5 Duer, 156.

See, generally, as to the right of a party to recover upon a note not actually in his possession, when he shows a positive right to recover the money due upon it. *Selden vs. Pringle*, 17 Barb., 458.

(b.) SURVEY BEFORE TRIAL.

Provision is made for this purpose as regards the whole class of real estate actions by sections 13, 14, and 15 of title VII., chapter V., part III. of the Revised Statutes ; 2 R. S., 341.

Section 13 prescribes that, whenever the court, in any action of this class, shall be satisfied that such a survey is necessary or expedient to enable either party to declare, plead, or prepare for trial, or for any other proceeding in such action, it may, by rule of court, upon the application of either party, order that such party have leave to make such survey. The order is, under section 14, to give a specific description as far as may be ; and, before entry for that purpose, a copy is to be served upon the owner or occupant, and section 15 gives authority to enter for that purpose, without liability for trespass, but with responsibility in an action in the case for any unnecessary injury.

(c.) DOCUMENTARY EVIDENCE.

All matters in the nature of documentary evidence, such as certified copies of orders, depositions or other matters on file, transcripts of

foreign or domestic records, volumes of foreign laws or reports, certificates, exemplifications, and such like must be carefully attended to, and prepared before the trial, so as to be ready and forthcoming in due form when required.

It would of course be beyond the province of this work to enter into the detailed consideration of what may, or may not be necessary for this purpose. In preparing for trial, the treatises on the law of evidence will of course be carefully consulted, where necessary, and the directions there given strictly followed. And, when a certified copy, transcript, or exemplification is requisite, care will of course be taken to see that it is in strict conformity with the statutory requisitions upon the subject; and that the proper seals and signatures are affixed, and the latter, where necessary, identified. See, as to the proof and identification of foreign records, 2 R. S., 396, 397, sections 26, 27. And, as to documentary evidence in general, article VII., title III., chapter VII., part III., of the Revised Statutes; 2 R. S., 403 to 406 inclusive.

The Code makes no special provision on the subject, except in section 426, inserted on the amendment of 1849, and proceeding as follows :

§ 426. Printed copies in volumes of statutes, code, or other written law, enacted by any other state or territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals of such state, territory, or government, shall be admitted by the courts and officers of this state, on all occasions, as presumptive evidence of such laws. The unwritten or common law of any other state or territory, or foreign government, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts, may also be admitted as presumptive evidence of such law.

In relation to the presumption, in the absence of specific averment to the contrary, that the common law, as it existed at the time of the separation of this country from England, exists in any other state; and the absence of any similar presumption in relation to the statutes of this state having been there enacted, see *Throop vs. Hatch*, 3 Abb., 23. But, as regards foreign laws, the presumption is that they are the same as our own. *Monroe vs. Douglass*, 1 Seld., 447. See also *Thatcher vs. Morris*, 1 Kern., 437.

There is also the following provision of the Code, dating from 1849, which may have some bearing upon the subject :

§ 422. If an original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

(d.) PAPERS FOR THE COURT.

The Code provides thus upon this subject :

§ 259. (214.) When the issue shall be brought to trial by the plaintiff, he shall furnish the court with a copy of the summons and pleadings, with the offer of defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect or refuse to furnish the court with a copy of the summons and pleadings and the offer of the defendant, the same may be furnished by the defendant.

Dates, as it stands, from 1851. The section in 1848 and 1849, merely provided that the plaintiff should furnish the papers in question.

This section is somewhat inartificially inserted in the middle of the chapter which provides for trial by jury. There can be no doubt, however, of its general applicability, and that it is equally incumbent where the case is brought on, either for trial by the court upon an issue of law or of fact, or before referees.

This practice is universal, and is expressly recognized as regards trial by referees, in *Post vs. New York Central Railroad Company*, 12 How., 552, especially with reference to the necessity of including any offer, if made, in the copy so provided.

Rule 42 also provides that the papers for the court shall be furnished by the party demurring, in cases of demurrer.

See, as to the correctness of such copies, *Wilcox vs. Bennett*, 10 L. O., 30. Where the defendant anticipates that the plaintiff may fail to attend, he should, of course, be prepared as above.

On a new trial, after a reversal by the court above, a copy of the opinion on that occasion, if any, will probably be required, and should be prepared and in readiness.

As a general rule, where any papers are likely to be required in the course of the trial, care must be taken that they are in court, and, where practicable, copies of them should be prepared, ready to hand in to the court, when asked for.

The attorney for the party in whose interest they have been taken, will also as a matter of course take care that any documentary evidence, in the custody of the clerk or other officers of the court, such as depositions taken on commission, former records, or other documents of a like nature, are ready in court, when called for, and previous notice to that effect should be given to such officers, and their attendance procured accordingly.

It will also be his duty to look carefully into the case, and see whether the production of any other documents or papers may not be necessary. Orders or copies of orders which tend to the exclusion of evidence which might be offered by the adverse party, with the neces-

sary collateral proof of service, may be instanced as among papers of this description.

And, especially should he be prepared with the necessary proof of service of subpoenas of whatever nature, and notices to produce documents, where there is the slightest chance of a non-attendance or refusal. And, where contumacy on the part of a witness is apprehended, it will be very desirable to prepare beforehand, and have ready in court for use, the necessary papers to bring him into contempt ready to be finally filled in and handed to the judge at once. This will save time, and also the risk of any omission in the hurry of preparing them in court on the spur of the moment, being papers on which strict practice is essential.

In the event of the absence of a material witness, or the necessity of applying for the postponement of the trial for any other reason, the necessary affidavits should also be prepared beforehand. See the next chapter in relation to the proceedings for this purpose.

(e.) CALCULATION OF INTEREST.

When the demand of the plaintiff, or of the defendant on counter-claim, sounds in or arises out of contract, it will be convenient to have in court a calculation of the interest due, or which may be claimed, ready to be sworn to.

The following cases may be advantageously noted with reference to the principles on which such interest will be recoverable, and require computation.

A sum of money payable under an instrument which is silent upon the subject, draws interest from its date. *Purdy vs. Philips*, 1 Kern., 406.

Legacies do not draw interest till the time when they become legally payable. *Bradner vs. Faulkner*, 2 Kern., 472.

On an indemnity bond, interest is recoverable even beyond the actual penalty. *Lyon vs. Clark*, 4 Seld., 148.

Interest is payable on rent, or on its value when payable in kind, from the time it becomes due, whatever the form of the action. *Livingston vs. Miller*, 1 Kern., 80 ; *Ten Eyck vs. Houghtaling*, 12 How., 523 ; *Van Rensselaer vs. Jewett*, 2 Comst., 135.

In an action for damages for non-delivery of goods under a contract, interest from the time of the default should be included in the damages. *Dana vs. Fiedler*, 2 Kern., 40.

But, on an unliquidated demand, interest only runs from the commencement of the action. *Holmes vs. Rankin*, 17 Barb., 454, and cases cited ; *Rarson vs. Grow*, 4 E. D. Smith, 18. See also *Adams vs. Fort Plain Bank*, 23 How., 45.

BOOK X.

TRIAL AND PROCEEDINGS DOWN TO ENTRY OF JUDGMENT.

CHAPTER I.

TRIAL, GENERALLY CONSIDERED.

§ 220. *General Citations and Remarks.*

By section 252 of the Code, already cited, trial is defined to be,

The judicial examination of the issues between the parties, whether they be issues of law or of fact.

The provisions in relation to it comprise portions of title VIII., part II., of the Code of Procedure. They are mixed up, however, in that title with others in relation to the entry of judgment, and also as to proceedings for obtaining a new trial, in the event of error at the first.

A portion of the provisions in question being those in relation to the joinder of issue, the particular branch of the court before which the cause has to be set down, and the preparations for the trial, when approaching, have been already cited and considered in book IX. See, especially, the first and last chapters. The citation of those in relation to new trial and the entry of judgment will be deferred for the present.

Such as have reference to this division of the work will be arranged thus:

In the present chapter the considerations applicable to trial in general, without reference to the particular branch of the court before which it takes place, will be entered upon, and the provisions bearing upon them cited. In those succeeding, each particular form of trial will be treated, and those specially applicable to it separately brought forward.

(a.) STATUTORY AND OTHER PROVISIONS.

Section 258, though introduced in the chapter especially devoted to trial by jury, is evidently of general application. It runs thus:

§ 258. (213.) Either party giving the notice, may bring the issue to trial, and, in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment, as the case may require. A separate trial, between a plaintiff, and any of the several defendants, may be allowed by the court, whenever, in its opinion, justice will thereby be promoted.

The last sentence was inserted in the amendment of 1851. Otherwise the section dates from 1848.

Section 259, with reference to the preparation of the papers for the court, has been cited in the last chapter.

The following provision is likewise of general application, though forming part of a section (section 264), introduced in the chapter devoted to trial by jury.

If an exception be taken, it may be reduced to writing at the time, or entered in the judge's minutes, and afterwards settled, as provided by the rules of the court, &c.

This particular portion of the provision dates from the amendment of 1852.

The following rules are of general application :

Rule 30. (13.) On the trial of issues of fact, one counsel only on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the cause, and, during such examination, the examining counsel shall stand, and the testimony, if taken down in writing, shall be written by some person other than the examining counsel, unless the justice who holds the court shall otherwise order.

No counsel shall occupy more than one hour in summing up, unless by permission of the court.

Rule 54. (14.) At the hearing of causes at a general or special term, not more than one counsel shall be heard, on each side, and then not more than one hour each, except when the court shall otherwise order.

The following special provision was inserted into section 256, on the amendment of 1860 :

In the same (*i. e.*, the first) district, the courts may direct the employment of a stenographer, in such cases as appear to them to require it, and may order the expense occasioned thereby to be paid by the parties, not exceeding, however, five dollars a day to be paid by each party.

By chapter 166 of 1856, p. 260, a special assistant clerk was ordered to be appointed in the county of Kings, to attend the courts held in that county, "to take testimony in all matters and proceedings tried and heard before said courts." This appointment has been made.

Under 2 R. S., 275, section 7, no court is to be opened or transact any business on Sunday, unless for the purpose of receiving a verdict or discharging a jury.

Under the amended judiciary act, chapter 470 of 1847, section 41, power is given, by stipulation and consent of the judge, to try a cause or proceeding elsewhere than at the court-house of the county where it is pending.

The statutes which provide for the precedence of specific classes of cases have been already noticed in the last chapter, at the close of section 214.

§ 221. *General Incidents of Trial.*

(a.) POSTPONEMENT.

If, when the cause is on the day calendar, either party is not ready for trial, he should apply for a postponement. The plaintiff's right to stipulate under rules 26 and 27, and the subject of a temporary postponement, on account of the absence of counsel, have been already considered.

The reasons for such postponement, when applied for, must be shown by affidavit, and a sufficient case of necessity made out, or it may be refused. It rests, of course, entirely in the discretion of the judge. The proper time for the application is on the sitting of the court, or on the call of the cause, as the presiding judge may regulate.

An usual ground of postponement, and one in which it becomes almost a matter of right, on a clear necessity being shown, and on the imposition of proper terms, is on account of the absence of a material witness.

The affidavit for that purpose must show distinctly the absence of the witness, that his testimony is material and necessary, and that the party, under the advice of counsel, cannot safely proceed to trial without it; that due diligence has been exerted in the endeavor to find the witness, the particulars showing that diligence being stated; and, lastly, that he is expected to return, and when. If not expected to return, an affidavit might possibly be admitted, stating the time within which, and the manner in which his testimony might be otherwise procurable, and that the party had no knowledge of his absence until a very recent date. As to the necessity of the affidavit being properly and carefully drawn, see *Fake vs. Edgerton*, 6 Duer, 653.

In *Hays vs. Berryman*, 6 Bosw., 679, it was held that the absence of a witness whose evidence might have been procured after the action was brought, was no ground for denying judgment, no reason being given for not taking his testimony, or diligence shown in endeavoring to procure it.

If the application be made in good faith, and due diligence be shown, a mere statement of the absence of such witness, and of the reason for

such absence, will be sufficient, without entering into any details as to the nature of his supposed testimony. See *Pulver vs. Hiserodt*, 3 How., 49.

If there be any reason to suspect that the application is made for the purpose of delay, the court will be more strict, and may require the nature of the testimony of the witness to be stated, in order that it may itself judge as to its materiality, or give the opposite party the chance of being able to urge on the cause, by tendering a stipulation to admit what the witness may be expected to prove.

Where a sufficient excuse is not shown, or the affidavits themselves are insufficient, the court, unless a clear case of merits be shown, may refuse to open a default. *Fake vs. Edgerton*, 6 Duer, 653. See also *Ward vs. Ruckman*, 23 How., 330.

Where the stay originally granted on issuing a commission has been revoked, and a condition imposed that the cause be brought on at the next term, the party, if it be not then returned, must make a similar application, showing sufficient grounds. See *Voss vs. Fielden*, 2 Sandf., 690.

On granting a postponement, terms will usually be imposed. They rest, of course, in the discretion of the court, and may be regulated according to the circumstances of the case. They will usually include the payment of the costs of the term, and, if so, those costs must be paid forthwith, or the adverse party will be in a position to move to vacate the postponement.

If the terms, when imposed, are considered too rigorous, it is, of course, competent for the party to abandon the order. But, if he does so, or suffers his adversary to move against him for non-compliance, he does so at his peril, and cannot make the consequent exclusion of a deposition ground for an application for a new trial. *Nason vs. Cockroft*, 3 Duer, 366 (370).

A cause cannot properly be postponed by the judge himself, on the mere ground that he has tried it on a former occasion. *Fry vs. Bennett*, 3 Bosw., 200.

But, of course, his legal disqualification, when apparent, will be a sufficient ground.

As to a postponement on the ground of surprise, when the adverse party is allowed to amend upon the trial, see *Therasson vs. Peterson*, 22 How., 98.

(b.) WAIVER.

By voluntarily going to trial, a party waives any stay of proceedings in his favor, if then existent. *Hasbrouck vs. Ehrich*, 7 Abb., 76.

So also as to any irregularities whatever in the previous proceedings.

D'Ivernois vs. Leavitt, 8 Abb., 59; *Phillips vs. Burr*, 4 Duer, 113. See likewise, as to a neglect to comply with terms imposed on a postponement, *Nason vs. Cockcroft*, above cited.

And, if he does so, with the pleadings in an imperfect state, without making a substantive motion to cure the defect, they will be construed most strongly against him. *Wall vs. Buffalo Water Works Company*, 18 N. Y., 119.

(c.) SEPARATE TRIAL.

Express provision is made for this purpose by section 258, as above cited, whenever justice will be promoted. Of course, the interests of the parties to be thus separately tried, must be either several or severable. See generally *Robinson vs. Frost*, 14 Barb., 536; *The People vs. Cram*, 8 How., 151; *Fullerton vs. Taylor*, 6 How., 259; 1 C. R. (N. S.), 411; *Downing vs. Mann*, 9 How., 204.

But, when this procedure is not appropriate, a partial trial of the cause will not be allowed. *Powell vs. Finch*, 5 Duer, 666; *New York Ice Company vs. North Western Insurance Company*, 31 Barb., 72; 10 Abb., 14; *Ward vs. Dewey*, 12 How., 193.

It is, however, in the power of the court to grant a general or a subsidiary reference of its own motion, if the judge think fit. See section 271, below cited, and considered under the head of *Trial by Referees*.

(d.) GENERAL COURSE OF TRIAL.

The old rule, that the counsel for the party who sustains the affirmative of the main issue to be tried, has the right to open, and is entitled to be heard in reply, remains unaltered. But a mere technical issue does not give the defendant that right, when the burden of substantial proof rests on the plaintiff. See *Fry vs. Bennett*, 3 Bosw., 200; *Same case*, 9 Abb., 45; *Littlejohn vs. Greeley*, 13 Abb., 41.

See also *Fry vs. Bennett*, *supra*, as to the extent of license which may be allowed to counsel, and how far statements unwarranted by the evidence may be checked by the court. See likewise, as to the power to restrict the right of cross-examination, when vexatiously abused, *Peck vs. Richmond*, 2 E. D. Smith, 380.

See also, generally, as to the plaintiff's right to begin, in all cases of unliquidated damages, or where, to maintain his claim, he has any thing to prove on that question or otherwise; but as to the counter-right of the defendant, where the damages are liquidated, and the plaintiff's case is fully or substantially admitted; and as to the affirmative of the issue meaning the affirmative in substance, and not in form, and upon the whole record, *Huntington vs. Conkey*, 33 Barb., 218; *Ayrault*

vs. *Chamberlain*, 33 Barb., 229; *Littlejohn* vs. *Greeley*, 13 Abb., 41; *Potter* vs. *Kitchen*, 5 Bosw., 566.

See likewise *Ayrault* vs. *Chamberlain*, *supra*, as to what may be properly stated by each party on opening the case, when the right devolves upon him.

See generally, as to the duty of the presiding judge, with reference to the direction to enter judgment, *Van Valen* vs. *Lapham*, 13 How., 240.

The subject of disregard of objections, and amendments, to conform or otherwise, made at the trial, has already been fully considered, in book VI., in the chapter devoted to that purpose.

The recent provision as to the employment of a stenographer in causes pending in the first district, will not, of course, be overlooked. The strict prescriptions of rules 30 and 54, as to taking down testimony, and the length of the addresses of counsel, are frequently dispensed with in practice, though it is, of course, always competent for the presiding judge to enforce them.

The expediency of full and accurate notes of all that passes upon the trial being taken in all cases, is so obvious that it seems needless to insist upon it. It is especially so with reference to the future preparation or settlement of a case or exceptions, should a review be sought by either party.

(e.) ADMISSIONS.

It is, of course, a frequent practice, in cases where the proceedings are fittingly carried on, to save the time of the court and the parties, and diminish the costs, by admitting facts known to be certainly provable.

An abuse of this practice will, however, be guarded against. Thus, in *Niles* vs. *Lindsley*, 8 How., 131; 1 Duer, 610, where a claim of title arose upon the pleadings, and was put in issue by the defendant, it was held that he could not save the costs of course, which follow a verdict of this description, by admitting the title on the actual trial, after the plaintiff had been put to the expense of preparing to prove it, by reason of his previous denial.

The provisions of section 168, under which every uncontroverted allegation on the pleadings is to be taken as true, will, of course, be borne in mind, in getting up the evidence for the hearing. A misapprehension on this subject will form no basis for an application for a new trial on the ground of surprise. *Wilcox* vs. *Bennett*, 10 L. O., 30.

Where, on the trial of a cause, the counsel agree as to what is admitted by the pleadings, and the judge, without looking into them, assumes the statement of their contents to be true, the truth of that statement cannot be controverted for the first time on the argument of an appeal.

Munson vs. Hegeman, 10 Barb., 112; 5 How., 223. The reversal by the Court of Appeals, on the 12th of April, 1853, does not seem to affect this ruling. See Selden's Notes, p. 26. See likewise *Ogden vs. Coddington*, 2 E. D. Smith, 317.

If a party fail to call the attention of the court to an implied admission in his favor, he may be held to have waived it, and to be afterward precluded from raising the same point. See *Williams vs. Hayes*, 20 N. Y., 58.

The admitted portions are, of course, entitled to be read upon the trial. So, also, as to any stipulation to admit particular facts. Each stands in the place of evidence to the same effect, and is conclusive to the extent of the admission. See *Bridge vs. Payson*, 5 Sandf., 210; *Hackett vs. Richards*, 11 L. O., 315. See, however, as to a qualified admission being unavailable where counteracted by the qualification, *Lewis vs. Ryder*, 13 Abb., 1.

Where there are several answers in a case, an admission made in that of one defendant, is not available against others. Each answer must stand by itself as a complete defence, and the plaintiff must recover upon the whole record. *Swift vs. Kingsley*, 24 Barb., 541.

As to the right to read the testimony of a party on a former occasion, as constituting an admission on his part, see *Pickard vs. Collins*, 23 Barb., 444.

A demurrer allowed by the party demurring to remain upon the record, by failure to comply with terms imposed on leave to withdraw it, may be used upon the subsequent trial as an admission of the facts stated in the pleading to which it was interposed. *Cutler vs. Wright*, 22 N. Y., 472.

(f.) CONTEMPT OF COURT.

The following provisions are made upon this subject by the Revised Statutes (2 R. S., 278, §§ 10 to 15, inclusive):

§ 10. Every court of record shall have power to punish, as for a criminal contempt, persons guilty of either of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

2. Any breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings;

3. Wilful disobedience of any process or order lawfully made by it;

4. Resistance wilfully offered by any person to the lawful order or process of the court;

5. The contumacious and unlawful refusal of any person to be sworn as a witness; and, when so sworn, the like refusal to answer any legal and proper interrogatory;

The publication of a false and grossly inaccurate report of its proceedings; but no court can punish, as a contempt, the publication of true, full, and fair reports of any trial, argument, proceeding, or decision had in such court.

Section 11 prescribes the punishment, which may be fine or imprisonment, or both, the former not to exceed \$250, nor the latter thirty days.

Section 12 provides that contempts committed in the immediate view and presence of the court, may be punished summarily; in other cases the party is to be notified of the accusation, and to have a reasonable time for his defence.

Under section 13, the particular circumstance of his offence shall be set forth in the warrant of commitment of any person charged under these provisions.

Proceedings against parties or officers, to enforce a civil right or remedy, are, by section 14, excepted from the foregoing, and section 15 gives a right of indictment for the same offence, if indictable.

Further remedies for contempt of court are given by title XIII., chapter VIII., part III. of the Revised Statutes. 2 R. S., 534 to 540. These proceedings will be considered hereafter, under the general head of *Execution*.

The testimony of a witness refusing to answer a pertinent question upon cross-examination, is liable to be stricken out; and this rule will be strictly applied in the case of a party testifying. *Burnett vs. Phalon*, 19 How., 530; 11 Abb., 157. The claim of such a party may also, in such case, be stricken out, unless he support it by other testimony. *Same case*.

On *habeas corpus* in respect of a commitment of this nature, nothing will be reviewed except its strict legality. The court will not look into the merits, or any thing beyond the questions of jurisdiction and regularity of the warrant of commitment. *The People vs. Sheriff of New York*, 29 Barb., 622; 7 Abb., 96; *The People vs. Kelly*, 21 How., 54; 12 Abb., 150.

See, as to the form and essentials of a commitment of this nature, *The People vs. Sheriff of New York*, 7 Abb., 96, *supra*; *Matter of Hackley*, 21 How., 103; *The People vs. Kelly*, 12 Abb., 150.

See, likewise, as to the privilege of a witness from answering questions which might tend to criminate himself, *Byass vs. Sullivan*, 21 How., 50.

(g.) NONSUIT.

At any time during the trial, before the jury have actually gone from the bar to consider of their verdict, or the case has been finally

submitted to the court or referees, the plaintiff may submit to a voluntary nonsuit, involving, of course, the right of bringing a fresh action for the same cause ; or, during the same stage of the proceedings, his adversary may make a motion of the same nature, which will involve the same result.

But where, on the contrary, the case has once been fully submitted to the court or jury on the merits, a dismissal of the complaint will then be in the nature of *res judicata*, a bar to a second proceeding. See these subjects heretofore considered, and cases cited, in book VIII., chapter III., section 177, under the head of *Former Adjudication*.

The granting of a motion of this description rests in the discretion of the judge, and, if there is any evidence whatever, on a question of fact, which may go to the jury, it will be competent and proper for him to refuse, and error in him to grant it. *Bronson vs. Wiman*, 4 Seld., 182 ; *Thompson vs. Dickerson*, 12 Barb., 108 ; *Westcott vs. Keeler*, 4 Bosw., 564 (573) ; *Bidwell vs. Lament*, 17 How., 357 ; *Ernst vs. Hudson River Railroad Company*, 32 Barb., 159 ; 19 How., 205 ; *McGrath vs. The Same*, 32 Barb., 144 ; 19 How., 211 ; *Russell vs. Cronkhite*, 32 Barb., 282 ; *Rider vs. Pond*, 19 N. Y., 262.

And where the defect, in respect of which a nonsuit is moved for, is capable of being cured, it will be error not to allow the plaintiff to give further evidence for that purpose. See *Lewis vs. Ryder*, 13 Abb., 1.

If, however, there be a complete failure of proof on the part of the plaintiff, so that, as a matter of law, he cannot recover, or where the court would set aside a verdict in his favor, as against evidence, it will be the duty of the judge to grant the motion, and his refusal will be error. *Carpenter vs. Smith*, 10 Barb., 663 ; *Haring vs. New York and Erie Railroad Company*, 13 Barb., 9 ; *Fox vs. Decker*, 3 E. D. Smith, 150 ; *Beirne vs. Dord*, 4 Duer, 69. See likewise *Ely vs. Cook*, 2 Hilt., 406 ; 9 Abb., 366 ; *Bidwell vs. Lament*, 17 How., 357 ; *Dominick vs. Michael*, 4 Sandf., 374 ; *Sheldon vs. Hudson River Railroad Company*, 29 Barb., 226 ; *Morrison vs. New York and New Haven Railroad Company*, 32 Barb., 568 ; *Lewis vs. Ryder*, 13 Abb., 1.

In like manner, where the defendant wholly fails in, or does not give evidence to prove a wholly affirmative defence, the plaintiff will be entitled, as of right, to judgment in his favor. *Potter vs. Kitchen*, 5 Bosw., 566.

An objection that the complaint, as it stands, is wholly defective, is properly raised in this form. *Budd vs. Bingham*, 18 Barb., 494.

A defendant moving for a nonsuit, which is denied, cannot safely rest upon his mere exception to the denial, and, if he afterward desires questions to be submitted to the jury, must distinctly request it. *Winchell vs. Hicks*, 18 N. Y., 558 ; *Bidwell vs. Lament*, 17 How., 357.

He must, on the other hand, rest upon his exception, when tenable, at the time; and if, instead of standing upon it, he subsequently introduces evidence on his part, and, on the whole testimony, a verdict is correctly found against him, his original objection will not be available. *Colegrove vs. Harlem and New Haven Railroad Company*, 6 Duer, 382.

The practice, in the English courts, of entering a verdict for the plaintiff, but with leave to the defendant to move for a nonsuit, though not unknown, is unusual in this state. The taking a verdict, subject to the opinion of the court, is the more common course. *Downing vs. Mann*, 9 How., 204.

In *Bennett vs. The American Art Union Company*, 5 Sandf., 614; 10 L. O., 132, it was held, in general terms, that objections to the right of the plaintiff to maintain a suit, cannot be so waived by the consent of the parties, as to deprive the court of the power, or release it from the duty of considering them; which principle is doubtless capable of application to cases in which the defendant may be entitled to move for a nonsuit, in respect of defects of this nature, but might wish to waive his right.

“One of several defendants, sued for a tort, is entitled to a verdict, before the case of his co-defendants is submitted to the jury, if the testimony be such, that, if he were sued alone, he would be entitled to a nonsuit. This is not matter of discretion, but of right.” *Dominick vs. Eacker*, 3 Barb., 17.

And where, in such a case, nothing appears to charge any one or more of the defendants, they will be entitled to a nonsuit, and the trial may proceed against the others. But a general nonsuit cannot be moved for when there is evidence to charge any of them. *Woodburn vs. Chamberlin*, 17 Barb., 446; *Montgomery County Bank vs. Albany City Bank*, 3 Seld., 459.

In making his motion, the defendant is bound to bring to the notice of the judge any special grounds on which it is founded. A mere general application will not bring up objections on points of form. *Vide Castle vs. Duryea*, 32 Barb., 480.

In relation to a nonsuit for misjoinder of parties, see *Spencer vs. Wheelock*, 11 L. O., 329.

(h.) DISCONTINUANCE.

Analogous to submission to a nonsuit is the right of a plaintiff to discontinue, and, occasionally, in case of surprise, he may be permitted to do so, even without costs. *Butler vs. Morris*, 1 Bosw., 329. See heretofore, under the head of *Discontinuance*.

(i.) POINTS IN DISCRETION.

It is within the discretion of the court to allow the parties to introduce further testimony after the case is stated to be closed. *Burger vs. White*, 2 Bosw., 92; *Anthony vs. Smith*, 4 Bosw., 503; *Williams vs. Hayes*, 20 N. Y., 58. Or to refuse such allowance. *Chancel vs. Barclay*, 1 E. D. Smith, 384.

So also, as to allowing or refusing to allow a witness to be recalled for further examination, after he has left the stand. *Sheldon vs. Wood*, 2 Bosw., 267; *Treadwell vs. Stebbins*, 6 Bosw., 538; *Harpell vs. Curtis*, 1 E. D. Smith, 78; *Stacy vs. Graham*, 3 Duer, 444; affirmed, 4 Kern., 492; *Briedert vs. Vincent*, 1 E. D. Smith, 542; *Pearson vs. Fiske*, 2 Hilt., 146; *Peckham vs. Leary*, 6 Duer, 494. But in such case the witness should not be resworn. *Parsons vs. Suydam*, 3 E. D. Smith, 276.

So, likewise, as to permitting leading questions to be put. *Cheney vs. Arnold*, 18 Barb., 434. And determining as to such questions. *Walker vs. Dunsbaugh*, 20 N. Y., 170. And as to the questions proper to be put on cross-examination. *Fry vs. Bennett*, 3 Bosw., 200.

But the mere fact that a party has formally rested, will not be ground for refusing him leave to introduce further evidence to cure a formal defect. See *Lewis vs. Ryder*, 13 Abb., 1.

The court may limit the number of witnesses to be called on any specific point. *Anthony vs. Smith*, 4 Bosw., 503. See, however, as to this right, and the extent to which its exercise will not be justifiable, *Ward vs. Washington Insurance Company*, 6 Bosw., 229.

The court may also refuse to receive a demurrer to evidence. *Colegrove vs. New York and New Haven Railroad Company*, 20 N. Y., 492.

(j.) POINTS AS TO EVIDENCE.

Although it is not proposed to enter into any disquisition on the law of evidence, or to give any summary whatever as to what ought or ought not to be produced at the trial, or the course to be taken with reference to its production, it may not be inexpedient to notice the following decisions:

As to the necessity of fully pointing out to a witness the circumstances as to which it is proposed to discredit him, before introducing evidence for that purpose, *vide Pendleton vs. Empire Stone Dressing Company*, 19 N. Y., 13; *Patchin vs. Astor Mutual Insurance Company*, 3 Kern., 268; *Stacy vs. Graham*, 4 Kern., 492.

As to the extent to which the cross-examination of an adverse witness may be carried, without making him the witness of the party

cross-examining, so as to preclude his being contradicted, see *Mattice vs. Allen*, 33 Barb., 543.

As to the right of a witness to refuse to answer a question as criminating himself, and the effect of such a refusal. *Fellows vs. Wilson*, 31 Barb., 162; *Pickard vs. Collins*, 23 Barb., 444 (456); *Byass vs. Sullivan*, 21 How., 50; *The People vs. Kelly*, 21 How., 54; 12 Abb., 150.

As to the right of a party to introduce evidence to show the real facts of the case, notwithstanding it may indirectly tend to discredit some of his own witnesses, though he is precluded from generally impeaching their credibility. *Thompson vs. Blanchard*, 4 Comst., 303; *Pickard vs. Collins*, 23 Barb., 444; *Parsons vs. Suydam*, 3 E. D. Smith, 276.

As to the waiver of the strict right to cross-examination, when a witness is allowed to leave the stand without reservation, *vide Sheffield vs. Rochester and Syracuse Railroad Company*, 21 Barb., 339.

As to the rule requiring a party to produce the best evidence, and the circumstances which will warrant the admission of secondary proof, when it is shown that the best cannot be given, *vide New York Car Oil Company vs. Richmond*, 6 Bosw., 213.

Before the amendments of section 399, and whilst interest in the result was a valid objection to a witness, the adverse party was entitled to have him sworn preliminarily, and examined on the *voir dire*, as a matter of right. And the objection was in season at any time during the examination, on his interest becoming apparent. *Seeley vs. Engell*, 3 Kern., 542; reversing *same case*, 17 Barb., 530. See also *Healy vs. Kingsley*, 4 E. D. Smith, 286.

§ 222. *Objections and Exceptions.*

A most important portion of the duties of counsel, and one on the intelligent and careful performance of which too great stress cannot be laid, is that of duly raising, in the course of the trial, every substantial and tenable objection to the proceedings or evidence on the part of his adversary, and of doing so at once, and in due form, on every material question of this nature, as it arises.

The following are the provisions of the Revised Statutes on this subject, which are still in force (2 R. S., 422, §§ 73, 74):

§ 73. In all cases where exceptions are allowed by law, on the trial of any cause, either party may make such exception, at the time the decision complained of is made; or if such exception be to the charge given to the jury it shall be made before the jury shall have delivered their verdict.

§ 74. Such exception shall be in writing; but the court may allow such time as shall be deemed reasonable, to settle and reduce the same to form.

But if the exception be taken down by the judge at the time, the statute will be satisfied, though it may not be tendered in writing by the party.

This duty is equally applicable to every species of trial, whether by a jury or before the court or referees. It must not be confounded with the right to except to the decision of either of the latter after it is pronounced, as secured by sections 268 and 272. This is a different proceeding, and regulated by different principles, as will be shown hereafter.

Both, however, have the same object, viz., the laying ground for a review of errors of law committed in the course of the trial, or in the consequent adjudication. The distinction is, that the former must be taken at once, *pro re nata*, whilst, as regards the latter, time for deliberation is given.

There is no point more abundantly settled than this, that any objections, of whatever nature, whether they go to the composition of the jury, to the regular course of trial, to the admission or exclusion of evidence, or to error of law committed by the judge in relation to a motion for a nonsuit or any other ruling on a question of law, arising during the proceedings, or to the nature or form of any instructions given by the judge to the jury, whether in his original charge, or in compliance with any request to charge made by either party, or to any omission on his part to charge upon any particular point, when duly requested, must be taken at once, at the time when the question arises, and so as to give the adverse party the opportunity of remedying the defect, or the judge that of correcting the error at once, and in order that the trial may proceed to its final result upon correct principles. If this precaution be neglected, the objection, however tenable it might have been, will be waived, and cannot afterwards be raised, either on motion for a new trial, or on appeal, either to another branch of the same court, or to a higher tribunal. The authorities on this question are so numerous as to be almost superabundant; amongst them may be mentioned the following: *People vs. Norton*, 5 Seld., 176; *Buffalo and New York City Railroad Company vs. Brainard*, 5 Seld., 100; *Hastings vs. McKinley*, Seld. Notes, 7th of October, 1853, p. 19; *Coon vs. Syracuse and Utica Railroad Company*, 1 Seld., 492; *Dayharsh vs. Enos*, 1 Seld., 531; *Newton vs. Harris*, 2 Seld., 345; *Barnes vs. Perine*, 2 Kern., 18; *Jencks vs. Smith*, 1 Comst., 90; *Cowperthwaite vs. Sheffield*, 3 Comst., 243; *McCrackan vs. Cholwell*, 4 Seld., 133; *Keegan vs. Western Railroad Corporation*, 4 Seld., 175 (head note); *Morris vs. Husson*, 4 Seld., 204; *Bumsted vs. Dividend Mutual*

Insurance Company, 2 Kern., 81 ; *Brown vs. Cayuga and Susquehanna Railroad Company*, 2 Kern., 486 ; *Bagley vs. Smith*, 6 Seld., 489 (495) ; 19 How., 1 ; *Stewart vs. Smith*, 14 Abb., 75.

The following decisions of the courts below involve the same principle, and may be further cited: *Merritt vs. Seaman*, 6 Barb., 330 ; *New York and Erie Railroad Company vs. Cook*, 2 Sandf., 732 ; *Laimbeer vs. City of New York*, 4 Sandf., 109 ; *Stoddard vs. Long Island Railroad Company*, 5 Sandf., 180 ; *Howland vs. Willetts*, 5 Sandf., 219 ; *Teall vs. Van Wyck*, 10 Barb., 376 ; *Hunter vs. Osterhoudt*, 11 Barb., 33 ; *Crooke vs. Mali*, 11 Barb., 205 ; *Ingraham vs. Baldwin*, 12 Barb., 9 ; affirmed, 5 Seld., 45 ; *Thompson vs. Dickerson*, 12 Barb., 108 ; 1 C. R. (N. S.), 213 ; *Waterville Manufacturing Company vs. Brown*, 9 How., 27 ; *Hubbard vs. Russell*, 24 Barb., 404 ; *Kennedy vs. Cotton*, 28 Barb., 59 ; *Lee vs. Schmidt*, 1 Hilt., 537 ; 6 Abb., 183 ; *Fellows vs. Wilson*, 31 Barb., 162 ; *Luckey vs. Frantzkee*, 1 E. D. Smith, 47 ; *Heim vs. Wolf*, *ibid.*, 70 ; *Van Dyke vs. Jackson*, *ibid.*, 419 ; *Simmons vs. Fay*, *ibid.*, 107 (115) ; *Frost vs. Hanford*, *ibid.*, 540 ; *Rice vs. Hollenbeck*, 19 Barb., 664 (665) ; *Mills vs. Thursby* (No. 10), 12 How., 385 ; 2 Abb., 432 ; *Brewer vs. Isish*, 12 How., 481 ; *Richards vs. Sandford*, 2 E. D. Smith, 349 ; *Stern vs. Drinker*, *ibid.*, 401 ; *Keyes vs. Devlin*, 3 E. D. Smith, 518 (523) ; *Mayor of New York vs. Mason*, 4 E. D. Smith, 142 ; 1 Abb., 344 ; *Snell vs. Snell*, 3 Abb., 426 (430) ; *McDonough vs. Laughlin*, 20 Barb., 238 ; *Westbrook vs. Douglas*, 21 Barb., 602 (604) ; *Smith vs. Hill*, 22 Barb., 656 ; *Whitlock vs. Bueno*, 1 Hilt., 72 ; *Gelhaar vs. Ross*, *ibid.*, 117 ; *Pearson vs. Fiske*, 2 Hilt., 146 ; *Bagley vs. Smith*, 19 How., 1 ; *Demeyer vs. Legg*, 18 Barb., 14 ; *Davis vs. Cayuga and Susquehanna Railroad Company*, 10 How., 330 ; *Bowdoin vs. Coleman*, 6 Duer, 182 ; 3 Abb., 431 ; *Bates vs. James*, 3 Duer, 45 ; *Smith vs. Floyd*, 18 Barb., 522 ; *Gardner vs. Ryerson*, 19 How., 108 ; *Ward vs. Forrest*, 20 How., 465 ; *Van Rensselaer vs. Secor*, 32 Barb., 469 ; *Castle vs. Duryea*, 32 Barb., 480 ; *Fowler vs. Clearwater*, 35 Barb., 143. See collaterally, *Mills vs. Thursby* (No. 3), 11 How., 116.

See also, as to a waiver of objections in respect to the pleadings or their construction or effect, by going to trial upon them as they stand without objection, *Munson vs. Hegeman*, 10 Barb., 112 ; 5 How., 223 ; and *Ogden vs. Coddington*, 2 E. D. Smith, 317, referred to in the last section.

But an objection on the ground of insufficiency in the pleadings, has been held to be maintainable even though the proofs might lead to a contrary conclusion. *Mallory vs. Lamphear*, 8 How., 491. Nor can any proceedings be maintained by the plaintiff, when it appears, upon the face of his complaint, that he has no title to relief. *Bennett vs. The American Art Union*, 5 Sandf., 614 ; 10 L. O., 132.

Objections which go to the whole merits of the case, and are such as, if taken at the trial, could not have been obviated, are, however, exceptions to this rule, and will not be waived. *Buffalo and New York City Railroad Company vs. Brainard*, 5 Seld., 100; *Pepper vs. Haight*, 20 Barb., 429. See also *Gillespie vs. Torrance*, 4 Bosw., 36 (47); 7 Abb., 462. And the same has been held with reference to objections patent on the record, *Mills vs. Thursby* (No. 10); 12 How., 385; 2 Abb., 432, and *Sanford vs. Granger*, 12 Barb., 403, there referred to. As to whether exceptions are raisable by a party who has allowed an inquest to be taken, see *Burger vs. Baker*, 4 Abb., 11.

The imposition of terms by the court on relief granted during the trial, may also be a subject of exception, and, if the objection be not taken at the time, it will be waived. *Griggs vs. Howe*, 31 Barb., 100.

And if, at the trial, a verdict subject to the opinion of the court is allowed to be taken all minor exceptions going to rulings at the trial will be lost. *McKenzie vs. Farrell*, 4 Bosw., 192. See below, under that head.

Nor can exceptions be taken for the first time at the general term. If omitted to be raised at the original trial, the right to take them will be wholly gone. *McCracken vs. Cholwell*, 4 Seld., 133; *Onondaga County Mutual Insurance Company vs. Minard*, 2 Comst., 98; *Livingston vs. Radcliff, &c.*, 2 Comst., 189; 3 How., 417; *Morris vs. Husson*, 4 Seld., 204.

And, to be available, exceptions must be actually raised as such. A general stipulation that a judge's decision shall be considered as duly excepted to, will be wholly unavailing. *Stephens vs. Reynolds*, 2 Seld., 454.

Exceptions will only lie for errors of the judge, and not for any miscarriage on the part of the jury. *Stanley vs. Webb*, 21 Barb., 148.

Nor will they be sustainable in respect of any matter which rests in the discretion of the court, and is not matter of legal right. *Ford vs. David*, 1 Bosw., 569; *Holbrook vs. Wilson*, 4 Bosw., 64 (head-note); *Hunt vs. Hudson River Fire Insurance Company*, 2 Duer, 481; *Roth vs. Schloss*, 6 Barb., 308; *Brown vs. McCune*, 5 Sandf., 224; *Watson vs. Bailey*, 2 Duer, 509; *People vs. Cook*, 4 Seld., 67 (77); *Phinckle vs. Vaughan*, 12 Barb., 215; *Howland vs. Willets*, 5 Sandf., 219; affirmed, 5 Seld., 170; *Fry vs. Bennett*, 3 Bosw., 200; *Stacy vs. Graham*, 3 Duer, 444; affirmed, 4 Kern., 492.

The exception, when taken, must be specific, and point out exactly the nature and extent of the objection relied upon. If it fails to satisfy these conditions, it will be unavailing for the purposes of a review. See, as to objections in relation to questions of admission or the introduction of evidence, *Pearson vs. Fiske*, 7 Abb., 419; *Newton vs. Harris*, 2 Seld., 345; *Mabbett vs. White*, 2 Kern., 442; *Elton vs. Mark-*

ham, 20 Barb., 343; *Valton vs. National Loan Fund Life Assurance Society*, 20 N. Y., 32 (35); *Belknap vs. Seeley*, 4 Kern., 143; *Graham vs. Dunigan*, 2 Bosw., 516; *Cowperthwaite vs. Sheffield*, 3 Comst., 243. See, however, as to a general objection to a wholly inadmissible question, *Rodgers vs. Fletcher*, 13 Abb., 299.

And the objection stated must, in itself, be tenable, otherwise the evidence to which it is directed will be admitted, though it might have been excluded on other grounds not assigned. *Harris vs. Panama Railroad Company*, 5 Bosw., 312.

Exceptions of this nature must be taken forthwith, and before the witness is heard or the evidence passed on by the court, or the right to take such objections will be lost. See *Leach vs. Kelsey*, 7 Barb., 466; *Cook vs. Hill*, 3 Sandf., 341.

A general exception to the denial of a nonsuit, will not bring up specific points as to the introduction of evidence. They must be raised separately. *Same case*. So also as to subsequent proceedings during the trial. If, at a later stage, the defendant require the case to go to the jury, he must make a specific request and take a specific objection, in case of a refusal, or he cannot raise the question. The motion for a nonsuit implies that the question is one of law. *Winchell vs. Hicks*, 18 N. Y., 558 (565); *Bidwell vs. Lament*, 17 How., 357.

And if, having taken an exception to the denial of a nonsuit, the defendant afterwards introduces evidence and goes to the jury on the general merits, his exception may be unavailing. See *Colegrove vs. Harlem and New Haven Railroad Company*, 6 Duer, 382.

Similar principles prevail with reference to the charge of the court: where that charge involves more than one single proposition, a general exception to it will be unavailing, and, if any portion of it be correct, the whole will stand. Each specific portion of it which is claimed to be erroneous must be distinctly pointed out, and specifically excepted to. And the same as to requests to charge, or refusal to charge as required. The objections must be specifically taken, and cannot be brought up under a general objection to the charges. See *Haggart vs. Morgan*, 1 Seld., 422; *Jones vs. Osgood*, 2 Seld., 233; *Hunt vs. Maybee*, 3 Seld., 266; *Hart vs. Rensselaer and Saratoga Railroad Company*, 4 Seld., 37; *Acker vs. Ledyard*, 4 Seld., 62 (66); *Howland vs. Willetts*, 5 Seld., 170; *Caldwell vs. Murphy*, 1 Kern., 416; *Decker vs. Matthews*, 2 Kern., 313; *Same case*, 5 Sandf., 439 (446); *Magie vs. Baker*, 4 Kern., 435; *Winchell vs. Hicks*, 18 N. Y., 558 (565); *Plumb vs. Cattaraugus County Mutual Insurance Company*, 18 N. Y., 392 (head-note); *Keyes vs. Devlin*, 3 E. D. Smith, 518; *French vs. White*, 5 Duer, 254; *McBurney vs. Cutler*, 18 Barb., 203; *Snell vs. Snell*, 3 Abb., 426 (430); *Robinson vs. New York and Erie Railroad Company*, 27 Barb., 512; *Dows*

vs. *Rush*, 28 Barb., 157; *Carland* vs. *Day*, 4 E. D. Smith, 251; *Wyman* vs. *Hart*, 12 How., 122; *Magee* vs. *Badger*, 30 Barb., 246; *Cronk* vs. *Canfield*, 31 Barb., 171; *Stroud* vs. *Frith*, 11 Barb., 300; *Van Kirk* vs. *Wilds*, 11 Barb., 520; *Wager* vs. *Ide*, 14 Barb., 468; *Murray* vs. *Smith*, 1 Duer, 412; *Meakim* vs. *Anderson*, 11 Barb., 215; *Booth* vs. *Swezey*, 4 Seld., 276 (278).

And the same rule prevails in relation to a general exception to a specific branch of the charge. If the general tenor of it be correct, a particular paragraph will not be reviewed. *Oldfield* vs. *New York and Harlem Railroad Company*, 4 Kern., 310; *East River Bank* vs. *Gedney*, 4 E. D. Smith, 582. Nor will an exception lie for incorrect reasoning on the part of the court, if the actual ruling be correct. *Gillespie* vs. *Torrance*, 4 Bosw., 36; 7 Abb., 462.

A general exception to the decisions of a judge or referee will, in like manner, fail to bring up specific or partial questions. *Sands* vs. *Church*, 2 Seld., 347; *Belknap* vs. *Seeley*, 4 Kern., 143; *Dean* vs. *Roester*, 1 Hilt., 420; and so where the exception is to a particular part of such decision. *McMahon* vs. *New York and Erie Railroad Company*, 20 N. Y., 463.

But exceptions are sufficiently specific where it appears that each offer or request was separately made and passed upon, and each ruling excepted to. *Dunckel* vs. *Wiles*, 1 Kern., 420.

And, where a charge contains only one legal proposition, a general exception to it will be good. *Requa* vs. *Holmes*, 16 N. Y., 193 (202). See also, as to a general objection to a specific proposition involving minor ramifications, *Green* vs. *Hudson River Railroad Company*, 32 Barb., 25.

In *Requa* vs. *Holmes*, it is also laid down that, in excepting to a charge, all that is necessary is to specify the legal proposition therein supposed to be objectionable. It is unnecessary to state the reasons why it is, or is supposed to be erroneous.

An exception, of whatever nature, must specify the exact grounds upon which it is taken, in specific terms, and each ground of exception must be distinguished. Thus a general objection to a document being received in evidence, will not avail to raise a question as to a defect in the proof or acknowledgment of its execution. *Mabbett* vs. *White*, 2 Kern., 442. And a general exception to the evidence of a witness will not avail to bring up specific objections to parts of his testimony, or to exclude the reception of such testimony, if any part of it be admissible. *Richardson* vs. *Wilkins*, 19 Barb., 510; *Graham* vs. *Dunigan*, 2 Bosw., 516.

Where exceptions are taken on specific grounds, the party will be confined to those which he has stated, and cannot raise others. *Parsons*

vs. *Disbrow*, 1 E. D. Smith, 547; *Durgin vs. Ireland*, 4 Kern., 322. *Requa vs. Holmes*, 16 N. Y., 193

The mere expression of opinion on a hypothetical case, put by counsel, will not form the subject of exception. *Walrod vs. Ball*, 9 Barb., 271.

Nor will a comment upon the evidence, unless error of law be directly involved in that comment. *Bulkeley vs. Keteltas*, 4 Sandf., 450; *Lansing vs. Russell*, 13 Barb., 510; *Dows vs. Rush*, 28 Barb., 157.

An exception, though tenable in itself, will not be available, unless material evidence be given on the point as to which it was taken. *Howland vs. Willetts*, 5 Seld., 170; *Purchase vs. Mattison*, 6 Duer, 587; *Requa vs. Holmes*, 16 N. Y., 193. Or, when it does not appear that evidence was actually given, or the rights of the party excepting prejudiced. *Fry vs. Bennett*, 3 Bosw., 200.

But if, where two defendants appear, evidence tendered be irrelevant as to one only, but relevant as to the other, the question cannot be raised by a joint exception. It must be separately taken on behalf of the defendant by whom it is sustainable. *Black vs. Foster*, 28 Barb., 387; 7 Abb., 406.

Although an objection may, at the time when it is originally taken, be perfectly tenable, it will cease to become so if, during the further progress of the trial, the defect objected to be supplied, by means of further testimony introduced, or otherwise by the act of either party. *Bronson vs. Wiman*, 10 Barb., 406; affirmed, 4 Seld., 182; *Westlake vs. St. Lawrence County Mutual Insurance Company*, 14 Barb., 206; *Bean vs. Canning*, 10 L. O., 248; 2 E. D. Smith, 419, note; *McCotter vs. Hooker*, 4 Seld., 497 (503); *Hyland vs. Sherman*, 2 E. D. Smith, 234; *Breidert vs. Vincent*, 1 E. D. Smith, 542; *Lambert vs. Seeley*, 2 Hilt., 429; *Schenectady and Saratoga Plank Road Company vs. Thatcher*, 1 Kern., 102; *Grimm vs. Hamel*, 2 Hilt., 434; *Barrick vs. Austin*, 21 Barb., 241; *Kent vs. Harcourt*, 33 Barb., 491.

But a party who has objected to the introduction of evidence in chief, will not waive his objection by cross-examining the witness. *Duff vs. Lyon*, 1 E. D. Smith, 536.

Where there is conflicting testimony as to whether an exception was or was not taken at the trial, the rule will be to admit it, though it may not appear upon the judge's minutes. *Sanger vs. Vail*, 13 How., 500; 4 Abb., 217.

As to the right of a party to take exceptions and to have them noted, and the extent to which it will be recognized and protected, though attempted to be abused, see *Peck vs. Richmond*, 2 E. D. Smith, 380.

It will, of course, be most important to take every exception as it

arises in due form, and to see that it is at once sufficiently specific to render it available, and, at the same time, sufficiently wide to embrace all questions which may arise in respect of the defect sought to be impeached. It is also highly expedient to see that every exception, as taken, should be correctly stated, and accurately noted by the judge or referee, to save trouble, in the subsequent settlement of a case or exceptions, if made.

Objections during the progress of the trial are usually made orally; propositions and requests to charge, more usually in writing, and handed to the judge; but neither rule is universal. As regards the latter, it is especially desirable, in order that there may be no question whatever, on a future occasion, as to the exact import and terms of the request. The nature of such request, and, occasionally, that of exceptions to be taken, may be often anticipated, before going to trial. When this is so, it will be a convenient practice to prepare them beforehand, with reference to any particular propositions which may be sought to be submitted, or any of the leading decisions by which such propositions have been established. This may often save trouble at the time, and the risk of omitting some important feature of the objection, in framing it on the spur of the moment.

It will be observed that, by section 73 of the Revised Statutes, above noticed, exception to the charge of the judge may be made, at any time before the jury have delivered their verdict. It will, however, be more expedient to do so in all cases, before they have retired to consider, to avoid the necessity of their being recalled, in the event of the objection being of such a nature as to require some addition to be made to the charge.

CHAPTER II.

OF INQUEST AND DEFAULT.

GENERAL REMARKS.

THESE two proceedings are, in some respects, distinct; in others, analogous. They are distinct, in so far that inquest is an extraordinary remedy, obtainable out of the regular course, by the plaintiff alone, and not by the defendant, and that, only under peculiar circumstances, and only as regards issues of fact; whilst default is a regular proceeding, free to be obtained by either party, taken in the ordinary march of the

cause, and applicable to all trials whatever. The analogy between them, as being both *ex parte* proceedings, upon the failure of the opposite party to sustain his case, is, however, so close, that they will be most conveniently treated in the same chapter, and in connection with each other.

And both fall, appropriately, under the head of *Trial*, though, in strictness, *ex parte* proceedings.

§ 223 *Inquest.*

This proceeding is regulated by rule 29, which runs as follows :

Rule 29. (12.) Inquests may be taken in actions, out of their order on the calendar, in cases in which they were heretofore allowed, at the opening of the court, on any day after the first day of the court, provided the intention to take an inquest is expressed in the notice of trial, and a sufficient affidavit of merits shall not have been filed and served.

The subjects of notice of trial, and affidavit of merits, have been considered in the preceding book, chap. VII., sections 213 and 215, to which, especially the latter, the reader is referred.

In the Superior Court, the following rule was made on the 10th of March, 1855 :

Ordered, That when a cause is placed on the day-calendar for trial, the plaintiff may, at the opening of the court each day, take an inquest therein, in any case the court will consent to try without the intervention of a jury, though an affidavit of merits may have been filed, unless the defendant shall appear, and state that a defence is intended to be made.

This proceeding is rather in the nature of an anticipated default, without waiting for the actual call of the cause in its order. Being called on inquest, however, the provision is cited in the present section. The practice is clearly pointed out by the regulation itself, and has not been made the subject of any reported discussion.

To an ordinary inquest, the want of an affidavit of merits is an essential prerequisite. Even if served and filed at the very last moment, such affidavit will be sufficient to render the proceeding irregular, if actually filed before it has commenced. See *Anon.*, noted 6 Abb., 512.

This proceeding can only be taken in the manner prescribed by the rule, *i. e.*, on any morning after the first day of term, and at the opening of the court. Even if applied for at that time, and taken at a later hour, by direction of the judge, it would seem to be technically irregular. See *Anon.*, 6 Abb., 512, above referred to. And, if taken on the first day of term, it will be a nullity. *Smith vs. Brown*, 1 Duer, 665.

Service of notice of trial on the part of the plaintiff himself, is also

an essential prerequisite. He cannot take it otherwise, though called to attend by the defendant's notice. *Potter vs. Davison*, 8 Abb., 43.

And if, at the time, the defendant is entitled to any privilege, which amounts to a virtual stay of proceedings, the plaintiff cannot take an inquest.

So held, as to one, taken whilst a motion for change of venue was under advisement, the venue having been subsequently changed. *Willson vs. Henderson*, 15 How., 90.

So also, an inquest, if taken, will not stand, whilst the defendant's time to amend has not expired. A subsequent amendment in good faith will defeat it. *Washburn vs. Herrick*, 4 How., 15 ; 2 C. R., 2 ; *Griffin vs. Cohen*, 8 How., 451. See likewise, as to a default, under similar circumstances, *Rogers vs. Rathbun*, 8 How., 466.

But, if the amendment be not made in good faith, and for the mere purpose of delay, an inquest may be supported. *Allen vs. Compton*, 8 How., 251 ; *Vanderbilt vs. Bleeker*, 4 Abb., 289.

And, if the pleading be not amendable in its nature, a subsequent amendment will be wholly unavailing, and the inquest will stand. *Plumb vs. Whipples*, 7 How., 411 ; *Farrand vs. Herbeson*, 3 Duer, 655.

The plaintiff, on moving for an inquest, must have in court his notice of trial, and proof or admission of service. If the case, or any portion of it, be not admitted by the answer of the defendant, he must be prepared with affirmative proof, so as to establish a *prima facie* case, by all necessary evidence, and, if the action be on a bill, note, or other document, the document itself must be in court ; or, if lost, the usual bond of indemnity. He should also be prepared with his calculation of interest.

Thus prepared, he must move, at the opening of the court, to have the cause called on for an inquest. This proceeding is wholly irrespective of the position of the cause on the general calendar, or whether it is or is not on that for the day. The defendant is then called in court by the clerk or judge, and the inquest proceeds.

Under the special rule of the Superior Court, above noticed, this can also be done, when the cause is on the day-calendar, and that, without regard to the first or any other day of term, whether an affidavit of merits has been filed or not ; though the defendant, by appearing, and stating that he has a defence, may prevent the proceeding.

If the defendant does not appear, the case is proceeded with at once, *ex parte*. He may appear and defend, however, if he so thinks fit. He has a right, in this event, to cross-examine the plaintiff's witnesses, and break down his case, if he can succeed in doing so. He cannot, though, introduce counter-evidence, or prove an affirmative defence on his own behalf, his right to do so being gone, by his omission to swear

to merits. It would seem, however, that he may take exceptions to the admissibility of the plaintiff's evidence, and appeal from the decision thereon. And the plaintiff may, it would seem, submit to a nonsuit, if thought advisable.

But the defendant's easier and more obvious course will be, where any real defence exists, either to tender an affidavit of merits at the time, or apply for a postponement in order to obtain one; and, if denied, then subsequently move to set aside the inquest.

Whether, after inquest had, in the absence of the defendant, he can subsequently take exceptions to the decisions of the court, seems doubtful. See *Burger vs. Baker*, 4 Abb., 11.

If the defendant appears, the inquest goes before the jury; and it is supposed to be tried before them in all cases. One, taken after the jury has been discharged, was accordingly held to be irregular, in *Dickinson vs. Kimball*, 1 C. R., 83.

But if, when the defendant is called, he fails to appear, his right to a jury is waived under section 266, subdivision 1; and an inquest may then be taken by the judge. *Haines vs. Davies*, 6 How., 118; 1 C. R. (N. S.), 407. And it should be so, it seems. See, as to a default, *Goodyear vs. Baird*, 11 How., 377.

Where a partial set-off has been pleaded by the defendant, and no reply has been put in, the plaintiff cannot take an inquest for the whole of his original demand, but must allow the set-off, and, if he omit to do so, his proceedings will be set aside. Nor is it necessary for the defendant to make an affidavit of merits, to entitle him to protection in this respect. *Potter vs. Smith*, 9 How., 262.

§ 224. Default.

The authority for this proceeding is specially conferred by section 258 of the Code, cited in the last chapter, providing thus:

Either party giving the notice, may bring the issue to trial, and, in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or verdict, or judgment, as the case may require.

Rule 55 provides thus:

Rule 55. (26.) When a rule is obtained, either at a general or special term, by default, the counsel obtaining the same shall indorse his name, as counsel, on the paper containing the proof of notice; and the clerk in entering the rule, shall specify the name of such counsel.

Attention should be paid to this, under these circumstances, as well as upon an ordinary motion.

And rule 91 (70) makes the following special provision, prohibiting this mode of procedure in divorce cases :

No sentence or decree of nullity, declaring void a marriage contract, or decree for a divorce, or for a separation or limited divorce, shall be made of course, by the default of the defendant, or in consequence of any neglect to appear at the hearing of the cause, or by consent.

In order to enable either party to take the default of the other, he must himself have noticed the cause for trial, for the term at which such default is taken. He must likewise have filed a note of issue, and placed the cause on the calendar on his own behalf. See preceding book, chapter VII., sections 213, 214. See also *Browning vs. Paige*, 7 How., 487, there cited.

And, for a default to be regular, the cause must be existent at the time and not abated. If the latter, the proceeding will be a nullity. See *Jarvis vs. Felch*, 14 Abb., 46; *Warren vs. Eddy*, 13 Abb., 28.

To enable him to take a default, the party must be in readiness in court, at the time the cause is called on in its course, and must answer to the call. He must also be prepared with the notice of trial, and with due proof of service.

When the default is taken by the plaintiff, he must be provided with the same affirmative proof of his case, unless admitted by the answer, as above specified, with respect to inquest: see last section, and, if an instrument be sued upon, he must bring it into court.

If a money judgment be asked for by the complaint, it may be taken at once, on the necessary proof being furnished. If the taking of a long account be involved, a reference will be the proper course. See these subjects, hereafter considered, under the head of *Judgment by Default*.

It seems, however, that it is not competent for the court to order damages to be assessed by a sheriff's jury, as in the case of default to answer. There is no authority in the Code to make such an order, and the cause, being at issue, must be tried, either by a jury, or by the court, if a jury be waived, by the defendant's default to appear. *Giberton vs. Fleischel*, 5 Duer, 652.

If the default be moved for by the defendant, all that will be requisite, under ordinary circumstances, will be the notice of trial and proof of service. On these alone, he will be entitled to take judgment, dismissing the plaintiff's complaint with costs.

But, if the answer demand affirmative relief, he must then become an actor in that respect, and must be prepared with the necessary proofs to substantiate a *prima facie* case for the relief so claimed, so as to enable him to take judgment for it accordingly. He must act substan-

tially, as if the position of the parties was reversed, and as if such affirmative relief was claimed by him as plaintiff, and must establish his case accordingly.

The taking of a default in this form is the only course open to the defendant, in those cases in which, on the trial, he must necessarily become an actor, as in replevin, where a return of the goods is claimed. He cannot obtain it by a mere motion for default. *Schroeder vs. Kohlenback*, 6 Abb., 66.

A defendant, separately appearing, and having a separate defence, may bring on the case on his own notice, and take a dismissal against the plaintiff, though his co-defendant be absent. *Gurnee vs. Hoxie*, 29 Barb., 547.

But, for this purpose, the leave of the court must be obtained, and it has been held, that a single defendant cannot force on the cause, before issue has been completely joined, nor unless the case is in readiness as to the others. *Ward vs. Dewey*, 12 How., 193.

A dismissal may be taken by the defendant, on any subsequent day during the same circuit, in case the plaintiff is not ready on the first call, and subsequently fails to perform conditions, then imposed. Or if, having served a notice of discontinuance, he fails to pay the full costs to which the defendant is entitled. *Moffatt vs. Ford*, 14 Barb., 577; *Hicks vs. Brennan*, 10 Abb., 304.

As in the case of inquest, a default cannot be taken by either party, so as to prejudice any right of the other, amounting to a virtual stay of proceedings, while that right is existent. So held, as to one taken by a defendant who had served an offer, within the ten days allowed to the plaintiff to make his election. *Walker vs. Johnson*, 8 How., 240. So likewise, when taken before the expiration of the time to amend, a subsequent amendment having been made in good faith. *Rogers vs. Rathbun*, 8 How., 466. See also cases involving the same principle, cited in the last section.

On taking a default, it is not necessary that the case should go to a jury; the right to that form of trial being waived, by the failure of the adverse party to appear. See last section, and *Haines vs. Davies*, there cited, with reference to inquest. Nor will it, as a general rule, be the proper course under such circumstances, and if taken, the fees paid to the jury may not be allowed on taxation. See *Goodyear vs. Baird*, 11 How., 377.

But, where damages are to be assessed, it may possibly be the better course to suggest that form of trial to the court, as it seems that the case cannot be sent to a sheriff's jury under these circumstances. See *Giberton vs. Fleischel*, above cited.

And, in all cases, attention should be paid to rule 55, requiring the

moving counsel to indorse his name, as such, on the paper containing the proof of notice.

A judgment entered by default would seem to be reviewable on appeal, at the general term, at all events: see *Kanouse vs. Martin*, 3 Sandf., 653; and probably by the Court of Appeals, under the present practice. But, whether exceptions can be taken to the decision of the judge, when the trial has been had before him, seems doubtful. See *Burger vs. Baker*, 4 Abb., 11.

The better course will in all cases be to move to open the default.

When the opposite party is really and *bonâ fide* prepared for trial, and his absence at the moment the cause is called on, is a mere matter of accident, the application for judgment by default would be not merely ungracious, but practically useless. Under these circumstances, the court will open a default so taken, almost as of course, on an application for that purpose. In cases, on the contrary, of wilful or vexatious delay, or virtual abandonment of his case by the opposite party, the taking a default will be a fitting and appropriate remedy. It may, likewise, be highly expedient to do so, in cases where the solvency of the adverse party is doubtful, or any other reason exists, rendering the imposition of terms necessary or desirable. The opening of a default rests always in the discretion of the court, and, on good cause being shown, that discretion will frequently be exercised in this matter; a provision that security be given as a condition of such opening, or that the judgment taken, and any levy made under it, are to stand as security, is of frequent occurrence in such cases, and to obtain it may be of great importance. See, as to the imposition of terms of this nature, *Clark vs. Lyon*, 2 Hilt., 91.

And the same observation may be made, in relation to the taking of an inquest, where practicable.

§ 225. *Opening Inquest or Default.*

If inquest or default be taken against either party unawares, he will, as a general rule, be admitted to prosecute or defend, under the enabling powers of section 174, provided he satisfies the court of the existence of a *bonâ fide* defence, or cause of action, and that the adverse proceeding has been obtained against him, through "mistake, inadvertence, surprise, or excusable neglect." He must, of course, in the case of inquest, swear to merits, in the usual form.

Where the application is to open a default, the practice is more strict, and a mere affidavit of merits will not be sufficient. The defendant, if the moving party, must also disclose the nature of his defence, so that the court may judge whether it is, or is not, meritorious. See *McGaf-*

figan vs. Jenkins, 1 Barb., 31; *Ferussac vs. Thorn*, 1 Barb., 42; *Merchants' Bank vs. Mills*, 3 E. D. Smith, 213.

It will be also important for the moving party, to show as good an excuse as possible, in either case, on the face of his moving affidavits, and to make that excuse, and also the existence of a real defence upon the merits, clearly apparent, by all necessary statements of fact for that purpose. Where merits are not disclosed and clearly apparent, the mere absence of counsel may not be held as sufficient excuse. *Morris vs. Slatery*, 6 Abb., 74. See also *Ward vs. Ruckman*, 23 How., 330. Or, the inefficiency of a party deputed to attend the court and postpone the cause. *Fake vs. Edgerton*, 6 Duer, 653. Or, the misconduct or negligence of the attorney. *Burger vs. Baker*, 4 Abb., 11. Or, a mistake of the party, as to delivering the papers and instructing the attorney to defend. *Merchants' Bank vs. Mills*, 3 E. D. Smith, 213 (215).

If the proceeding be irregular, it is, of course, competent for the party aggrieved to move on that ground, in the usual manner, or, where practicable, he may combine both applications in the same motion. But, where the irregularity is perfectly clear, it may be expedient to confine the motion to that ground only, with regard to the question of costs, as, under those circumstances, the relief asked is not a matter of favor, but of right.

But, where the inquest or default has been regular, it will be useless to ask for costs, and the payment of them will, on the contrary, be usually imposed.

The application must be brought on upon the usual notice. An order to show cause will, however, be often the more convenient form, as an *interim* stay of proceedings may be included in it. And where such an order cannot be obtained, an *ex parte* stay of this nature should, as a general rule, be applied for, and served, in the usual manner, on the adverse party, and also on the sheriff, should execution have been issued.

The motion may, of course, be resisted by the adverse party, on affidavit showing that the proceeding has been regular, that the application is devoid of merits, or that circumstances exist, which render the imposition of terms proper.

Irregularity in the proceeding itself will, of course, form ground for setting it aside, and, as a general rule, with costs, and costs of motion.

And where the default is, in any manner, taken in bad faith or by means of sharp practice, the party taking it acts at his peril. If he is not strictly regular, he will be chargeable with costs. *Anonymous*, noted 6 Abb., 512.

Where the application is to the favor of the court, and merits are clearly shown to exist, it will be almost a matter of course to open the

proceeding, on terms more or less stringent, as the circumstances of the case may require. See, as to the practice in this respect in the New York Common Pleas, *Commissioners of Excise vs. Hollister*, 2 Hilt., 588. See also, as to a judgment on failure to answer, *Quinn vs. Case*, 2 Hilt., 467; *Clark vs. Lyon*, 2 Hilt., 91. And the same rule may be predicated, as prevailing in the other courts.

Where a defence is disclosed and interposed in good faith, the court will not pass upon it, on affidavit, where it does not appear to be frivolous. *Commissioners of Excise vs. Hollister, supra*.

Nor will the court, as a general rule, impose any restrictions as to the defence to be set up, unless it be clearly unconscionable. *Audubon vs. Excelsior Fire Insurance Company*, 10 Abb., 64. But otherwise, where the defence is really unconscientious. *King vs. Merchants' Exchange Company*, 2 Sandf., 693; *Morris vs. Slatery*, 6 Abb., 74; *Potter vs. Clark, ibid.*, note. Or, where the conduct of the applicant in the matter is open to just exception. *Genet vs. Dusenbury*, 2 Duer, 679; 11 L. O., 355. And the application may be refused, where the defence sought to be put in is insufficient. See *Hunt vs. Mails*, 1 C. R., 118.

So also, if it be unreasonably delayed, and the judgment entered appears to be just. *Fake vs. Edgerton*, 6 Duer, 653.

Nor will a default be opened, merely because the plaintiff, being a non-resident, has not filed security for costs, no motion having been made by the defendant. *Merchants' Bank vs. Mills*, 3 E. D. Smith, 213.

It is, of course, competent for the attorney, to open a judgment of this nature by stipulation, and such is occasionally the course pursued. He does so, however, to a certain extent, at his own peril, in the event of its being shown that any loss has resulted to his client from that act, which, by opposition to a regular motion, might have been prevented. See *Clussman vs. Merkel*, 3 Bosw., 402.

The order to be made on the application, as above, must be duly entered, and a copy served by the prevailing party. If the inquest be set aside, or the default be opened upon terms, care must be taken that those terms are fully complied with forthwith, or, at all events, within the time limited by the court, a reasonable limitation to which effect should always be asked for by the adverse party. On compliance with these terms, the cause is restored to the position in which it previously stood, and must be noticed and brought on for trial accordingly. On failure in that compliance, the order setting aside the inquest or default becomes a nullity, and the opposite party will gain the right to proceed with the entry and enforcement of the judgment, as if it had never been made.

CHAPTER III

TRIAL BY JURY.

§ 226. *Statutory and Other Provisions.*

THE provisions of the Code upon this subject, are contained in chapter III., title VIII., part II.

They are, however, more than ordinarily mixed up with extraneous matter, either applicable to trial in general, or to ulterior proceedings for the purpose of review. Sections 258 and 259, and one sentence in section 264, are of the former nature; and, as they have been already cited in the first chapter of the present book, or in the last of that previous, under the head of *Preparations*, it would be needless to repeat them. The other class consists of portions of sections 264 and 265. The citation of those portions is deferred, until the subject of proceedings for a new trial is entered upon. The statement of these sections on the present occasion, will be confined to those portions of them which are specially applicable to the present chapter.

The portions which require citation relate in fact exclusively to the subject of *Verdict*. They run as follows :

§ 260. (215.) A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

Dates from 1849; substantially the same in 1848.

§ 261. (216.) In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained, by reason of the detention, or taking and withholding such property.

In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be

stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered upon the minutes.

Dates from 1849. In 1848, the first clause was absent, and there were other verbal differences.

§ 262. (217.) Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

§ 263. (218.) When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant, when a set-off for the recovery of money is established, beyond the amount of the plaintiff's claim, as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery, when the court give judgment for the plaintiff on the answer. If a set-off, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess; or, if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Dates from 1851. In 1848 and 1849, the section simply provided for an assessment of the plaintiff's claim.

§ 264. (219.) Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict.

This is only the first portion of the section; the balance relates to the subject of new trial. One sentence, providing for the noting down of exceptions, has been already cited in chapter I. of the present book.

The first of the above two sentences dates substantially from 1848, with subsequent verbal amendments.

The second sentence was added on the amendment of 1852.

§ 265. (220.) When exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard in the first instance at the general term, and the judgment in the mean time suspended; and, in that case, they must be there heard in the first instance, and judgment there given. And where, upon a trial, the case presents only questions of law, the judge may direct a verdict, subject to the opinion of the court at a general term; and, in that case, the application for judgment must be made at the general term.

The above citation forms part only of the section, commencing in the middle of a sentence. The rest relates to new trial.

This portion dates, as it stands, from the amendment of 1852.

These are the only provisions of the Code upon the subject, it being wholly silent as to the subjects of the composition of the jury, and the course of procedure before verdict.

For these, recourse must be had to the Revised Statutes, which are full and explicit; title IV., chapter VII. of part III. being devoted to the subject. *Vide* 2 R. S., 409 to 424.

But, before passing on to that title, it will be expedient to notice the following general provisions:

In the constitution, article I., section 2, it is provided thus:

The trial by jury, in all cases in which it has been heretofore used, shall be inviolate forever. But a jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law.

In the general declaration of the rights of citizens, chapter IV., part I., of the Revised Statutes (1 R. S., 93, section 8), the declaration as to trial by jury being inviolate forever is repeated *totidem verbis*.

Passing on to title IV., chapter VII., part III., above referred to, the author does not propose to cite *in extenso* those parts of it which relate to the duties of the officers of the court, in making out the jury panel, &c., &c., but merely such portions as may require to be acted upon in court, by the parties actually litigant, on the occasion of the trial itself, merely noticing the rest, and leaving them as matters for further research, if necessary.

The provisions of article I. do not require special citation. Most of them are, in fact, superseded by portions of the Code. Sections 10 and 11 may, however, be alluded to, as providing for the summoning of a foreign jury, if ordered by any court.

Article II. relates to the return and summoning of jurors. Of the sections which compose it, 12 to 45 inclusive, only two require special citation. The rest relate entirely to the duties of officers, in making out the jury lists, the summoning of jurors, the excuses for not serving which may be admitted, and similar matters. When a challenge to the array is contemplated, it will, of course, be necessary to refer to the article in detail; but this proceeding is of comparatively rare occurrence.

Two sections, however, may be specially noticed. The first is important, with a view to the exercise of the right of challenge to the polls. It prescribes the qualifications of jurors, running thus:

§ 5. The said town officers, when so assembled, shall proceed to select from the names of those assessed on the last assessment rolls of the town, suitable persons to serve as jurors; and, in making such selection, they shall take the names of such only as are—

1. Male inhabitants of the town, not exempt from serving on juries:
2. Of the age of twenty-one years or upward, and under sixty years old:
3. Who are at the time assessed for personal property, belonging to them in their own right, to the amount of two hundred and fifty dollars, or who

shall have a freehold estate in real property in the county, belonging to them in their own right, or in the right of their wives, to the value of one hundred and fifty dollars:

4. In the possession of their natural faculties, and not infirm or decrepit:

5. Free from all legal exceptions, of fair character, of approved integrity, of sound judgment, and well informed.

The other section alluded to (No. 31) gives parties litigant the right to obtain a copy of the jury list, for the purpose of enabling them to exercise their rights of challenge intelligently, in the following terms:

§ 31. It shall be the duty of the county clerk, and of the sheriff, to furnish any person applying therefor, and paying the fees allowed by law for the same, a copy of the list of jurors drawn to attend any court.

The next article (No. III.) relates to the power of the parties to have causes tried by a special jury.

The first section (No. 46) has been modified by chapter 530 of 1857, vol. II., p. 114. (The reference to the number of the section in that place is, however, incorrect, standing 56 instead of 46.) So modified, it stands thus:

When it shall appear to the Supreme Court, or to any county court, or to the Superior Court of the city of New York, or to the Superior Court of Buffalo, in which any cause shall be pending, that a fair and impartial trial will be more likely to be obtained by having a struck jury, or that the importance or intricacy of the cause requires such a jury, such court shall order a special jury to be struck for the trial of such cause.

The form of procedure, on striking such a jury, is thus prescribed by the two next succeeding sections.

§ 47. The party obtaining such order shall give notice, eight days previously, of the time when he will attend before the clerk of the county in which the venue in such action is laid, for the purpose of having such jury struck.

§ 48. At the time appointed, the clerk of the county shall attend at his office, with the original lists of the jurors returned to him by the officers of the several towns, who are then liable to serve, and, in the presence of the parties, or their counsel, shall proceed to strike a jury as follows:

1. The clerk shall select from such lists the names of forty-eight persons, whom he shall deem most indifferent between the parties, and best qualified to try such cause:

2. The party on whose application such struck jury was ordered, or his attorney, shall then first strike out one of the said names, and the opposite party or his agent shall strike out another of such names, and so alternately until each party shall have stricken out twelve names:

3. If either party shall fail to attend at the time and place of striking such

jurors, or shall neglect to strike out any names according to the foregoing provisions, the clerk shall strike for each party:

4. The clerk shall therefrom make out a list of the names of the twenty-four persons not stricken out, and certify the same to be the persons drawn to serve as jurors pursuant to the order of the court, and shall deliver such list so certified to the sheriff of the county.

The next two sections prescribe as to the mode of summoning and forming a jury from the list thus made out, in the usual manner.

Section 51 gives power to the court to appoint two persons to perform the same duties, in any case in which the clerk shall appear to be interested, or not indifferent.

The last section provides thus upon the subject of costs:

§ 52. The expense of striking a jury shall be paid by the party applying for the same, and shall not be taxed in the costs of the suit.

Article IV. provides generally as to trial and its incidents.

The two first sections of it run thus:

§ 53. Trials of fact, by jury, in every court of common-law jurisdiction, shall be had by jurors, drawn, summoned and returned, in the manner herein before directed; and no alien shall be entitled to a jury of part aliens or strangers, in any suit whatever.

But a foreign jury may, it seems, be still ordered. See sections 10 and 11 of article I., above referred to. The practice is, however, extremely rare.

§ 54. Whenever a sufficient number of jurors, duly drawn and summoned, do not appear, or cannot be obtained, to form a jury, the court may order the sheriff to summon from the bystanders, or from the county at large, so many persons qualified to serve as jurors, as shall be sufficient.

The next section provides thus, as to the summoning of talesmen, pursuant to such order:

§ 55. The sheriff shall summon the number, as ordered, from among the inhabitants of the county, duly qualified to serve as jurors in the cause, and return their names to the court. Every person so summoned shall attend forthwith, and serve as a juror, unless excused by the court; and for every neglect or refusal so to attend, shall be subject to fine, in the same manner as jurors regularly drawn and summoned, as herein before provided; and the persons so summoned shall be subject to all exceptions and challenges as other jurors.

Sections 56 and 57 provide, in relation to challenges to the array, that it shall not be cause for such challenge that either the clerk or the sheriff are interested, or not indifferent, unless, in the case of the latter, "it be alleged in the challenge, and satisfactorily shown, that

some of the jurors drawn by the clerk were not summoned, and that the omission was intentional.”

Section 58 provides that, in penal actions for the recovery of money, it shall not be cause of challenge, that any juror, or that the summoning officer, is liable to pay taxes, in any town or county which may be benefited by the recovery.

In relation to the subject of challenges, it may be convenient to cite here the two following sections of chapter 134 of 1847, though, in strictness, out of order :

§ 1. Upon the trial of any issue, or issues of fact, joined in a civil action, each party shall be entitled, peremptorily, to challenge two of the persons drawn as jurors for such trials.

§ 3. Nothing in this act contained shall be deemed to prevent any challenges heretofore allowed, either to the array of jurors, or to individual jurors.

N. B. Section 2 relates to criminal cases.

Returning to article IV., the next two sections, 59 and 60, provide as to the mode of drawing the jury by the clerk.

The next section declares thus :

§ 61. The twelve first persons who shall appear, as their names are drawn and called, and shall be approved as indifferent between the parties, shall be sworn, and shall be the jury to try such issue.

The succeeding sections, 62 to 67 inclusive, provide for divers ministerial acts, in relation to the disposition and drawing of the ballots, and like matters. Section 65 gives power, in case of deficiency of jurors from any cause, to order jurors to be summoned from the bystanders, or other persons, who are to be returned and sworn, and to be competent jurors, as in other cases, even though there may be none of the original panel among them.

Section 68 provides that no jury shall, in any case, be compelled to give a general verdict, so that they find a special verdict, showing the facts, respecting which issue is joined, and therein require the judgment of the court upon such facts.

Section 69 lays down that, where issue has been joined by some defendants, and the default of any other of them shall have been entered, for any cause, upon the trial, contingent damages may be assessed against such defendants, in the same manner as if interlocutory judgment had been entered against them.

The article proceeds, down to section 71 inclusive, to provide in relation to the punishment of misconduct on the part of jurors, or of parties attempting to influence them. And the remainder of it, from

section 72 to 83, inclusive, relates to sundry matters of practice, now superseded by the Code.

Misconduct on the part of jurors is likewise punishable as a contempt of court, under section 1, title XIII., chapter VIII., part III., of the Revised Statutes ; 2 R. S., 534, 535. See, hereafter, under the general head of *Execution*.

Offences of the above nature, on the part of either jurors, embracers, or officers, are likewise punishable criminally, on indictment for a misdemeanor. See Title VI., chapter I., part IV. of the Revised Statutes ; 2 R. S., 693, §§ 16, 17, 18.

In title XVII., chapter VIII., part III. of the same statutes (2 R. S., 554), the following provision occurs :

§ 26. When any jury shall be impannelled to try any issue, to make any inquiry, or to assess any damages, if they cannot agree, after being kept together for such time as shall be deemed reasonable by the court or officer before whom they shall have appeared and been impannelled, such court or officer may discharge them, and issue a precept for a new jury, or order another jury to be drawn, as the case may require ; and the same proceedings shall be had before such new jury, as might have been had before the jury so discharged.

The fees of jurors are provided for at 2 R. S., 643, 644, section 37, and other statutes. In New York they are allowed 12½ cents each. In Circuit Courts elsewhere, and County Courts, 25 cents. In Albany, \$1.00 each and travel fees. For attendance on a sheriff's jury, 12½ cents.

The following provisions may be noticed, as having reference to particular actions.

At 2 R. S., 335, section 9, provision is made for enabling the parties to apply to the court, on good cause shown, for an order for the jury to view the premises alleged to be wasted, in an action of this description. But such view is not necessary, unless so applied for.

Special provisions are also made at 2 R. S., 307, sections 30, 31, in relation to the verdict to be entered in ejectment, according to the circumstances of the case, prescribing the different particulars to be specially found, in cases where a general verdict would be inapplicable.

None of the rules require special citation, except rule 31, which runs as follows :

Rule 31. (23.) It shall not be necessary to call the plaintiff, when the jury return to the bar to deliver their verdict ; and the plaintiff shall have no right to submit to a nonsuit, after the jury have gone from the bar to consider of their verdict.

§ 227. *General Course of Trial.*

The essential features common to all trials, of whatever nature, have been already considered. Trial by jury has, however, many features peculiar to itself, which demand a separate notice.

(a.) RIGHT OF CHALLENGE.

The first of these peculiar features is the right possessed by either party, of objecting to the general composition of the jury, or the competency of individual jurors, prior to the trial being entered upon.

The first of these rights is exercised by challenge to the array, by means of which the whole of the jury list is impeached, for partiality or defect in its formation.

The former objections on this ground are much restricted, by sections 56, 57, and 58, of article IV., above referred to, and the proceeding is consequently of very rare occurrence. The objection must, of course, be taken at once, in writing, before the selection of individual jurors is proceeded with, and the party who takes it must, of course, be prepared with satisfactory evidence to sustain his attempted impeachment.

The more usual form is that of challenge to the polls, by which the competency of individual jurors is impugned.

This objection must also be taken at the outset, before the juror objected to is sworn, and, generally, on his being called.

It is not proposed to enter into the various minute distinctions which have been drawn upon this subject. Graham's Practice, pp. 301 to 308, may be referred to. It will be sufficient to state that the main grounds of objection are—

1. That the juror is not duly qualified, as not satisfying some one or more of the requisites prescribed by section 5 of article II., above cited.
2. That he is not disinterested, as between the parties.
3. That he has formed or expressed an opinion, which will prevent his rendering an impartial verdict.

The objection is taken at once, *ore tenus*, and the question is immediately tried. The proper mode is by two triers appointed by the court; and, where two jurors have been already sworn, the rule is to appoint them for that purpose.

The triers must find, where the challenge is for favor, that the juror stands impartial and indifferent, or they should reject him. *Smith vs. Floyd*, 18 Barb., 522.

But, when duly instructed, their decision is, as a general rule, conclusive, and will not be reviewed. *Same case*.

And the same is the case as to the decision of the judge, when by

agreement of the parties, he himself acts instead of the triers. *Costigan vs. Cuyler*, 21 N. Y., 134; *Sanchez vs. The People*, 22 N. Y., 147.

It is principal cause of challenge to a juror, that he is tenant to either party, and, if decided against the objector, the defect will not be waived, even though, at a subsequent stage of the trial, he do not object to the jury as a whole. *Hathaway vs. Helmer*, 25 Barb., 29.

As to the nature of the evidence, and the questions which may be admissible, on the trial of a challenge, on the ground of having formed or expressed an opinion, see *People vs. Christie*, 2 Abb., 256.

If his challenge be overruled, or if, in his discretion, he does not think fit to make one, each party has, since the statute of 1847, above cited, the right of challenging two jurors, peremptorily, without assigning any reason whatsoever. This right will, of course, be kept in reserve, for any important emergency, and not exercised at the outset.

If less than twelve jurors appear, neither party can be compelled to go on with the cause, either at the outset or any subsequent stage. The objection is, however, not unfrequently waived by consent.

And any objection whatever to the composition or power of the jury, if not taken at the time, will be waived altogether, and cannot be raised in any subsequent stage of the cause. See *Dayharsh vs. Enos*, 1 Seld., 531; *Mayor of New York vs. Mason*, 4 E. D. Smith, 142. See also, as to the objection that one of the jurors was not duly sworn, no prejudice or injury being shown, *Hardenburgh vs. Crary*, 15 How., 307.

(b.) WITHDRAWING A JUROR.

This is a voluntary proceeding, occasionally taken by consent of the parties, or at the suggestion of the judge, when it is clear that, on the present occasion, the trial cannot proceed with advantage.

The result is to effect a technical disqualification of the remainder of the jury, and at once to stop the trial of the cause. It works no prejudice to either party, and is no bar to bringing a fresh action; or the jury may be discharged by consent, which will have the same effect.

These forms of procedure differ from a voluntary nonsuit, inasmuch as they do not necessarily carry costs. And, in a proper case, the cause may be withdrawn from the jury for the purpose of being referred, when the necessity becomes apparent during the trial. But it must be so entirely. See *Buchanan vs. Cheesburgh*, 5 Duer, 238. See also *Smith vs. Dodd*, 3 E. D. Smith, 348.

(c.) SPECIAL, OR STRUCK JURY.

The proceedings for obtaining a jury of this nature are so clearly pointed out by the provisions of article III., above cited, that detailed comment upon them would be unnecessary.

It has been held, however, that, in the city of New York, this course is inexpedient, and a motion for the purpose was denied. See *Nesmith vs. Atlantic Insurance Company*, 8 Abb., 423.

But, of course, this is a matter which rests entirely in the discretion of the judge.

(d.) READING OF PLEADINGS.

It has been held to be wholly within the discretion of the judge whether he will, or will not, allow the pleadings to be read to the jury, during the progress of the trial. *Willis vs. Forrest*, 2 Duer, 310.

(e.) NONSUIT.

It will have been observed that, under rule 31, above cited, the plaintiff cannot submit to a voluntary nonsuit, after the jury have retired from the bar to consider of their verdict.

(f.) PROPOSITIONS AND REQUESTS TO CHARGE.

When the evidence and arguments on both sides are completed, the judge charges the jury as to the law of the case, their province being to determine the issues of fact. The questions as to the extent of their respective powers, in this respect, will be considered in the next succeeding section.

But, if either party wish to submit any specific question to the jury, or to correct any erroneous submission, which the judge may have made in the course of his charge, he should at once submit a specific proposition and request to that effect. If such request be granted, he will have obtained the object which he has in view. If it be refused, he will have laid the proper basis for an exception on that ground, and, unless he make such a request, he cannot, in many cases, sustain an objection to the ruling, however defective. Thus, an objection that the judge had not submitted a specific question of fact to the jury, could not, it was held, be taken, on a general exception to the denial of a nonsuit. It was the duty of the party to make a specific request that such question be submitted, and, if refused, then take a separate exception to that refusal. *Winchell vs. Hicks*, 18 N. Y., 558; *Bidwell vs. Lament*, 17 How., 357.

It is the duty of the judge to charge distinctly, upon every proposition thus submitted to him. *Zabriskie vs. Smith*, 3 Kern., 322.

But, if he fail to do so, it is the duty of counsel to call his attention to the fact. *Same case*. And, if he charge substantially to the same effect as the proposition submitted to him, it will be sufficient, and his refusal to repeat a charge already made in substance, will not be error. *Holbrook vs. Utica and Schenectady Railroad Company*, 2 Kern., 236; *Bulkeley vs. Keteltas*, 4 Sandf., 450; *Sherman vs. Wakeman*, 11 Barb.,

254; *Decker vs. Mathews*, 2 Kern., 313 (320); *Williams vs. Birch*, 6 Bosw., 299.

When charging, pursuant to a request made by one party, it will be proper for the judge to call the attention of the jury, to any conflicting testimony adduced by the other. *Cheesebrough vs. Taylor*, 12 Abb., 227.

A request to charge must be made in such a form, that the judge may properly charge in the terms of the request, without qualification, or his refusal to do so will not be ground of error. *Bagley vs. Smith*, 6 Seld., 489 (499); 19 How., 1; *Carpenter vs. Stilwell*, 1 Kern., 61; reversing *same case*, 12 Barb., 128; *Winchell vs. Hicks*, 18 N. Y., 558 (565); *Kiernan vs. Rocheleau*, 6 Bosw., 148.

And, if a request contain more than one proposition, and any part of it be untenable, the judge may properly refuse to charge, though a portion of the propositions be sound. *Magee vs. Badger*, 30 Barb., 246. So also, if it be incorrect, in fact, or in law. *Gardner vs. Clark*, 17 Barb., 538; *Lyon vs. Marshall*, 11 Barb., 241. Nor, although a hypothetical case may be submitted, is the judge bound to charge upon one, which there is no evidence to support. *Mayor of New York vs. Price*, 5 Sandf., 542; *Kiernan vs. Rocheleau*, 6 Bosw., 148; *Rushmore vs. Hall*, 12 Abb., 420.

But, if the proposition be clearly right, a refusal or omission to charge accordingly, will be error. See *Gale vs. Wells*, 12 Barb., 84; *Underhill vs. New York and Harlem Railroad Company*, 21 Barb., 489.

As to the presumption in favor of the charge of a judge, where error is not affirmatively shown, see *Parsons vs. Brown*, 15 Barb., 590.

(g.) RETIREMENT OF JURY.

Section 261 gives express power to submit written questions to the jury, on their retirement, to be passed upon by them, and such is the frequent practice.

They may also be allowed to take with them, any calculations or documentary evidence which may have been put in, by consent of the parties, or by express direction of the judge. See as to the right of the judge to allow them to take with them, a deposition which has been read upon the trial. *Howland vs. Willetts*, 5 Seld., 170.

They may be recalled by the judge, either for the purpose of submitting additional propositions to them, if necessary, or at their own request, in case they require to be further instructed upon any particular point. See, as to the course to be pursued, on the judge's answer to inquiries so made, *Stroud vs. Frith*, 11 Barb., 300.

But, except in this manner, they are bound not to hold any communication whatever, with any other person, on the subject of their verdict, or of the evidence before them.

In strictness, they ought not to be allowed to separate, from the time they are sworn, until the delivery of their verdict. Where the trial is long, however, this rule is very generally dispensed with by consent, and they are allowed to return to their own residences each night, under strict charge not to communicate with third parties.

And, after they have retired to consider of their verdict, the rule is generally enforced with strictness. Power to find a sealed verdict is, however, frequently accorded to them, after which they are allowed to separate, attending the ensuing morning, and delivering it to the judge, by whom it is opened. Unless this liberty is given, they must wait until the court is ready to receive their finding. Their separation, without the consent of the judge, is not, however, ground *per se* for a new trial, unless it be shown that they have been guilty of other misconduct, so as to prejudice the parties. *Anthony vs. Smith*, 4 Bosw., 503; *Green vs. Bliss*, 12 How., 428.

As to the duty of the judge, in relation to his conduct toward the jury, and the length of time for which it will be proper to keep them together, in the event of their inability to agree, see *Green vs. Telfair*, 11 How., 260.

If they fail in coming to any verdict whatever, within a reasonable time, they may then be discharged. The effect of this is to render the trial which has taken place a practical nullity, and the cause will come on for a retrial, either immediately, or afterwards in its order.

If the jury have been guilty of any misconduct, or have been approached in any manner which might have influenced their verdict, it will be liable to be set aside. *Nesmith vs. Clinton Fire Insurance Company*, 8 Abb., 141. So also, if they be intermeddled with in any manner during the trial. *Reynolds vs. Champlain Transportation Company*, 9 How., 7.

But, where the irregularity has been trifling, and not really calculated to influence their verdict, it has, in some cases, been disregarded. *Green vs. Bliss*, 12 How., 428. See also, as to criminal cases, *The People vs. Hartung*, 17 How., 85; 8 Abb., 132; *The People vs. Wilson*, 8 Abb., 137.

The fact that a juror attempted to communicate the verdict to the party in whose favor it had been rendered, before it was announced in court, was held not to be sufficient ground for setting it aside, in *Fash vs. Byrnes*, 14 Abb., 12.

The questions as to verdict will be considered in the next section but one, that intermediate being devoted to the consideration of the province of the court and of the jury respectively, on questions arising during the trial.

§ 228. *Province of Court and Jury.*

The general rule on this subject is plain and simple, being this: All matters of law rest with the court, and matters of fact with the jury, to decide; the latter acting under the direction of the judge, in relation to questions of law, bearing upon the facts brought before them.

Simple as this rule is, it has, however, been made the subject of abundant discussion, as regards the application of its principles in detail.

The general effect of that discussion may be summed up thus:

Where the facts, either as regards the whole case or any specific issue, are undisputed or indisputable, the decision rests with the judge.

When, on the contrary, any portion of such facts is contested, the question rests with the jury, and cannot be withdrawn from them. But, in rendering their verdict, they are bound to follow the directions of the judge, as to any legal rights, arising out of a given state of facts, which by that verdict is found or established to exist. Still, where the question is entirely a question of fact, its decision rests exclusively with the jury.

It may accordingly be convenient to apportion the decisions, as cited, under three corresponding heads, noticing,

1. Questions of law, belonging solely to the court.
2. Mixed questions.
3. Questions resting solely with the jury.

(a.) 1. QUESTIONS FOR THE COURT.

Where the plaintiff has clearly failed to prove his case, the defendant is entitled, as of right, to a nonsuit, and it will be error to allow the case to go to the jury. *Carpenter vs. Smith*, 10 Barb., 663; *Haring vs. New York and Erie Railroad Company*, 13 Barb., 9; *Fox vs. Decker*, 3 E. D. Smith, 150; *Beirne vs. Dord*, 4 Duer, 69; *Ely vs. Cook*, 2 Hilt., 406; 9 Abb., 366; *Bidwell vs. Lament*, 17 How., 357; *Dominick vs. Michael*, 4 Sandf., 374; *Sheldon vs. Hudson River Railroad Company*, 29 Barb., 226. See also *Winchell vs. Hicks*, 18 N. Y., 558 (565); *Cuyler vs. McCartney*, 33 Barb., 165. But, unless the question be perfectly clear, it will be error to nonsuit. See *Rider vs. Pond*, 19 N. Y., 262.

A matter which rests in inference of law, arising from undisputed facts, rests wholly with the judge, and his refusal to submit it to the jury will be correct. *Agawam Bank vs. Strever*, 18 N. Y., 502; *Holbrook vs. Wilson*, 4 Bosw., 64; *Milbank vs. Dennistown*, 21 N. Y., 386; 19 How., 126.

And his leaving such a question to them may be error. *Gale vs.*

Wells, 12 Barb., 84; *Underhill vs. Crawford*, 29 Barb., 664; 18 How., 112; *Adams vs. Leland*, 5 Bosw., 411.

The construction of a contract or instrument, when its terms and intent are fully proved, rests with the court. *Stacy vs. Graham*, 3 Duer, 444; affirmed, 4 Kern., 492; *Thomas vs. Dickinson*, 23 Barb., 431; *Chafee vs. Cattaraugus County Mutual Insurance Company*, 18 N. Y., 376; *Hough vs. Brown*, 19 N. Y., 111 (113); *Chapin vs. Potter*, 1 Hilt., 366. So also, as to the sufficiency of a document, where there is no conflict of evidence as to its terms. *Cook vs. Litchfield*, 2 Bosw., 137; *Same case*, 5 Sandf., 330; 10 L. O., 330. Whether a regulation is or is not reasonable, is likewise a question for the judge, and not for the jury. *Vedder vs. Fellows*, 20 N. Y., 126.

Questions as to the competency of a witness, belong to the court. *Prall vs. Hinchman*, 6 Duer, 351.

So, likewise, as to whether a proved publication, unprivileged and incapable of an innocent construction, is or is not a libel; the statute (1 R. S., 94, § 21) providing that in prosecutions for libel, the jury have the right to determine the law and the fact, being applicable to criminal proceedings only. *Hunt vs. Bennett*, 19 N. Y., 173; *Lewis vs. Chapman*, 16 N. Y., 369 (371); *Matthews vs. Beach*, 5 Sandf., 256 (265); *Green vs. Telfair*, 20 Barb., 11. See also *Littlejohn vs. Greeley*, 13 Abb., 41.

So also as to the existence of probable cause for a prosecution, upon a given state of facts. *Carpenter vs. Sheldon*, 5 Sandf., 77; *Bulkeley vs. Smith*, 2 Duer, 261; 11 L. O., 300; *Besson vs. Southard*, 6 Seld., 236; *Garrison vs. Pearce*, 3 E. D. Smith, 255; *Gordon vs. Upham*, 4 E. D. Smith, 9; *Waldheim vs. Sichel*, 1 Hilt., 45; *Bulkeley vs. Keteltas*, 2 Seld., 384.

The existence of fraud, on an undisputed state of facts, and where there is no doubt as to the intent of the parties, is a question of law. So held, as to a chattel mortgage, fraudulent upon its face, notwithstanding the provision at 2 R. S., 137, section 4. *Edgell vs. Hart*, 5 Seld., 213. See also *Spies vs. Boyd*, 1 E. D. Smith, 445; *Griswold vs. Sheldon*, 4 Comst., 581. But, where there is any conflict of evidence, the case must go to the jury. *Kellogg vs. Wilkie*, 23 How., 233.

It is also a question of law, as to whether the evidence does or does not, in any respect, tend to make out fraud. *Gage vs. Parker*, 25 Barb., 141; *Erwin vs. Voorhies*, 26 Barb., 127. And, where there is no evidence to sustain a charge or defence, it is error to let it go to the jury. *Fay vs. Grimstead*, 10 Barb., 321. And a refusal to do so will be sustained. *The People vs. Cook*, 4 Seld., 67.

Alimony is a question, which it is neither necessary nor proper to submit to the jury. *Forrest vs. Forrest*, 6 Duer, 102; 3 Abb., 144.

Where there is undisputed evidence as to the existence of a given state of facts, importing want of care, the question as to whether they do or do not constitute negligence, has been held to be a question of law. *Dascomb vs. Buffalo and State Line Railroad Company*, 27 Barb., 221; *Mackey vs. New York Central Railroad Company*, 27 Barb., 528; *Brooks vs. Buffalo and Niagara Falls Railroad Company*, 27 Barb., 532, note; affirming *same case*, 25 Barb., 600; *Brendell vs. Buffalo and State Line Railroad Company*, 27 Barb., 534, note.

And even where there was conflicting evidence, it has been held that the judge is not bound to submit the question to the jury, where the fact was conclusively proved, by the defendant's own witnesses. *Moore vs. Westervelt*, 1 Bosw., 357. See *same case*, 2 Duer, 59.

It is a question of law, as to whether a proved state of facts does or does not constitute a river a public highway. *Morgan vs. King*, 18 Barb., 277. So likewise, as to whether they do or do not constitute an adverse possession. *Bowie vs. Brahe*, 3 Duer, 35.

Whether, on a given state of facts, a transaction does or does not constitute a stated account, has also been held to be a question of law. *Lockwood vs. Thorne*, 1 Kern., 170. See however subsequent report in *same case*, 18 N. Y., 285.

Where a transaction is proved to be illegal, it will be error on the part of the judge to submit it to the jury, upon any hypothetical supposition of its validity. *Storey vs. Brennan*, 15 N. Y., 524.

(b.) 2. MIXED QUESTIONS.

Where, in any of the foregoing, or any other cases, any portion of the facts necessary to sustain the conclusion on which a verdict is to be founded, are disputed, and there is conflicting evidence, the case must, on the contrary, go to the jury, and it will be error to withdraw it from them. But, in submitting it, the judge may, and should, accompany it with proper directions, as to the verdict which it will be their duty to render, as the result of their decision on the issue of fact submitted to them.

See, as to the general principle that a case must go to the jury under these circumstances, and that, if there be any deficiency in the evidence, it will be error to give them a positive instruction, *Outwater vs. Nelson*, 20 Barb., 29.

See also, as to the general principle that, if there be any conflict of evidence as to the existence of alleged facts, the case must go to the jury, *Cook vs. Litchfield*, 2 Bosw., 137; *Galen vs. Brown*, 22 N. Y., 37; *Graham vs. Harrower*, 18 How., 144; *Gates vs. Brower*, 5 Seld., 205; *Thompson vs. Dickerson*, 12 Barb., 108; *Russill vs. Cronkhite*, 32 Barb., 282; *Borrodaile vs. Leek*, 9 Barb., 611; *Kellogg vs. Wilkie*,

23 How., 233. See, however, where the case is patent on the party's own evidence, *Moore vs. Westervelt*, 1 Bosw., 357, before cited.

The following have been decided to be questions which it was necessary to submit to the jury, where there was conflicting or deficient evidence :

Whether usury has or has not been taken in fact. *Carland vs. Day*, 4 E. D. Smith, 251; *Elwell vs. Chamberlain*, 2 Bosw., 230; *Thomas vs. Murray*, 34 Barb., 157; *Robbins vs. Dillaye*, 33 Barb., 77; *Ayrault vs. Chamberlain*, 33 Barb., 229.

The question of fraudulent intent in execution of a mortgage or assignment of personal property, where fraud is not patent upon its face. *Gardner vs. McEwen*, 19 N. Y., 123; *Thompson vs. Blanchard*, 3 Comst., 335; *Griswold vs. Sheldon*, 4 Comst., 581.

In *Bidwell vs. Lament*, 17 How., 357, it was held that the objection may be waived, by an omission to request a submission. See generally, as to fraud being a question for a jury, on conflicting evidence, *Erwin vs. Voorhies*, 26 Barb., 127; *Kellogg vs. Wilkie*, 23 How., 233. Also all cases sounding in tort should, it has been held, be tried by a jury. *Lewis vs. Varnum*, 12 Abb., 305.

But, where fraud is clear upon the evidence, the judge is bound to give proper instructions to the jury, and if against that evidence, their verdict will be set aside. *Marston vs. Vultee*, 12 Abb., 143.

The applicability of a libel, and the question of malice, where it is ambiguous, and will admit of an innocent construction, have also been held to be questions which must go to the jury. *Lewis vs. Chapman*, 16 N. Y., 369 (371); *Fry vs. Bennett*, 3 Bosw., 200; *Green vs. Telfair*, 20 Barb., 11.

The terms of a contract, where doubtful, and the intention of the parties making it. *Chapin vs. Potter*, 1 Hilt., 366; *Pendleton vs. Empire Stone Dressing Company*, 19 N. Y., 13; *Gardner vs. Clark*, 17 Barb., 538; *Moore vs. Pentz*, 5 Sandf., 664; *Bridgeport City Bank vs. Empire Stone Dressing Company*, 30 Barb., 421; 19 How., 51.

So likewise, as to questions of fact, bearing upon the manner in which it is made or evidenced. *Pringle vs. Chambers*, 1 Abb., 58; *Coons vs. Chambers*, 1 Abb., 165; *Thurman vs. Wells*, 18 Barb., 500; *Genter vs. Morrison*, 31 Barb., 155.

The question of negligence, when the facts constituting it, or any portion, are contested or doubtful. *Johnson vs. Hudson River Railroad Company*, 20 N. Y., 65; affirming same case, 5 Duer, 21; *Vanderpool vs. Husson*, 28 Barb., 196; *Brown vs. New York Central Railroad Company*, 31 Barb., 385; *Purvis vs. Coleman*, 1 Bosw., 321; *Bernhardt vs. Rensselaer and Saratoga Railroad Company*, 32 Barb., 165; 19 How., 199; affirmed, 23 How., 166; *McGrath vs. Hudson River*

Railroad Company, 32 Barb., 144; 19 How., 211; *Ernst vs. The Same*, 32 Barb., 159; 19 How., 205; *Clark vs. Eighth Avenue Railroad Company*, 32 Barb., 657; *Morrison vs. New York and New Haven Railroad Company*, 32 Barb., 568; *Brown vs. Buffalo and State Line Railroad Company*, 22 N. Y., 191 (195); *Fero vs. The Same*, 22 N. Y., 209. So also, as to the removal of a presumption of negligence, *Brehon vs. Great Western Railway Company*, 34 Barb., 256.

The question of probable cause, so far as regards the existence of the facts from which it is to be inferred, but not as to their effect, *Bulkeley vs. Keteltas*, 2 Seld., 384; reversing *same case*, 4 Sandf., 450; *Bulkeley vs. Smith*, 2 Duer, 261; 11 L. O., 300; *Garrison vs. Pearce*, 3 E. D. Smith, 255; *Besson vs. Southard*, 6 Seld., 236. See, however, *Grinnell vs. Stewart*, 32 Barb., 544; 20 How., 478; 12 Abb., 220.

As to whether an obstruction or erection does or does not constitute a nuisance, *Morgan vs. King*, 18 Barb., 277; *St. John vs. The Mayor of New York*, 6 Duer, 315; 13 How., 527.

In relation to the instructions which should be given to the jury, in relation to a submission of this nature, the following cases may also be noticed:

The court cannot be required, when charging them, to express its opinion upon a question of fact. *Moore vs. Meacham*, 6 Seld., 207. But such an expression of opinion, or a comment on the evidence, is not error, where proper rules are given to the jury. *Hunt vs. Bennett*, 4 E. D. Smith, 647; *Bruce vs. Westervelt*, 2 E. D. Smith, 440; *Doros vs. Rush*, 28 Barb., 157.

The judge is not justified in submitting to the jury a hypothetical case, unwarranted by the evidence. *Storey vs. Brennan*, 15 N. Y., 524. Or to submit to them a question, where their verdict, if contrary to his views, would be against law and evidence. *Godin vs. Bank of Commonwealth*, 6 Duer, 76. Nor is he bound to charge them upon a mere abstract proposition. *Bedell vs. Commercial Mutual Insurance Company*, 3 Bosw., 147.

And he may submit a question to them generally, without drawing minute distinctions. *Pendleton vs. Empire Stone Dressing Company*, 19 N. Y., 13.

See generally, as to the right of the judge to instruct the jury as to what verdict they should properly find, *Frost vs. McCargar*, 31 Barb., 617; *Green vs. Hudson River Railroad Company*, 32 Barb., 25.

(c.) 3. QUESTIONS RESTING WITH JURY.

The assessment of damages rests, as a general rule, with the jury only.

But the court may and should instruct them, as to the correct measure

of damages, as constituting the rule on which they are to assess them, and is bound to do so on correct principles. *Thomas vs. Dickinson*, 2 Kern., 364; *Green vs. Hudson River Railroad Company*, 32 Barb., 25.

And it may also instruct them to apportion damages paid in lieu of an indemnity, and to find the different amounts applicable to specific items. *Partridge vs. Gilbert*, 3 Duer, 184.

But damages against joint tortfeasors cannot be severed. If attempted, the plaintiff is entitled to judgment against all, for the largest amount found against any, a *remittitur* as against the rest being entered as a matter of form. *O'Shea vs. Kirker*, 8 Abb., 69; 4 Bosw., 120; *Beal vs. Finch*, 1 Kern., 128; *Bulkeley vs. Smith*, 1 Duer, 643. The adverse indication of opinion in *Bulkeley vs. Smith*, 2 Duer, 261 (271); 11 L. O., 300, must be considered as overruled. In *Turner vs. McCarthy*, 4 E. D. Smith, 247, a verdict of this nature was held to be unsustainable, against either defendant in trespass.

See, as to the power of the jury to give vindictive damages, when admissible, *Fry vs. Bennett*, 4 Duer, 247; 1 Abb., 289; *Same case*, 3 Bosw., 200. As to the rule of damages in libel, see *Littlejohn vs. Greeley*, 13 Abb., 41. See, however, as to seduction, *Knight vs. Wilcox*, 4 Kern., 413; reversing *same case*, 18 Barb., 212. In relation to nominal damages, see *Conger vs. Weaver*, 20 N. Y., 140.

Whether, when a breach of promise of marriage has been proved, there has not also been a refusal, is a proper question to be submitted to them. *Hubbard vs. Bonesteel*, 16 Barb., 360.

So also, as to whether a payment was or was not in full of all claims. *Pierce vs. Pierce*, 25 Barb., 243. Or whether the use of a stream enjoyed in common, has or has not been reasonable. *Thomas vs. Brackney*, 17 Barb., 654.

But, in their finding, they cannot disregard positive testimony, and, if they assume to do so, their verdict will not stand. *Dolsen vs. Arnold*, 10 How., 528; *Marston vs. Vultee*, 12 Abb., 143.

Although error may have been committed in not submitting a question to them, still, if it be clearly apparent, that, if submitted, they must have come to the same result at which the court has arrived, that error may be disregarded. *Miller vs. Eagle Life and Health Insurance Company*, 2 E. D. Smith, 268. And, where a question has been submitted, which ought to have been passed upon by the court, the same rule will be applied. *Cook vs. Litchfield*, 2 Bosw., 137.

Where separate defences have been put in, the court may require the jury to render a separate verdict upon each. *Gardner vs. Clark*, 21 N. Y., 399.

§ 229. *Verdict and its Incidents.*

The different forms of verdict are clearly prescribed, by section 260 to 263 inclusive, and also in section 265.

It may be either—

1. A general verdict on all the issues.
2. Separate general verdicts upon individual issues.
3. A general verdict, with special findings, in addition, upon questions of fact.
4. A special verdict on all the issues.
5. A special verdict upon individual issues.
6. A verdict, subject to the opinion of the court.

The last is a matter which does not rest in their discretion, but as to which they are bound to obey the direction of the court. So, likewise, as to an instruction to make special findings of fact, in connection with a general verdict, and as to rendering a special verdict in certain cases.

But, in actions for the recovery of money only, or of specific real property, the rendering of a general or special verdict, rests in their discretion.

The general rule is for the jury to render their verdict to the judge in the presence of the parties. That presence is not, however, absolutely essential, nor need the plaintiff be called, when they return to the bar to deliver it (rule 31). But the judge is the only party who can properly receive it, unless a sealed verdict has been permitted.

When that is the case, the sealed verdict is brought in by the foreman, to the court, on the following morning, and handed to the judge. It must properly be signed by all, but the irregularity, if not objected to, will be waived. *Green vs. Bliss*, 12 How., 428.

Either party has the right, on the render of the verdict, whether oral or sealed, to poll the jury, and inquire of each jurymen whether it is his verdict. In strictness, the jurymen must give a direct answer to the question; but the irregularity of doing so, in an indirect form, is likewise an objection that must be taken at the time. *Same case*. The question must be put in the above form, and cannot be so in any other. *Labar vs. Koplin*, 4 Comst., 547.

(a.) CORRECTIONS OR ADDITIONS, WHERE ADMISSIBLE.

If the verdict be returned in open court, and in the presence of counsel, and the jury, as is often the case, have fallen into manifest error, the present is the proper period for its correction. By a recon-

sideration of such errors, under the direction of the judge, much subsequent trouble, and possibly the necessity of a new trial, may be obviated. This observation of course assumes, that the errors in question have arisen, from a manifest misapprehension, on the part of the jury, as to the extent of their functions, or as to the real nature of the questions submitted to them.

If any purely technical errors have been committed, the defect may be even cured by subsequent amendment, when there is no doubt of their real intention. *Burhaus vs. Tibbets*, 7 How., 21; *Williams vs. Willis*, 7 Abb., 90.

But, if there is the slightest doubt upon the subject, or upon what transpires at the trial, none should be allowed. *Burhaus vs. Tibbets*, *supra*.

And it cannot be changed in substance, however erroneous it may be. *United States Trust Company vs. Harris*, 2 Bosw., 75.

(b.) GENERAL CHARACTERISTICS OF VERDICT.

A verdict, when rendered, cures all minor defects in the pleadings and proceedings, not previously impeached. *Dias vs. Short*, 16 How., 322 (324); *Brown vs. Harmon*, 21 Barb., 508.

The fact that the jury have found for either party, on a special issue, the facts being admitted, does not render it a special verdict, but, taken with the admission, it entitles the party to judgment, without further application to the court. *Williams vs. Willis*, 7 Abb., 90. Nor will a mere finding of the jury upon special questions, when incomplete in its nature, give the verdict the character of a special verdict. *McCrackan vs. Cholicell*, 4 Seld., 133; *Manning vs. Monaghan*, 23 N. Y., 539.

A special verdict need not be found in the precise terms in which it ultimately comes up for further adjudication, but its form may be subsequently settled (rule 34). All important questions of fact, must, however, be regularly submitted to the jury, and passed upon by them at the time, and their finding must be reduced into writing, filed with the clerk, and entered upon the minutes.

A special verdict need not contain facts admitted by the pleadings. All facts, however, necessary to enable the court to render a proper judgment, must be found in terms, and cannot be supplied by inference, or examination into the evidence. The special verdict should find all facts requisite to enable the court to give the proper judgment, upon looking at the pleadings and verdict alone. *Eiseman vs. Swan*, 6 Bosw., 668; *Williams vs. Willis*, 7 Abb., 90; *Barto vs. Himro*, 4 Seld., 483; *Sisson vs. Barrett*, 2 Comst., 406. See hereafter, as to the proper form of such verdict, in connection with the subject of *New Trial*.

If a special verdict only be taken, and that verdict does not dispose

of all the material issues, the court, at general term, will not entertain the case, but will order a new trial. *Eiseman vs. Swan*, 6 Bosw., 668.

If no general verdict be rendered, but merely special findings, not covering the whole case, it will be a mistrial. Such special findings, standing alone, are not sufficient to constitute it a special verdict. *Manning vs. Monaghan*, 23 N. Y., 539.

A general verdict is usually given orally, but, where particular questions of fact are submitted to the jury, their finding must be in writing and filed with the clerk, and entered on the minutes, as above.

As to the right of the court to submit such questions, and to control the requests of the parties, as to the nature of those which are to be passed upon, see *Partridge vs. Gilbert*, 3 Duer, 184 (200).

If the special findings be in favor of the defendant, and therefore inconsistent with a general assessment of damages, claimed by the plaintiff, judgment cannot be rendered. *Congreve vs. Morgan*, 4 Duer, 439 (448). See also *Eiseman vs. Swan*, 6 Bosw., 668.

The power given by section 261, to find a general or special verdict, in cases for the recovery of specific real property, is an evident modification of the provisions of the Revised Statutes, as to the verdict in ejectment, in which description of action, a verdict can now be taken, adapted to any peculiar state of the title. *Wood vs. Staniels*, 3 C. R., 152.

In replevin against several defendants, the jury may find, as against one or more, and need only assess the damages generally. *Woodburn vs. Chamberlin*, 17 Barb., 446. And, where the value of the property is not contested, a general verdict will be proper, and that value need not be specifically assessed. *Archer vs. Boudinet*, 1 C. R. (N. S.), 372.

In an action of this nature, the plaintiff, if he recover less than fifty dollars damages, should be careful to ask for an assessment of the value of the property recovered, with a view to the purposes of costs, and in order to bring the case within the following clause, forming part of section 304 :

And, in an action to recover the possession of personal property, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages, unless he recovers also property, the value of which, with the damages, amounts to fifty dollars. Such value must be determined by the jury, court, or referee, by whom the action is tried.

A verdict, subject to the opinion of the court, may be taken for either party. *Cobb vs. Cornish*, *infra*. It is, however, only proper in cases where, upon the trial, there is no real contest of fact. If there be any conflict of evidence, a verdict of this nature cannot properly be rendered, nor can one be taken, in connection with exceptions raised at the trial. If attempted, and a judgment inconsistent with the verdict be

awarded, it will be a mistrial. *Gilbert vs. Beach*, 16 N. Y., 606; *Cobb vs. Cornish*, 16 N. Y., 602; 15 How., 409; 6 Abb., 129; *Clark vs. Dearborn*, 6 Duer, 309; *Hull vs. Wheeler*, 7 Abb., 411; *Bangs vs. Palmer*, 16 How., 542; *Havemeyer vs. Cunningham*, 8 Abb., 1; *Sackett vs. Spencer*, 29 Barb., 180; *Sharp vs. Whipple*, 3 Bosw., 474 (477); *Purvis vs. Coleman*, 1 Bosw., 321; *Bell vs. Shibley*, 33 Barb., 610. See also, as to such a verdict, in connection with special findings not disposing of the whole case, *Eiseman vs. Swan*, 6 Bosw., 668.

But the mere taking of a verdict in this form may not amount to a mistrial, when judgment is ultimately rendered according to the verdict, after hearing the exceptions of the unsuccessful party. *City Bank of Brooklyn vs. McChesney*, 20 N. Y., 240.

A verdict of this nature must be a complete disposition of the case. It cannot be rendered for an assumed sum, to be afterwards settled by a reference, if the court at general term sustain the right of the plaintiff. *Buchanan vs. Cheeseborough*, 5 Duer, 238.

If a general verdict of this nature be taken, in connection with special findings, the whole case must be taken as admitted. The defendant cannot claim, on the hearing, that the issues of fact were not found in favor of the plaintiff. The verdict is, on the contrary, conclusive, except so far as the special finding may control it. *Sharp vs. Whipple*, 3 Bosw., 474; *Purvis vs. Coleman*, 1 Bosw., 321.

And, when such a verdict has been taken, it has been held that the court will draw in support of it, every inference which the jury would have been justified in drawing. *Williams vs. Insurance Company of North America*, 1 Hilt., 345.

And any verdict of a jury, on a question of fact duly submitted to them, is, as a general rule, conclusive, if there be evidence to support it, even although it be manifestly unsatisfactory. The principle is elementary, and scarcely needs the citation of cases to support it. The following may, however, be noticed as some of those in which it has been sustained: See *Bennett vs. Scutt*, 18 Barb., 347; *Adsit vs. Wilson*, 7 How., 64; *Kasson vs. Mills*, 8 How., 377; *Mann vs. Witbeck*, 17 Barb., 388 (390); *Needles vs. Howard*, 1 E. D. Smith, 54; *Heim vs. Wolf*, *ibid.*, 70; *Catlin vs. Grote*, 4 E. D. Smith, 296 (305); *Coddington vs. Carnley*, 2 Hilt., 528; *Gardner vs. Ryerson*, 19 How., 108; *Anonymous*, 3 Abb., 102 (103); *Conkling vs. Thomson*, 29 Barb., 218; *Williams vs. Vanderbilt*, 29 Barb., 491; *Mackey vs. New York Central Railroad Company*, 27 Barb., 528; *Bronson vs. Wiman*, 4 Seld., 182 (189); *Erben vs. Lorillard*, 23 Barb., 82; *Wilcox vs. Green*, 23 Barb., 639; *Hart vs. Potter*, 4 Duer, 458; *French vs. White*, 5 Duer, 254; *Whiting vs. Otis*, 1 Bosw., 420; *Ward vs. Forrest*, 20 How., 465; *Gould vs. Rumsey*, 21 How., 97; *Heritage vs. Hall*, 33 Barb., 347.

See, however, as to a verdict manifestly against evidence, *Harris vs. Panama Railroad Company*, 5 Bosw., 312; *Heritage vs. Hall*, *supra*; *Marston vs. Vultee*, 12 Abb., 143. See also hereafter, under the head of *New Trial*.

(c.) PROCEEDINGS ON VERDICT BEING RENDERED.

When the verdict is sought to be set aside for errors of fact, as well as of law, it will not be expedient to ask that any exceptions be heard at the general term, in the first instance, under the power conferred by section 265. That course is only proper, when the case comes up on points of law only. A case, on which questions of fact are raised, cannot be so heard. *Cobb vs. Cornish*, 16 N. Y., 602 (604); *Gilbert vs. Beach*, *ibid.*, 606 (608).

On such a hearing, the court may render such judgment as ought to have been given, notwithstanding irregular action in the court below. *United States Trust Company vs. Harris*, 2 Bosw., 75.

The judge at circuit cannot order exceptions to be heard at the general term, and also direct the entry of judgment. If he make the former order, he must direct such entry to be suspended. *Roosa vs. Snyder*, 12 How., 285.

As to the duty of the judge and the clerk, on the coming in of the verdict, in relation to the entry of judgment, and the power of the former, in case of doubt, to order the case to be reserved for argument or further consideration, see *Van Valen vs. Lapham*, 13 How., 240; 5 Duer, 689.

On the entry of the verdict (as to which see section 264, above cited), the court and jury fees must be paid by the prevailing party. The results of that verdict remain for future consideration. Where, on the delivery of the verdict, it is manifest that a new trial will be moved for, or an appeal taken, a stay of proceedings may at once be applied for, whilst in court, and may probably be granted.

This step, if taken at once, will enable the moving party to obtain, upon the spot, whatever time he may reasonably require for the preparation of his case, or exceptions on such motion or appeal, without putting him to the necessity of a special application on notice on the one hand, or, on the other, from being fettered by the inconvenience of the twenty days' limitation under section 401, incident to an *ex parte* order, if resorted to.

CHAPTER IV.

TRIAL BY THE COURT.

§ 230. *Statutory and Other Provisions.*

THE following cases are triable by the court :

Issues of law (section 253).

All issues which are not triable by a jury (section 254).

And any issues whatever, as to which trial by a jury has been waived.

Trial by the court is specially provided for by chapter IV., title VIII., part II., of the Code.

The mode in which such waiver may take place, is defined by section 266, already cited in book IX., chapter I., but which it will be convenient to repeat :

§ 266. (221.) Trial by jury may be waived by the several parties to an issue of fact, in actions on contract ; and, with the assent of the court, in other actions, in the manner following :

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent in open court, entered in the minutes.

Section 267 provides thus, as to the decision of such an issue, when so tried :

§ 267. (222.) Upon the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found and the conclusions of law, separately ; and, upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the clerk, within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly.

This section dates, as it stands, from 1860. From 1849 down to that year it omitted to make provision as to the form of the decision. In 1848, the form was provided for, but less in detail.

Section 268 commences as follows :

§ 268. (223.) For the purpose of an appeal, either party may except to a decision on a matter of law arising upon such trial, within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury.

This clause was altered as it stands in 1851. In the previous years, it was less specific in its terms.

The remainder of the section provides as to the ulterior proceedings for obtaining a review on such exceptions, when taken, and will be cited below under the head of *New Trial*.

Section 269 provides in relation to the entry of judgment consequent on the decision of an issue of law, and will be considered hereafter, in connection with that subject.

Both issues of law and issues of fact must be tried before a single judge in the first instance, generally at special term, but with power to entertain them at the circuit. See section 255. In the Superior Court of Buffalo, however, the former are to be heard at general term. See chapter 96 of 1854, section 23, p. 227.

Rule 28 specially provides that "issues to be tried by the court shall be tried at the circuit or special term."

The papers for the court, upon an issue of law, must be furnished by the party demurring. Rule 42.

It will be convenient to consider the two modes of trial separately, treating that of issues of law in the first instance, and reserving for the close, such general observations as are applicable to both in common.

§ 231. *Trial of Issue of Law.*

An issue of this nature must be first tried, unless the court otherwise direct (section 251).

A demurrer to complaint must, of course, stand or fall by the sufficiency of the pleading objected to. On a demurrer to answer or reply, it has been held, however, that a party, whose pleading is demurred to, may go behind it, and attack the previous pleading of his adversary, when that pleading is defective in substance; and, if he succeed in establishing a defect of this description, he may be entitled to judgment in his favor, notwithstanding the deficiencies of his own. *Stoddard vs. Onondaga Annual Conference*, 12 Barb., 573; *Fry vs. Bennett*, 5 Sandf., 54; 9 L. O., 330; 1 C. R. (N. S.), 238; *Schwat vs. Furniss*, 4 Sandf., 704; 1 C. R. (N. S.), 342; *Burnham vs. De Bevoise*, 8 How., 159. The defect, however, to be so impeachable, must be substantial, and such as would have entitled the objecting party to judgment, had that objection been originally taken in due form.

In determining on a demurrer to part of an answer, the court will take the whole pleading into consideration, and if, taken as a whole, it is sufficient, the demurrer will be overruled. *Beach vs. Burdell*, 2 Duer, 327.

On the other hand, a technical inadvertence in stating grounds of

demurrer may probably be disregarded. *President of Connecticut Bank vs. Smith*, 17 How., 487.

Since the amendment of 1860, a written finding, stating the conclusion of law arrived at by the judge, is necessary in all cases. Previously, a direction to the clerk would have sufficed.

(a.) LEAVE TO AMEND.

If a demurrer be allowed to a portion of a pleading, that portion falls of course, unless leave to amend be granted, but usually, the decision will only involve a curtailment of the pleading objected to, instead of entitling the prevailing party to a positive entry of judgment.

But when a demurrer to the whole of a pleading is allowed, the entry of judgment for the demurring party follows, as of course, unless leave to amend be given by the court, or applied for and obtained by counsel. This application will be a matter of absolute necessity, unless it be meant to abandon the litigation altogether, or to rest the case exclusively on an appeal from the allowance of the demurrer, without raising any contestation as to the facts.

If delayed until the argument of such an appeal, it may very possibly be refused. See *Ketchum vs. Zerega*, 1 E. D. Smith, 553 (562).

The application for the above purpose may be made at the time the decision is pronounced, or afterwards, on special motion or order to show cause: the former is the more usual course. If the application be made *bonâ fide*, the court will rarely refuse it; but it is competent to the adverse party to oppose, and, where the pleading is evidently of a frivolous nature, that opposition may possibly prevail.

Where, on the other hand, the demurrer fails, it will not be proper to grant leave to amend, to the party whose pleading is demurred to, as part of the decision. It should be made the subject of a separate application. *Lord vs. Vreeland*, 13 Abb., 195.

The following special provision is made by the last clause of section 172, on the subject of a demurrer for misjoinder of causes of action:

If the demurrer be allowed for the cause mentioned in the fifth subdivision of section 144, the court may, in its discretion, and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

In these cases, a direction to this effect will of course be pressed for by the party on whom it is incumbent to amend, and he will, of course, see that it is duly incorporated in the order.

Leave to amend may also be granted, on overruling a demurrer, not involving the entry of judgment, and such leave may be made to involve the pleadings of both parties. *Vide Rider vs. Pond*, 12 L. O., 278.

(b.) LEAVE TO PLEAD OVER.

Where, on the contrary, a demurrer has been overruled, leave for this purpose should be applied for.

Section 172 provides thus upon the subject :

After the decision of a demurrer, either at a general or special term, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over, on such terms as may be just.

Where the demurrer has been clearly frivolous or untenable, such leave may be refused by the court. But, as a general rule, when the case presents any question on the merits, it will be given.

The imposition of terms will, however, be usual. That of payment of the costs of the demurrer will be almost universal, whether the leave be to plead over or to amend, and they should always be asked for. See *Getty vs. Hudson River Railroad Company*, 8 How., 177.

It is also competent for the court to impose conditions, on granting leave to defend, as, for instance, that the statute of limitations should not be pleaded ; though, if then omitted, it will be too late to make the same demand at a later period. The court will not, however, be disposed to take the same course with regard to the defence of usury. *Grant vs. McCaughin*, 4 How., 216.

But if leave to plead over be refused, or be not applied for, the adverse party becomes entitled to sign judgment as of course.

(c.) COURSE ON DECISION.

If leave to amend, or to plead over, be granted, the decision of the judge should be entered on an order, and a copy served upon the adverse party in the usual manner. The prevailing party should see that a proper limit is fixed for either purpose, and that any terms imposed, are clearly expressed, and imposed as a condition precedent. The same should be done where the decision only affects a part, and not the whole of the pleading objected to, and sufficient of it is left to raise a triable issue of fact.

In the former case, nothing further can be done in the cause until the expiration of the period allowed for either purpose, or of any extension thereof duly obtained ; and, if the adversary avail himself of the facilities thus granted in due time, a new issue will be raised, and the former proceedings will become obsolete, except in so far as they control those subsequent, by preventing the matter objected to from being again brought forward.

If, however, on the contrary, the party in default suffer the time allowed him to elapse, without taking the necessary steps, he will be precluded from further amendments, if the demurrer be partial ; or, if it be

to the whole pleading, the party prevailing will be entitled to sign judgment on such demurrer, in the usual manner, exactly as if leave to amend, or plead over had not been asked for ; or, if asked for, had been refused.

The proceedings in connection with such entry, will be considered hereafter, under their proper head.

As to the risk incurred by a party, who allows a demurrer which he has had leave to withdraw, to remain upon the record, of having that demurrer used by his adversary upon the subsequent trial, as an admission, see *Cutler vs. Wright*, 22 N. Y., 472.

§ 232. *Trial of Issue of Fact.*

Where the cause tried by the court is one primarily triable by a jury, the waiver should be clearly established, before proceeding with the hearing. If not so established, the trial may be ineffectual. See *Salters vs. Genin*, 3 Bosw., 250 ; 7 Abb., 193.

If the cause be so tried by written consent, that consent should be filed beforehand, and the cause noticed, and placed upon the special term calendar, accordingly. In the Common Pleas this is made the subject of a special order. See rule 7th of June, 1848.

When the waiver takes place by oral consent in open court, the parties should see that it is duly entered upon the minutes.

The question as to what issues are or are not primarily triable by the court, has been already considered, and the decisions cited, in book IX., chapter I., section 193, under the head of *Issues of Fact*.

On the trial of an issue by the court, simultaneous relief may be properly asked, against defendants then in default. See *Ford vs. David*, 1 Bosw., 569.

When the cause has been brought on for trial as an equity case, and so disposed of, it cannot be retained in court for a subsequent trial, before a jury, of any legal questions involved. *New York Ice Company vs. North Western Insurance Company*, 31 Barb., 72 ; 20 How., 424 ; 10 Abb., 34.

When the trial is commenced, all the issues joined between the parties should be then disposed of ; a reservation of a portion of them until an accounting has been had, will be improper, unless as to such as arise directly out of the accounting itself. There cannot properly be two trials of the case, one before, and one after the reference for such accounting. See *Griffin vs. Cranston*, 5 Bosw., 658.

As to the judge's power to direct a reference during the trial, see *Van Zandt vs. Cobb*, 10 How., 348 ; *McMahon vs. Allen*, 10 How., 384. But such a reference cannot be directed by another judge. *Chamberlain vs. Dempsey*, 14 Abb., 241.

Nor can such a reference be granted, or a special issue directed, to try a question of fact, by the judge, of his own motion, after the trial is over, and the case has been finally submitted to him. His power to make such a disposition of the matter will then be gone, and he must decide all the questions before him. *O'Brien vs. Bowns*, 4 Bosw., 657; 10 Abb., 106.

The judge is not bound to pass primarily, on any issue not made by the pleadings. If important that he should do so, he should be specially requested to that effect on the trial, before the decision, or the matter may be brought up by motion, on the subsequent settlement of a case. See *Heroy vs. Kerr*, 21 How., 409.

(a.) DECISION.

The requisition, in section 267, that the decision of the court must be filed within twenty days, though imperative, is directory only, and an omission to comply with it will not vitiate the judgment, when pronounced. *Phelps vs. Dodge*, 5 How., 47; *Stewart vs. Slater*, 6 Duer, 83; *Burger vs. Baker*, 4 Abb., 11. See also collaterally *In re Empire City Bank*, 4 Abb., 118; *Wood vs. Chapin*, 3 Kern., 509.

Prior to the recent amendment of 1860, it was not an essential prerequisite that the decision should state the facts found, and the judge's conclusions of law thereon, but a mere adjudication was sufficient. And not merely so, but it was held to be the proper form. See *Otis vs. Spencer*, 16 N. Y., 610; 15 How., 425; 6 Abb., 127; *Hunt vs. Bloomer*, 3 Kern., 341; 12 How., 567; *Johnson vs. Whillock*, 3 Kern., 344; 12 How., 571; *Sharp vs. Wright*, 35 Barb., 236; *Attorney-General vs. Mayor of New York*, 12 L. O., 17.

But even then, it was held that such an adjudication must dispose of all the material issues raised by the pleadings. *Burger vs. Baker*, 4 Abb., 11.

Under this state of the section, it seems to have been considered that if the entry of the judgment awarded was made by the clerk, under the judge's direction, it might be a sufficient decision in writing, to satisfy the requirements of section 267. *Sands vs. Church*, 2 Seld., 347 (356). See, however, *Thomas vs. Tanner*, 14 How., 426, holding the judge's signature to be essential; and, in *Sands vs. Church*, the point was not directly passed upon.

But the section, as now framed, seems to contemplate a written decision by the judge, in all cases whatever, whether decided at the time or on subsequent deliberation, and also that such decision should be specific in its terms, and should contain detailed findings of the facts, and of the conclusions arrived at by the court.

See, as to the proper form of such a finding, *Griffin vs. Cranston*, 1

Bosw., 281, decided with reference to the similar statements in a case required by section 268. The decision should be made, as such, and not by way of a mere opinion. *Thomas vs. Tanner*, 14 How., 426. See, as to the effect of an omission to make a proper finding of facts, before the amendment of 1860, *Viele vs. Troy and Boston Railroad Company*, 20 N. Y., 184.

Where the facts and conclusions conducing to the decision are not disputed, the court may, it seems, allow them to be drawn by the parties, according to its opinion as delivered. See *Barker vs. Crosby*, 32 Barb., 184 (190). They must, of course, be adopted, and the decision itself signed by the court, to give it validity.

Any omission in the finding should be submitted to the judge, on motion to correct the decision, before it can be considered at general term. See *Sharp vs. Wright*, 35 Barb., 236.

The decision must be complete, and must specify the relief granted, or it will be wholly insufficient to sustain a judgment, and the objection may be taken at any subsequent stage of the proceedings, and even on appeal. And, after the case has been heard before one judge, matter conducing to a judgment cannot be brought on before another. *Chamberlain vs. Dempsey*, 14 Abb., 241.

Judgment of dismissal, granted by the judge on the hearing of a common-law action, is equivalent to a nonsuit, and does not bar a fresh suit. *Coit vs. Beard*, 33 Barb., 357; 22 How., 2; 12 Abb., 462.

The decision of a judge, on a question of fact tried before him, is equivalent to the verdict of a jury, and is conclusive, if there is any evidence to support it, or unless the weight of evidence be so great against it, that a verdict under similar circumstances would be set aside. See *Osborne vs. Marquand*, 1 Sandf., 457; *Gilbert vs. Luce*, 11 Barb., 91; *Masters vs. Madison County Mutual Insurance Company*, 11 Barb., 624 (633); *Adsit vs. Wilson*, 7 How., 64; *Oakley vs. Aspinwall*, 2 Sandf., 7; *Mann vs. Witbeck*, 17 Barb., 388; *Clark vs. Dales*, 20 Barb., 42 (60); *Watkins vs. Cousall*, 1 E. D. Smith, 65; *Harpell vs. Curtis*, 1 E. D. Smith, 78; *Stewart vs. Slater*, 6 Duer, 83; *Newton vs. Bronson*, 3 Kern., 587 (591); *Dunham vs. Watkins*, 2 Kern., 556; *Mathews vs. Poulteney*, 33 Barb., 127; *Bank of North America vs. Embury*, 21 How., 14 (17). See also numerous decisions cited in next chapter, as applicable to a trial by referees.

And not merely so, but every reasonable inference will be made, in favor of such decision. See *Viele vs. Troy and Boston Railroad Company*, 20 N. Y., 184.

As regards the question of abatement, by the death of a party, the decision of the court dates back to the time of the submission of the cause. Where, therefore, a party had died before it was formally pro-

nounced, judgment was ordered to be entered, *nunc pro tunc*, as of the date of the actual hearing. *Ehle vs. Mayer*, 8 How., 244.

(b.) EXCEPTIONS TO DECISION.

Though properly belonging to the subject of new trial, it may be convenient to notice here, the power of excepting to the decision of the court, as conferred by section 268, above referred to.

This is a separate and independent privilege, granted for the purpose of enabling the aggrieved party to bring up for revision, any errors of law committed by the judge in rendering that decision. It must not be confounded with the right to bring up questions arising on the trial itself for review, on exceptions taken at the time, a proceeding essentially different.

The true theory of this class of exceptions is that given by the Court of Appeals, in *Hunt vs. Bloomer*, 3 Kern., 341 (343); 12 How., 567: "The exceptions, which may and must be made within ten days after notice of the judgment, are those, and only those which, under the former practice, were made to the rulings of the court, after the evidence was closed, and before the jury retired. This clause of the section does not authorize exceptions to be taken, after judgment, to matters arising during the trial, and where there is opportunity to except, at the time the adverse decision is made." See likewise, to the same effect, *Johnson vs. Whitlock*, 3 Kern., 344; 12 How., 571; *Tremain vs. Rider*, 13 How., 148; *Belknap vs. Seeley*, 4 Kern., 143 (148); *Gilchrist vs. Stevenson*, 7 How., 273.

The Code contemplates that exceptions on a trial of this nature shall only be brought up for hearing, on appeal, after judgment. The judge cannot therefore make an order that those taken at the trial be heard in the first instance at the general term, and that judgment be suspended, as admissible under section 265, when the trial is by jury. *Wright vs. Delafield*, 11 How., 465; *Mallory vs. Wood*, 6 Duer, 657; 14 How., 67; 3 Abb., 369. See also, generally, *Watson vs. Scriven*, 7 How., 9.

It is essential that exceptions thus taken should be served within the ten days limited by the section; if not, the right of objection will be gone. *Beach vs. Gregory*, 2 Abb., 203 (204); *Beach vs. Raymond*, 1 Hilt., 201; 3 Abb., 78. But, to set such time running, the notice given must be of the judgment, after actual entry. Previous notice of the decision, before such entry, will not avail. See *Leavy vs. Roberts*, 3 Abb., 310; 2 Hilt., 285.

And, if the case and exceptions to be made on the trial be made and served within ten days after the decision, then the exceptions to the decision may be served in, and as forming part of it. It will not be

necessary to serve them separately, under these circumstances. *Vide Hunt vs. Bloomer*; and other cases above cited.

The exceptions must be specifically taken, in the form prescribed by the section. A mere general stipulation that the decision shall be considered as duly excepted to, will be wholly unavailing. See *Stephens vs. Reynolds*, 2 Seld., 454.

They should be specific, and embrace all points proposed to be raised. Any omitted to be then taken cannot be afterwards inserted. *Vide Beach vs. Raymond, supra.*

And a general exception will only raise the question whether, upon the facts found, the law has been properly decided, and will not bring up special objections for consideration. *Belknap vs. Seeley*, 4 Kern., 143 (148).

But, for the former purpose, a general exception to a decision of the judge, drawing a single conclusion of law, from an undisputed state of facts, will be fully available. When, however, the decision involves a variety of points, the objections ought to be specific, as where a party excepts to the charge of a judge. *Pratt vs. Foot*, 5 Seld., 463. See additional opinion, reported 6 Seld., 599.

But errors of fact committed by the judge cannot be reviewed in this manner. *Same case.* Nor will an exception lie, to a matter resting in discretion. See *Ford vs. David*, 1 Bosw., 569.

Whether an exception of this nature can be taken to the decision of the court on an inquest, when the defendant has failed to appear, seems questionable. See *Burger vs. Baker*, 4 Abb., 11.

See, as to the necessity of exceptions of this nature being taken and served in due time, but with power to the court to allow of their being served *nunc pro tunc*, under exceptional circumstances, *infra*, section 237 (b), and decisions there cited.

The analogy between exceptions to the decision of the judge, on a trial by the court, and those which, under section 272, may be taken to the report of a referee or referees of the whole issue, when the trial is had in that form, is so close, that the decisions on one bear, as a general rule, directly upon the other subject. See next chapter and cases there cited. Both must be taken within the same time, and in the same manner, and the office of both is identical, *i. e.*, to assign errors in the substance of the decision, as contradistinguished from interlocutory objections raised during the progress of the trial.

CHAPTER V.

OF REFERENCES.

§ 233. *Statutory and Other Provisions.*

THOSE portions of the Code, and also the special rules by which the appointment of referees is either directed or regulated, have been already cited in chapter II., book IX. of this work, section 196.

The trial or hearing of the matter, when brought before them, is regulated by section 272 of the Code, running thus :

§ 272. (227.) The trial by referees shall be conducted in the same manner and on similar notice as a trial by the court. They shall have the same power to grant adjournments, and to allow amendments to any pleadings and to the summons, as the court upon such trial, upon the same terms and with the like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them, by attachment, and to punish them as for a contempt, for non-attendance or refusal to be sworn or testify, as is possessed by the court. They must state the facts found and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed in like manner, and with like effect in all respects, as in cases of appeal under section 268 ; and they may in like manner settle a case or exceptions. The report of the referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon, in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report shall have the effect of a special verdict.

The remainder of the section provides as to the review of the judgment to be entered on the report when made. It falls therefore within the subject of the succeeding chapter, and will be there cited.

The portion of the section above cited has undergone considerable mutations since its original passage.

In the original Code it merely provided, to the effect that the report of referees should stand on the same footing as the decision of the court. In 1849, various corrections were made in the wording.

In 1851, the scope of the section was extended, powers similar to those now given being conferred, though less extended and specific. In 1852, some corrections were made.

In 1857, a general revision and amplification of the section took place. It then substantially assumed its present form. The power to amend the summons was added in 1859, and in 1860 the form was finally settled, as it now stands.

Chapter XIV., title XII. of the Code also provides as to the powers of referees. It consists of one section, running thus :

§ 421. (382.) Every referee appointed pursuant to this act, shall have

power to administer oaths in any proceeding before him, and shall have generally the powers now vested in a referee by law.

Section 273, as amended in 1862, contains the following direction as to the report :

“ Unless the court shall otherwise order, the referee or referees shall make and deliver his report, within sixty days from the time the action shall be finally submitted ; and, on default thereof, said referee or referees shall not be entitled to receive any fees, and the action shall proceed as though no reference had been ordered.”

Section 313 provides thus as to the fees of referees :

§ 313. (268.) The fees of referees shall be three dollars to each, for every day spent in the business of the reference ; but the parties may agree in writing upon any other rate of compensation.

And section 314 gives power to referees to impose a payment, of not more than ten dollars costs, in addition to witnesses' fees, as the condition of granting a postponement of the trial, when applied for.

The powers vested in a referee by law, referred to in section 421, will be found in the Revised Statutes, article IV., title VI., chapter VI., part III., 2 R. S., 383 to 386. Most of these provisions are incorporated with, and in effect superseded by, those of the Code. The following only appear to require notice :

Section 42 of that article imposes upon the referees a duty to proceed with diligence.

Section 44 provides thus, as to the oath of the referees themselves :

§ 44. Before proceeding to hear any testimony in the cause, the referees shall be severally sworn, faithfully and fairly to hear and examine the cause, and to make a just and true report, according to the best of their understanding ; which oath may be administered by any person authorized to take affidavits, to be read in the court in which the suit is pending, or by any justice of the peace.

Section 45 gives power to compel the attendance of witnesses before the referees, by subpoena issuing out of the court, in like manner and with the like effect as in the case of a trial.

Section 46 provides thus :

Any one of the referees may administer the necessary oath to the witnesses produced before them for examination. All the referees must meet together, and hear all the proofs and allegations of the parties ; but a report by any two of them shall be valid.

Section 47, thus :

The referees may be compelled, by the order of the court in which the cause is pending, to proceed to the hearing thereof, and to make report of

the amount they find due to either party; and the court may require them to report their decision, in admitting or rejecting any witness, in allowing or overruling any question to a witness, or the answer thereto, and all other proceedings by them, together with the testimony before them, and their reasons for allowing, or disallowing any claim of either party.

Section 52 gives special power to report to the court, with a view to the punishment, as for a contempt, of any party refusing to account or to produce documents, under judgment rendered in an action for an accounting, as between parties jointly interested, or against a party standing in a fiduciary position.

The peculiar reference, with respect to claims against the estate of a deceased party, provided for by the Revised Statutes (see 2 R. S., 88, 89, sections 36 to 38, amended by chapter 261 of 1859, p. 569), has been already noticed above, in section 196.

Rule 32 provides as follows, on the subject of proceedings before a referee or referees, when appointed :

Rule 32. (22.) On a hearing before referees, the plaintiff may submit to a nonsuit or dismissal of his complaint, or may be nonsuited, or his complaint be dismissed, in like manner as upon a trial, at any time before the cause has been finally submitted to the referees for their decision. In which case, the referees shall report according to the fact, and judgment may thereupon be perfected by the defendant.

Upon a trial by referees, they shall, in their decision and final report, state the facts found by them and their conclusions of law separately, a copy of which shall be served with notice of the judgment; and the time within which exceptions may be taken to the report, shall be computed from the time of such service.

In references, other than for the trial of the issues in an action, upon the coming in of the report of the referee, the same shall be filed, and a note of the date of the filing shall be entered by the clerk in the proper book, under the title of the cause or proceeding; and the said report shall become absolute, and stand as in all things confirmed, unless exceptions thereto are filed and served, within eight days after the service of notice of filing the same. If exceptions are filed and served within such time, the same may be brought to a hearing thereafter, on the notice of any party interested therein.

§ 234. *General Characteristics.*

References under the Code, may be divided into two grand classes:

1. References of the whole issue.
2. Interlocutory, or collateral references.

In the former, the referee acts as a judge *pro hac vice*, and exercises similar powers; in the latter, his office is rather that of a master in chancery, and his duty is merely to report facts, for the guidance and

consequent action of the court itself. See *Graves vs. Blanchard*, 4 How., 300; 3 C. R., 25.

But, in both, the course of hearing is substantially the same, the difference lying in the action to be taken upon the report when made. Down to that stage, the same considerations are generally applicable, and the same decisions will be in point.

In either, the referee derives his whole authority from the appointment of the court, and any action taken by him, before that appointment is complete, will be null. See *Litchfield vs. Burwell*, 5 How., 341; 1 C. R. (N. S.), 42; 9 L. O., 182; *Bonner vs. McPhail*, 31 Barb., 106.

But any objection to his appointment, save only those which go to the jurisdiction, will be waived, by proceeding before him. See before, section 196, and cases cited.

An objection, on the ground that the suit itself is defective, as regards a matter of form, cannot be taken upon the trial before a referee. It goes to the regularity of the reference itself, and must be raised on the motion to refer, if not previously waived by an omission to demur. See *Hawkins vs. Avery*, 32 Barb., 551.

There can be no doubt but that, under the present section, a referee of the whole issue, exercises substantially the powers of a judge at special term. Under the original Code, and down to 1857, this was not clear under the section as it then stood, but, even then, the courts were disposed to attribute to him similar powers. See *Langley vs. Hickman*, 1 Sandf., 681; *Green vs. Brown*, 3 Barb., 119; *Allen vs. Way*, 7 Barb., 585; 3 C. R., 243; *Graves vs. Blanchard*, above cited; *Ludington vs. Taft*, 10 Barb., 447. And in *Schermerhorn vs. Develin*, 1 C. R., 13, they even refused to instruct a referee, on a point connected with the exercise of judicial discretion, though the application was made at his own request.

The office of the referees being in its nature judicial, they cannot testify, under any circumstances, in the course of the proceedings pending before them. *Morss vs. Morss*, 11 Barb., 510; 1 C. R. (N. S.), 374; 10 L. O., 151.

Their action is also subject to the same strict rules as that of jurors. Any private communication with the parties, or with their witnesses, however devoid of suspicion of bad faith or intentional impropriety, will be ground for avoiding the report. See *Yale vs. Gwinits*, 4 How., 253; *Dorlon vs. Lewis*, 9 How., 1; *Roosa vs. Saugerties and Woodstock Turnpike Road Company*, 12 How., 297; *Billings vs. Vanderbeck*, 15 How., 295 (298).

On the death of the referee, or of part of the referees, if more than one, before the cause is decided, it is a matter of course to vacate the reference. *Emmet vs. Bowers*, 23 How., 300.

When a reference is ordered on judgment by default, it must be executed in the county of venue, unless the court shall otherwise order (rule 24). See this regulation strictly enforced, in *Brush vs. Mullany*, 12 Abb., 344.

If a new trial be granted, on the setting aside of judgment entered on a referee's report, he may proceed to retry the case without any renewed authority. *Shuart vs. Taylor*, 7 How., 251. Nor will it be by any means a matter of course to change him, where the decision has been reversed on questions of law only. *Billings vs. Vanderbeck*, 15 How., 295.

But, where his decision has been reversed on questions of fact, it will be proper to send the case to a new referee. *Billings vs. Vanderbeck*, *supra*; *Schermerhorn vs. Van Alen*, 13 How., 82; *Sharp vs. Mayor of New York*, 31 Barb., 578; 19 How., 193; *Murphy vs. Winchester*, 35 Barb., 616 (620). And, where the referee himself cannot proceed with diligence in the trial, by reason of his own arrangements, a change may be granted. See *Forrest vs. Forrest*, 3 Bosw., 650.

Although, pending a reference before him, the powers of a referee are similar to those of a judge at special term, still, when his report is once made and delivered over, those powers are exhausted. And it will not be regular to refer the matter back to him, to make a supplemental report, on facts omitted to be noticed by him. The question, if any, should be brought up in a regular form, and the case opened for retrial. *Pratt vs. Stiles*, 17 How., 211; 9 Abb., 150. See also *Laking vs. New York and Erie Railroad Company*, 11 How., 412; *Marston vs. Johnson*, 13 How., 93.

But, when he has decided the main issues, the cause may be referred back to him, to take such an accounting as may be necessary for the information of the court, before awarding final judgment. *McMahon vs. Allen*, 27 Barb., 335; 7 Abb., 1. Or to report any other particulars, that may be necessary for the same purpose. *Elmore vs. Thomas*, 7 Abb., 70. And it has been held the better practice, where the right to an accounting is involved in the main issue, to make a separate report, in the first instance, to allow the parties to test the question, before an accounting is gone into. *Palmer vs. Palmer*, 13 How., 363. See also *Bantes vs. Brady*, 8 How., 216; *Graham vs. Golding*, 7 How., 260; *Cameron vs. Freeman*, 18 How., 310; 10 Abb., 333. In *Mills vs. Thursby* (No. 1), 11 How., 113, a preliminary accounting was essential to the decision of the main issue. See also *Smith vs. Dodd*, 3 E. D. Smith, 348, and *Sheldon vs. Wood*, 1 C. R. (N. S.), 118; 3 Sandf., 739, there referred to.

Wherever the question of costs lies in the discretion of the court, the referee has power to pass upon it. *Pratt vs. Stiles*, *supra*; *Graves vs.*

Blanchard, 4 How., 300 ; 3 C. R., 25 ; *Ludington vs. Taft*, 10 Barb., 447 ; overruling *Van Valkenburgh vs. Allendorph*, 4 How., 39 ; *Gilliland vs. Campbell*, 18 How., 177.

But, on a statutory reference of a claim disputed by executors, where the right to costs may depend on facts not proved at the trial, he cannot do so, but the discretion rests with the court. But his certificate may be obtained and used, as affording the best evidence of what took place at the trial itself. *Mersereau vs. Ryerss*, 12 How., 300. But not so as to whether the claim was, or was not, unreasonably resisted. See *Comstock vs. Olmstead*, 6 How., 77.

Nor, inasmuch as a motion for an extra allowance is not a portion of, but a consequence of the trial, can one be granted by the referee. *Gould vs. Chapin*, 4 How., 185 ; 2 C. R., 107 ; *Howe vs. Muir*, 4 How., 252 ; 3 C. R., 21. But, in the same manner, his certificate may and should be obtained, as affording the best evidence of what took place, to enable the judge to decide as to its propriety. See *Fox vs. Gould*, 5 How., 278 ; 3 C. R., 209.

§ 235. *Course of Trial.*

(a.) INITIAL PROCEEDINGS.

The first proceeding to be taken, is to leave with the referee, or with each, if more than one, a certified copy of the order by which he is appointed. That order constitutes his authority to act, and, without it, he cannot properly proceed. *Bonner vs. McPhail*, 31 Barb., 106.

He should be then asked to appoint a time and place for the hearing, which must be fixed for some date, sufficient to enable regular notice of trial to be given, as now requisite. The appointment need not be in writing, though such is the better practice. See *Stephens vs. Strong*, 8 How., 339 ; *Sage vs. Mosher*, 17 How., 367.

Due notice must then be given to the adverse party of such appointment, specifying the time and place. It must be served and proved, in the same manner, and given for the same period, as in the case of an action triable by the court. *Williams vs. Sage*, 1 C. R. (N. S.), 358 ; *Thompson vs. Krider*, 8 How., 248. And, on receiving it, the adverse party is bound to attend at the time and place appointed, and erroneous information from the referee will not justify his disregarding it. *Sage vs. Mosher*, 17 How., 367. Once noticed, the trial is commenced, and no further term fees are chargeable. See *Anon.*, 1 Duer, 596 ; 8 How., 82 ; overruling *Benton vs. Bugnall*, 1 C. R. (N. S.), 229.

Although the insufficiency of notice will constitute an irregularity, it is one capable of waiver, and will be waived, if the parties appear, and ask for an adjournment. *Wetter vs. Schleiper*, 7 Abb., 92.

The oath prescribed by the Revised Statutes ought, in all cases, to be taken by the referees, before they proceed upon the business of the reference. The better course is, that it should be prepared in writing, and signed and sworn to in the same manner as an affidavit.

It is not an infrequent practice, however, to waive it by consent. If this be done, the consent ought to be reduced to writing, or entered upon the minutes.

(b.) POSTPONEMENT.

The special power of section 315, enabling referees to impose the payment of costs, as a condition of the postponement of the trial, has been already noticed.

They exercise, in this respect, precisely the same authority as a judge upon a trial before him, and the application, if necessary, must be made in the same manner, and upon the same grounds. Even before 1851, this had been so held. *Vide Langley vs. Hickman*, 1 Sandf., 681.

The application must, however, be reasonable, or it should not be entertained, and, if an unreasonable postponement be granted, the court will interfere. See *Forrest vs. Forrest*, 3 Bosw., 650.

(c.) ADJOURNMENTS.

The practice of adjourning from time to time, to suit the convenience of the parties or the referee, instead of disposing of the case at one consecutive sitting, is a peculiar feature of this form of trial; conducing, on the one hand, to greater convenience in making a complete but somewhat leisurely examination into the merits of the case, but tending, on the other, to promote laxity in the conduct of the trial, and to increased delay and expense in bringing it to its termination.

When the necessity of an adjournment is known beforehand, the better practice is to let it be made by consent, signed by the attorneys for both parties, and left with the referee. In this case, and, whenever an adjournment takes place in the absence of either of the parties, the other should notify him forthwith, and that notification should be in writing. Otherwise, the chain of proceedings will be broken, and it may be difficult to take, or, at all events, to hold a subsequent default, if taken. There is, however, no particular period or form necessary with respect to notices of this description.

Where both parties are present, no such notice will, of course, be requisite, but each meeting should be formally adjourned.

Nevertheless, if the trial proceeds, and all the testimony which they desired is given by both parties, any informality in the adjournments, from time to time, will be disregarded. *Accessory Transit Company vs. Garrison*, 18 How., 1; 9 Abb., 141.

(d.) NONSUIT OR DEFAULT.

The power to submit to a nonsuit on the part of the plaintiff, or to grant one on the part of the referee, is clear under rule 32. See *Brockway vs. Burnap*, 12 Barb., 347.

It was at first doubted whether a referee could proceed, on default suffered, to grant judgment of dismissal in favor of the defendant, on proof of service of notice, and of the plaintiff's failure to attend. See *Holmes vs. Slocum*, 6 How., 217; 1 C. R. (N. S.), 380; *Mathews vs. Jones*, 1 E. D. Smith, 429.

A less strict view was taken, however, and it was held that a default may be taken in the ordinary manner, the same as on a trial by the court, in *Williams vs. Sage*, 1 C. R. (N. S.), 358; *Thompson vs. Krider*, 8 How., 248; *Stephens vs. Strong*, 8 How., 339; *Salter vs. Malcolm*, 1 Duer, 596.

And the present wording of rule 32 seems to settle the question, in favor of the latter construction.

(e.) PRODUCTION OF BOOKS, &c.

This is a matter in which, as a general rule, a referee has no power, unless specially conferred on him; but the course will be to obtain his certificate, and base upon it a special application to the court. *Frazer vs. Phelps*, 3 Sandf., 741; 1 C. R. (N. S.), 214. But it may be specially conferred by the order of reference, and then enforced. *Fraser vs. Phelps*, 4 Sandf., 682; *Higgins vs. Bishop*, 12 L. O., 127. See heretofore, under § 201.

(f.) PROCESS OF CONTEMPT.

The section, as now amended, unquestionably gives to a referee, the same power of punishing a contumacious witness, by process of contempt, as is possessed by the court. The difficulties attendant upon the issuing and enforcement of that process will, however, be very great, and there is as yet no reported case in which its exercise has been brought in question, and the mode of procedure regulated. In *Seeley vs. Jobson*, 6 Abb., 217, note, it was decided by both the Superior Court, and also by the Common Pleas, on *habeas corpus*, that the power of the court to punish for this offence, on the certificate of the referee, is still existent and unimpaired. And an application of this nature will still be the better course in all cases. And it is more than questionable whether, even under the section as it stands, referees possess any of the powers for collateral punishments of a contempt committed by a party, such as striking out his complaint for a refusal to testify, or the like. See *Bonesteel vs. Lynde*, 8 How., 226; affirmed,

8 How., 352. This case was decided, it is true, before the amendment conferring the present power; but still the reasoning seems applicable, and a motion to the court the better course

(g.) POWER TO AMEND.

The power conferred by the section must not be carried beyond its legitimate limits. It is the same power as is possessed by the court, to disregard objections, or to allow amendments to the pleadings (or, since 1859, to the summons) as is possessed by the court, under sections 169 and 170. It can only be exercised during the actual trial, in respect of matter then arising, and in relation to which an immediate amendment would be granted by the court. It does not extend to striking out the name of a party, or any other matter of amendment, which would properly form the subject of a motion to the court, under section 172 or 173. *Billings vs. Baker*, 6 Abb., 213; *Union Bank vs. Mott*, 18 How., 506; 10 Abb., 372; *Woodruff vs. Husson*, 32 Barb., 557. See, as to such an order, before the amendment conferring the power, *Turner vs. Hillerline*, 14 How., 231.

In *Van Ness vs. Bush*, however, 22 How., 481; 14 Abb., 33, the general powers of a referee are maintained to the fullest extent, and as comprising any amendment, which the court would have power to allow, under section 173, upon the trial.

(h.) ACCOUNTING.

Where an account is directed to be taken, the former rules of practice of the Court of Chancery are still in full force. Where, therefore, the account of a defendant was directed to be taken in the "usual manner," it was held that he was bound to bring in before the referee, a sworn account, including both debits and credits, in the manner prescribed in the 107th rule of the late Court of Chancery, and to submit to such examination as was allowed by that rule. *Wiggins vs. Gans*, 4 Sandf., 646. The rule in question will be found, *in extenso*, in a note at the end of the case in question, 4 Sandf., 649. See also, to the same effect, and laying down similar principles as to the mode of procedure in such cases, *Palmer vs. Palmer*, 13 How., 363.

Where the whole issue is referred, the referee may, at his discretion, either go on, and take the account at once, or report, in the first instance, upon the main issue separately, though the latter has been held to be the better practice. *Same case*.

See also, as to the old chancery practice being still in force, on a reference to take an account, as such, and as to the proper course being to bring up objections to the allowance of specific items, by exceptions to the report, *Ketchum vs. Clark*, 22 Barb., 319.

(i.) EXERCISE OF DISCRETION.

A referee is entitled, in the course of a trial before him, to exercise the same discretionary powers, as are vested in a judge at special term.

So held, as to the order of admitting proof. *Gibson vs. Pearsall*, 1 E. D. Smith, 90. So also, as to allowing a leading question, where no injury to the objecting party is shown; or the reopening of the direct examination of a witness. *Beach vs. Raymond*, 2 E. D. Smith, 496. Or the allowing a witness to be recalled. *Trimble vs. Stilwell*, 4 E. D. Smith, 512; *Pearson vs. Fiske*, 2 Hilt., 146. Or the allowing of an adjournment, to give the applicant an opportunity to give a necessary notice. *Billings vs. Vanderbeck*, 15 How., 295.

He may also, in his discretion, reopen the case, on his own motion, in order to hear further testimony, even after it has been actually submitted. *Duguid vs. Ogilvie*, 3 E. D. Smith, 527; 1 Abb., 145. And he may even do so, after he has actually announced his decision, but has not yet signed his report, though the power is one liable to abuse, and to be cautiously exercised. *Ayrault vs. Sackett*, 17 How., 461; 9 Abb., 154, note; affirmed, 17 How., 507; 9 Abb., 155, note. When, however, he has delivered his report, duly signed, his power is exhausted, and he cannot make any subsequent corrections. *Shearman vs. Justice*, 22 How., 241.

A referee must pass upon all questions as to the admissibility of evidence, at the time they arise, and in the presence of the parties. He cannot properly admit testimony at the time, for what it may be worth, and afterward reject it in forming his decision. *Allen vs. Way*, 7 Barb., 585; 3 C. R., 243; *Clusman vs. Merkel*, 3 Bosw., 402; *Brown vs. Colie*, 1 E. D. Smith, 265. See, however, as to a provisional admission, *Brooks vs. Christopher*, 5 Duer, 216.

But, when such testimony is wholly inadmissible in substance, its subsequent exclusion from his consideration will not form ground for setting aside the report. See last case. Nor will his bare intimation that a party need not produce further testimony; though the subsequent decision may be against that party, no actual injury being shown. *Hauptman vs. Catlin*, 1 E. D. Smith, 729. But it may tend to guide the discretion of the court, in granting a new trial.

Exceptions of the above nature, must be taken and noted at the time, precisely as on a trial by the court. *Deming vs. Post*, 1 C. R., 121. Or, if evidence be provisionally admitted, a specific ruling must be obtained upon it before the case is finally closed, and an exception taken. *Brooks vs. Christopher*, 5 Duer, 216.

If a report be sent back to referees for correction, and they go beyond it, and hear additional evidence, the whole case will be reopened. See *Goulard vs. Castillon*, 12 Barb., 126.

(j.) INTERLOCUTORY OR SPECIAL REFERENCES.

On a reference to take proof, and report to the court, in a divorce case, under rule 86, the case must be fully proved, and that by competent testimony, the same as on a trial, or the report will not be acted upon. *Arborgast vs. Arborgast*, 8 How., 297.

On a reference to take proofs, a referee cannot reject evidence, as on an ordinary trial. He is bound to take down and report all that is offered, with his opinion thereon, leaving it to the court to determine what is or is not competent. *Scott vs. Williams*, 14 Abb., 70.

An interlocutory report before judgment, must be excepted to, or sought to be set aside, on motion, at the time it is first presented, or it cannot be afterward impeached, on appeal from a subsequent judgment. *Ehlen vs. Rutgers Fire Insurance Company*, 2 Bosw., 482; 6 Abb., 68. See also *Ketchum vs. Clark*, 22 Barb., 319. See also below, as to the proceedings necessary for confirmation of a report of this nature.

See, as to the course of practice, on a reference to appoint a receiver, *Wetter vs. Schleiper*, 7 Abb., 92.

Where a reference of the above nature had been ordered, in an interpleader suit, an order of the court, founded upon the report, and awarding the sum in question accordingly, to one of the contending parties, was held to have the effect of a judgment, and to be reviewable accordingly. *Kirby vs. Fitzpatrick*, 18 N. Y., 484.

(k.) STATUTORY REFERENCES.

The proceedings on a reference of a disputed claim against executors, referred under the special provisions of the Revised Statutes, present precisely the same incidents as those on an ordinary trial. Though there are no formal pleadings, any defence admissible in a regular action may be put in, and any description of evidence, which would be relevant in an ordinary suit, will be admissible. *Tracy vs. Suydam*, 30 Barb., 110. See also, as to the proceedings in such cases, *Francisco vs. Fitch*, 25 Barb., 130.

On a report of this nature coming up for action upon it by the court, it must either be confirmed, or set aside, and a new trial ordered. Judgment against the report cannot be awarded. *Vide Coe vs. Coe*, 14 Abb., 86.

(l.) FEES OF REFEREES.

These are expressly fixed by section 313, but, as there provided, any other rate may be agreed on, in lieu of the statutory allowance of \$3 per diem. The agreement for such allowance should regularly be in writing, and the usual and better course is to sign one at the outset of the

trial. A verbal agreement, entered by the referee on his minutes, was, however, held valid, in *Philbin vs. Patrick*, 22 How., 1.

In the absence of such a stipulation, the statutory fee cannot be exceeded. Nor can the referee charge for services performed by a third person in his absence, or make any charge for adjournment of a meeting, when no business is actually done. The proper form for objecting to any overcharge, is to bring up the account for taxation, when any overcharge will be disallowed. *Schultz vs. Whitney*, 17 How., 471; 9 Abb., 71; *Richmond vs. Hamilton*, 9 Abb., 71, note.

In case of such an overcharge, a motion to set aside the report will not be admissible. If the prevailing party do not take up the report, the unsuccessful one should move to compel him to file it, and enter up judgment, or, in default, that he be at liberty to do so himself. *Richmond vs. Hamilton*, *supra*.

If the report be taken up by the wrong party, he will be ordered to file it, or, in default, that the referee deliver a new report, on payment of any fees remaining due. *Richards vs. Allen*, 11 L. O., 159.

The referee cannot, of course, be required to deliver up his report, until his proper fees are paid, the remedy of the party disputing them lying in an application for taxation, as above.

But if he do so without payment, the attorney is not personally liable. *Lamoreux vs. Morris*, 4 How., 245; *Howell vs. Kinney*, 1 How., 105; *Judson vs. Gray*, 1 Kern., 408. But, if the attorney, for consideration passing between him and the party, agree to advance them, the referee may then maintain an action. *Judson vs. Gray*, 17 How., 289.

Under the last amendment of section 273 (1862), the referee may forfeit his fees, unless he deliver his report, within sixty days from the time the action shall be finally submitted.

§ 236. *Report and its Incidents.*

The hearing being complete, its result is embodied in the form of a report by the referee, or by two at the least of the referees, if three are appointed. If any specific time be imposed by the court, within which the report must be made, the direction must of course be complied with, or, if necessary, an extension obtained in due course.

And such a time is now in fact imposed by section 273 (amendment of 1862). Unless the court shall otherwise order, the referee must now make and deliver his report, within sixty days from the time the action shall be finally submitted. In default thereof, he himself forfeits his fees, and the action is to proceed as though no reference had been ordered.

Unless therefore the successful party is prepared to abandon the whole proceeding, he must, in the event of necessity arising, apply for

and obtain an order extending the referee's time to report. Or, where both parties concur, the same may be done by stipulation, or agreement to waive the objection. Or the referee himself, if he show good reason for his delay, may apply for an extension. The period allowed is, however, amply sufficient to meet all usual contingencies.

The report must of course be signed, that being essential to its validity. See incidentally, *Thomas vs. Tanner*, 14 How., 426 (428).

And, when made, it cannot be properly delivered to any other than the successful party; and, if so delivered, and not duly filed by the party who has taken it up, a fresh report may be ordered. See *Richards vs. Allen*, 11 L. O., 159.

After delivery to the party, the report cannot properly be altered by the referee, under any circumstances. See *Shearman vs. Justice*, 22 How., 241.

(a.) FORM OF REPORT.

As regards a reference of the whole issue, the form of the report is distinctly prescribed by section 272. The referee, in making it, must "state the facts found, and the conclusions of law separately," and, having so stated them, he must give his decision. When the reference is special, the report must, of course, follow the directions, and satisfy the terms of the order.

In *Johnson vs. Whitlock*, 3 Kern., 344; 12 How., 571, it was considered that the decision of the referee might be in the same general form as that of a judge, under the practice as then existent, and that there was no necessity of making the statement of facts found and conclusions of law, above required on the face of the report. It was sufficient if it were made afterwards, in settling the case for the purpose of review, if desired. The same conclusions are adhered to in *Otis vs. Spencer*, 16 N. Y., 610; 15 How., 425; 6 Abb., 127.

These *dicta* are in a great measure "*obiter*," and the ground on which they then stood is now substantially removed, by the amendment of section 268, in 1860, requiring the same species of statement from a judge, in giving his decision.

Even before that amendment, the doctrine there held was essentially contrary to a number of cases, directly deciding that a report made under the Code, must conform in the first instance to the actual terms of the section, and must make upon its face the statements so required.

Rule 13 of the Superior Court, requiring a special report to be obtained, on a motion for a rehearing, was passed, before the clause above referred to was introduced into the section, and, as regards reports on references of the whole issue, may be considered as obsolete, review by way of rehearing being abolished.

The following cases, decided prior to that introduction, anticipate it, and decide that a report, even prior to 1851, was to be drawn in this manner. *Doke vs. Peek*, 1 C. R., 54; *Mucklethwaite vs. Weiser*, 1 C. R., 61; *Deming vs. Post*, 1 C. R., 121; *Van Steenburgh vs. Hoffman*, 6 How., 492.

The following hold the same doctrine, as applicable to the section, since this requisition was introduced in 1851. *Church vs. Erben*, 4 Sandf., 691; *Roberts vs. Carter*, 28 Barb., 462; 17 How., 524; *Rogers vs. Beard*, 20 How., 282. See also prior but imperfect report, 20 How., 98. See likewise in the Court of Appeals, *Mills vs. Thursby* (No. 11), 12 How., 417. And the requisitions of rule 32 are positive upon the subject. See likewise *Snook vs. Fries*, 19 Barb., 313; *Peck vs. Yorks*, 14 How., 416.

The referee should report on all the material issues joined by the pleadings, on which evidence is offered. *Van Steenburgh vs. Hoffman*, 6 How., 492. But he need not do so, on issues on which no evidence is given, or which are in fact reported upon, by necessary implication. *Patterson vs. Graves*, 11 How., 91; *Ingraham vs. Gilbert*, 20 Barb., 151.

But it will neither be necessary nor proper, for him to report the mere evidence, instead of the facts found. *Patterson vs. Graves*, *supra*. See also *Doke vs. Peek*, 1 C. R., 54; *Dorr vs. Noxon*, 5 How., 29. Nor will an opinion, not finding the facts, but merely referring to them argumentatively, satisfy the requirements of the Code. *Mills vs. Thursby* (No. 11), 12 How., 417.

Where an accounting was directed, as part of the general reference, it has been held that a mere finding of facts found and of an amount due, as on an ordinary issue, was insufficient. The referee should have shown also that he had duly taken the account. See *Kapp vs. Barthan*, 1 E. D. Smith, 622.

Where a referee is merely directed to report the facts, it will be wrong for him to find the testimony also. *Dorr vs. Noxon*, *supra*. But where he is instructed to take proof as to a specific matter, and report the same, together with the testimony, it will be proper for him to make a special finding of the facts, reporting the testimony also. *Goodridge vs. New*, 18 How., 189.

As to the import and force of the word "duly," when employed by a referee in his report, see *Farmers' and Mechanics' Bank vs. Empire Stone Dressing Company*, 10 Abb., 47; 6 Bosw., 275.

(b.) CORRECTION OR SETTING ASIDE OF REPORT ON MOTION.

If the report, when made, be defective, by reason of an omission to comply with any of the foregoing requirements, or otherwise in matter of form, the proper course will be to apply to the court at once, for an

order requiring the defect to be corrected. *Snook vs. Fries*, 19 Barb., 313; *Peck vs. Yorks*, 14 How., 416; *Hulce vs. Sherman*, 13 How., 411 (412); *Van Steenburgh vs. Hoffman*, 6 How., 492; *Church vs. Erben*, 4 Sandf., 691; *Renouil vs. Harris*, 2 Sandf., 641; 1 C. R., 125; *Gouldard vs. Castillon*, 12 Barb., 126; *Ingraham vs. Gilbert*, 20 Barb., 151 (152); *Parsons vs. Suydam*, 3 E. D. Smith, 276; *Bishop vs. Main*, 17 How., 162; *Murray vs. Barney*, 34 Barb., 336 (343); *Grant vs. Morse*, 22 N. Y., 323. See also, as to procuring a specific finding, *New York Car Oil Company vs. Richmond*, 6 Bosw., 213; 19 How., 505; 10 Abb., 185.

See also, as to an order to set aside a collateral ruling, on the ground of irregularity, *Billings vs. Baker*, 6 Abb., 213; 15 How., 525; 28 Barb., 343.

See, as to a correction of a report, and the consequent entry of judgment, by striking out a direction, inserted after delivery to the party, *Shearman vs. Justice*, 22 How., 241.

The motion for this purpose may be grounded on the report itself, and the previous proceedings, if the defect be patent, or any extraneous matter necessary to show its existence, may be supplied by affidavit. The defect itself, and that it works some prejudice to the applicant, must, of course, be clearly shown.

A motion to set aside a report on the ground of irregularity, must be made with due diligence, or the defect may be waived. *Paterson vs. Graves*, 11 How., 91.

An order for a further report, should specify the points upon which it is required. If it omit to do so, it will not be irregular, however, especially if the necessary information can be obtained from the affidavits. *Union Bank vs. Mott*, 13 Abb., 247.

(c.) CONCLUSIVENESS OF DECISION.

It is superabundantly settled that the decision of a referee, on a question of facts, stands on the same footing as that of a judge, or as the verdict of a jury, and is equally conclusive, if there be any evidence to support it; and that, where no error in law has been committed, it will not be set aside, however greatly the court above may differ with him in opinion, on the question of fact. See *Watkins vs. Stevens*, 4 Barb., 168; *Green vs. Brown*, 3 Barb., 119; *Baker vs. Martin*, 3 Barb., 634; *Spencer vs. The Utica and Schenectady Railroad Company*, 5 Barb., 337; *Camp vs. Pulver*, *ibid.*, 91; *Quackenbush vs. Ehle*, *ibid.*, 469; *Durkee vs. Mott*, 8 Barb., 423, and *Hayes vs. Symonds*, 9 Barb., 260; *Ludington vs. Taft*, 10 Barb., 447; *Kemey's vs. Richards*, 11 Barb., 312; *Orchard vs. Cross*, 12 Barb., 294; *Lockwood vs. Thorne*, 12 Barb., 487; *Shuart vs. Taylor*, 7 How., 251; *Borst vs. Spelman*, 4 Comst., 284; *Morris vs. Husson*, 4 Seld., 204; *Bearss vs. Capley*, 6 Seld., 93;

Dorlon vs. Lewis, 9 How., 1; *Doubleday vs. Newton*, 9 How., 71; *Vansteenburg vs. Hoffman*, 15 Barb., 28; *Wooden vs. Foster*, 16 Barb., 146; *Foster vs. Coleman*, 1 E. D. Smith, 85; *Mazelli vs. New York and Harlem Railroad Company*, 3 E. D. Smith, 98; *Lutz vs. Ey*, *ibid.*, 621; 3 Abb., 475; *Fish vs. Wood*, 4 E. D. Smith, 327; *Davis vs. McCready*, *ibid.*, 565; *Thompson vs. Wood*, 1 Hilt., 93; *Pearson vs. Fiske*, 2 Hilt., 146; *Woodruff vs. Commercial Mutual Insurance Company*, *ibid.*, 122; *Western vs. Genesee Mutual Insurance Company*, 2 Kern., 258 (264); *Griscom vs. Mayor of New York*, 2 Kern., 586; *Davis vs. Allen*, 3 Comst., 168; *Esterly vs. Cole*, *ibid.*, 502; *Cady vs. Allen*, 22 Barb., 388; *Murfey vs. Brace*, 23 Barb., 561; *Barth vs. Walther*, 4 Duer, 228 (230); *Brooks vs. Christopher*, 5 Duer, 216; *Watson vs. Campbell*, 28 Barb., 421; *Roberts vs. Carter*, 28 Barb., 462; 17 How., 524; *Sheldon vs. Wood*, 2 Bosw., 267; *Hoagland vs. Wight*, 20 How., 70; *Cady vs. Allen*, 18 N. Y., 573; *Chamberlain vs. Townsend*, 26 Barb., 611; 7 Abb., 31; *Hall vs. Morrison*, 3 Bosw., 520; *Forward vs. Harris*, 30 Barb., 338; *New York Car Oil Company vs. Richmond*, 6 Bosw., 213; 19 How., 505; 10 Abb., 185; *Smith vs. Paton*, 6 Bosw., 145; *Murray vs. Barney*, 34 Barb., 336; *Brown vs. Brown*, 34 Barb., 533; *Train vs. Brown*, 21 How., 93; 12 Abb., 217; *Van Alstyne vs. Indianapolis, Pittsburgh and Cleveland Railroad Company*, 34 Barb., 28; 21 How., 175; *Van Ness vs. Bush*, 22 How., 481; 14 Abb., 33. See likewise, as to a question of fact referred to him, *Demarest vs. Daig*, 11 Abb., 9.

Nor will a report be set aside, for unimportant mistakes. The error complained of must be a clear and decisive error, by which the party complaining has been injured. *Ludington vs. Taft*, 10 Barb., 447. And a report may be upheld, even though some testimony has been improperly admitted, if, excluding that testimony, enough remains to sustain it. *Kemeys vs. Richards*, 11 Barb., 312.

But, like the verdict of a jury, a report palpably against evidence, which is full, and in no way contradicted or discredited, will be set aside. *Smith vs. Schanck*, 18 Barb., 344. And so, if it be grounded on testimony palpably insufficient or improbable, a new trial should be granted. *Kennedy vs. New York and Harlem Railroad Company*, 3 Duer, 659.

So likewise, where the referee has omitted to pass upon facts in evidence before him, in misapprehension of a rule of law. *Allen vs. Devlin*, 6 Bosw., 1.

Or, where the conclusions drawn by him are erroneous, as inconsistent with his subsequent specification of facts found, on settling a case for review. *Hartman vs. Proudfit*, 6 Bosw., 191.

And a report should be set aside, where the finding is clearly against

the weight of evidence, or where, upon the trial, some rule or principle of law has been violated. *Green vs. Brown*, 3 Barb., 119 (120); *Quackcnbush vs. Ehle*, 5 Barb., 469 (471); *McCready vs. Woodhull*, 34 Barb., 180. Or, if there be an absence of evidence, or so great a preponderance of evidence against the finding, as to indicate prejudice, partiality, or corruption, or the like. *Vansteenburgh vs. Hoffman*, 15 Barb., 28 (31); *Mazelli vs. New York and Harlem Railroad Company*, 3 E. D. Smith, 98 (102); *Brooks vs. Christopher*, 5 Duer, 216 (219); *Woodruff vs. Commercial Mutual Insurance Company*, 2 Hilt., 122; *Pearson vs. Fiske*, 2 Hilt., 146. See also collaterally, *Wiley vs. Slater*, 22 Barb., 506.

So also, if there be a clear error in the report itself, rendering one portion inconsistent with another. *Garrison vs. Howe*, 17 N. Y., 458 (461).

And the rule as to conclusiveness will only be applied, where the grounds of the referee's decision are apparent upon the face of the report. Where the case involves distinct and alternative questions of fact, and the report is general, the court must necessarily act upon its own judgment, both as to the law, and as to the evidence. *Scranton vs. Baxter*, 4 Sandf., 5.

And, in *Burhaus vs. Van Zandt*, 7 Barb., 91, it was considered that the report of a referee in an equity case, should not be treated like the verdict of a jury, but should be generally reviewed, like the report of a master, or the decision of a vice-chancellor, under the former practice. The case was, however, reversed, and the decision of the referee sustained, 3 Seld., 523. The report above, does not, however, touch upon the above question, in direct terms.

Any imputation whatever of undue influence will, of course, vitiate the report. See cases above cited in section 234.

§ 237. *Review, or Confirmation.*

(a.) REPORT ON WHOLE ISSUE.

The report of referees upon the whole issue requires no confirmation, inasmuch as, by the terms of section 272, judgment may be entered thereon, without any special direction, as on the decision of a judge. Prior to the amendment of 1849, when this provision was inserted, this power was doubted. See *Clark vs. Andrews*, 1 C. R., 4, and *Deming vs. Post*, 1 C. R., 121; but, even then, the rule since adopted by the legislature, was maintained in *Renouil vs. Harris*, 2 Sandf., 641; 1 C. R., 125.

Under the Code of 1849, and down to 1851, review by means of an application at special term for a rehearing, was recognized. See *Sim-*

mons vs. *Johnson*, 6 How., 489; *Church* vs. *Rhodes*, 6 How., 281; *Watson* vs. *Scriven*, 7 How., 9. But, since the latter year, the only mode of review upon the merits, is by appeal from the judgment. See *Dana* vs. *Howe*, 3 Kern., 306. The only cases to which a motion is applicable, are those where a correction is sought, or the report itself is impeached for irregularity.

(b.) EXCEPTIONS.

In order to lay ground for a review by appeal, for errors of law in the decision, exceptions must be filed and served within ten days, in the same manner as on the decision of a judge. Section 272. See last chapter, section 232, under the head of *Exceptions to Decision*.

They must be taken, filed, and served in the same manner, and are subject to the same incidents; and the necessity of taking them is equally paramount.

Unless exceptions are duly taken, and that in due time, errors of law in the decision cannot be brought up for review. *Mills* vs. *Thursby* (No. 11), 12 How., 417; *Brewer* vs. *Isish*, 12 How., 481; *Johnson* vs. *Whitlock*, 3 Kern., 344; 12 How., 571; *Beach* vs. *Raymond*, 1 Hilt., 201; 3 Abb., 78; *Tremain* vs. *Rider*, 13 How., 148; *Cheeseborough* vs. *Agate*, 26 Barb., 603; 7 Abb., 32; *Marshall* vs. *Smith*, 20 N. Y., 251; *Mallory* vs. *Wood*, 6 Duer, 657; 14 How., 67; 3 Abb., 369; *Kee-gan* vs. *Western Railroad Corporation*, 4 Seld., 175; *Morris* vs. *Husson*, 4 Seld., 204; *Tyler* vs. *Willis*, 33 Barb., 327; 12 Abb., 465; *Ferguson* vs. *Hamilton*, 35 Barb., 427; *Grant* vs. *Morse*, 22 N. Y., 323; *Ingersoll* vs. *Bostwick*, 22 N. Y., 425.

But, under special circumstances, exceptions of this nature were allowed to be made and filed, *nunc pro tunc*, in *Sheldon* vs. *Wood*, 6 Duer, 679; 14 How., 18; *Bortle* vs. *Mellen*, 14 Abb., 228.

It has been held that it is not necessary to file exceptions, to enable a party appealing, to obtain a review at general term, upon a case. *O'Neil* vs. *New York State Agricultural Society*, 19 Barb., 162.

It will, however, as a general rule, be most imprudent to omit this precaution, under any circumstances, as, even admitting the principle, the omission will clearly preclude the party from carrying the case further. The better course is to take formal exceptions, in every case where a review is sought on the ground of error of law, or where such error is involved in the decision, and to make such exceptions specific and detailed, so as to raise in terms, every point on which the decision is sought to be impeached, subjoining a separate general allegation of error. See *Dean* vs. *Roesler*, 1 Hilt., 420, as to the scope of a general exception, that the decision is against law and evidence.

In equity cases especially, exceptions to a report must be specific,

and must point out distinctly the errors sought to be reviewed. And a mere general exception will, in all cases, be insufficient. *Lawrence vs. Fowler*, 20 How., 407.

Since the amendment of section 272, in 1860, a referee's report may be brought up for review, on exceptions to the decision only, without making a case. *Ferguson vs. Hamilton*, 35 Barb., 427. See to the same effect, *Brewer vs. Isish*, 12 How., 481, decided before the amendment. But this course is only appropriate, where all that is sought to be reviewed is the referee's conclusion of law, and not error in the process by which he arrived at such conclusion.

(c.) SPECIAL REPORTS.

A report on a special question must be confirmed, before it can be acted upon by the court.

The course for this purpose is clearly pointed out by rule 32.

The report, when obtained, must be filed with the clerk, and an entry made by him of the filing. When filed, notice of such filing must be served upon the adverse party, from the service of which notice, the time of such party to file and serve exceptions will run. Unless such adverse party file and serve his exceptions, within eight days from the service of that notice, the report stands *ipso facto* confirmed, without any necessity for entry of a formal order, as heretofore.

When exceptions are so filed and served, they may be brought to a hearing at any special term thereafter, on motion of either party.

This regulation dates from the revision of the rules in 1858. Before that revision, it was necessary to obtain and enter an order of course to confirm the report, unless cause were shown, in eight days after service of notice of such order.

If the adverse party desire to present any objections to the report as filed, he must file and serve exceptions to it, within the time thus limited. But, to be available on points arising during the trial, the objections taken must also have been interposed when they originally arose. *Belmont vs. Smith*, 1 Duer, 675 ; 11 L. O., 216. If the party fail to file and serve his exceptions, his right to object will be gone, and the report will be conclusive against him. *Vide Marshall vs. Smith*, 20 N. Y., 251 ; *Ketchum vs. Clark*, 22 Barb., 319. *Evertson vs. Givan*, 16 How., 25, was decided before the rule was revised.

And, when his exceptions have been filed, such adverse party must present his objections before the report has been read in evidence, or he cannot raise the question on appeal. *Ehlen vs. Rutgers Fire Insurance Company*, 2 Bosw., 482 ; 6 Abb., 68. Under the rule in question, he is entitled to bring them to a hearing on his own notice.

When exceptions have been filed by the adverse party, or where

further action of the court is required, the proper course will be for the prevailing party to move at special term for the confirmation of the report, and for the relief, of whatever nature, to which it entitles him; or for the latter only, where no exceptions are taken. *Bantes vs. Brady*, 8 How., 216; *Elmore vs. Thomas*, 7 Abb., 70; *Belmont vs. Smith*, 1 Duer, 675; 1 L. O., 216. See also *Swarthout vs. Curtis*, 4 Comst., 415; 5 How., 198; 3 C. R., 215. And a motion of this description has been held to be the only proper course, for obtaining the confirmation of a report, under an order made on motion or petition. *Griffing vs. Slate*, 5 How., 205; 3 C. R., 213. A motion of this nature may be heard in the first instance, at general term. *Tracy vs. Tallmadge*, 1 Abb., 460.

In *Forrest vs. Forrest*, 5 Bosw., 672, it is stated as the opinion of the court, that the practice, on reviewing a report of this nature, is governed by rule 32; that no case need be made, and that the proper papers on the motion, will be copies of the referee's report, of the testimony and proceedings, as detailed in the papers annexed to it, and of the exceptions of the adverse party. The point was not, however, directly passed upon, time being given to the moving counsel to determine which course he would pursue.

The report on a reference to report facts has, under the section, the effect of a special verdict, and an order, taking action upon it, is reviewable accordingly. *Kirby vs. Fitzpatrick*, 18 N. Y., 484. But any error committed in the course of the hearing before the referee, can only be reviewed, on exceptions taken in due course as above. *Marshall vs. Smith*, 20 N. Y., 251.

The review of the report on an executor's reference under the Revised Statutes, should be obtained, by means of a motion to set aside the report before judgment, and a consequent appeal. *Boyd vs. Bigelow*, 14 How., 511.

CHAPTER VI

PROCEEDINGS FOR NEW TRIAL.

§ 238. *Statutory and Other Provisions.*

THE following portions of the Code have reference to this subject:

The first requiring notice is section 264 (219). The first clause prescribes the course to be pursued on entering the verdict, and has been already cited, in chapter III. of the present book.

The remainder of the section runs thus:

If an exception be taken, it may be reduced to writing at the time, or entered in the judge's minutes, and afterwards settled, as provided by the rules of the court, and then stated in writing, in a case, or separately, with so much of the evidence as may be material to the questions to be raised, but need not be sealed or signed, nor need a bill of exceptions be made. If the exceptions be, in the first instance, stated in a case, and it be afterwards necessary to separate them, the separation may be made under the direction of the court, or a judge thereof. The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict, and grant a new trial, upon exceptions, or for insufficient evidence, or for excessive damages; but such motions, in actions hereafter tried, if heard upon the minutes, can only be heard at the same term or circuit at which the trial is had. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had.

This portion of the section dates from 1852.

Down to 1851, there were no special provisions upon the subject. Those of 1851 were to a similar effect, but entering more into special details.

Section 265 runs thus:

A motion for a new trial, on a case or exceptions, or otherwise, and an application for judgment on a special verdict, or case reserved for argument or further consideration, must, in the first instance, be heard and decided at the circuit or special term, except that, when exceptions are taken, the judge trying the cause may, at the trial, direct them to be heard in the first instance at the general term, and the judgment in the mean time suspended; and in that case they must be there heard in the first instance, and judgment there given. And when, upon a trial, the case presents only questions of law, the judge may direct a verdict, subject to the opinion of the court at the general

term. And in that case, the application for judgment must be made at the general term. Every judgment rendered upon a verdict, taken subject to the opinion of the court at a general term, may be reviewed by the Court of Appeals in the same manner, and with the like effect, as if exceptions had been duly taken at the proper time; provided it shall appear by the return, that questions of law were involved in the rendition of the judgment.

Dates as it stands from 1857. The last sentence was added on that occasion. The rest of it stood in the same words in 1852.

In 1851, the section was less comprehensive. In 1849 and 1848, the clause was very short, making no special provisions beyond a power to reserve the case for argument or further consideration.

The next section applicable, is section 268, relating to trial by the court, and running thus:

§ 268. (223.) For the purposes of an appeal, either party may except to a decision on a matter of law, arising upon such trial, within ten days after notice in writing of the judgment, in the same manner, and with the same effect, as upon a trial by jury. And either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law, may at any time within ten days after notice of the judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions, in like manner as upon a trial by jury, except that the judge in settling the case must briefly specify the facts found by him, and his conclusions of law. But the questions, whether of fact or of law, arising upon the trial, can only be reviewed in the manner prescribed by this section,—the questions of law in every stage of the appeal, and the questions of fact, upon the appeal to the general term of the same court, as prescribed in section three hundred and forty-eight.

No finding of facts by the general term shall be required for the purpose of review in the Court of Appeals; and, if the judgment be reversed at the general term, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal; and in that case the question whether the judgment should have been reversed, either upon questions of fact or of law, shall be open to review in the Court of Appeals.

The provisions of this section, and also of section two hundred and seventy-two, as they are hereby amended, shall apply to appeals now pending, as well as to those hereafter brought.

The last two sentences, from "no finding of facts" downward, were added on the amendment of 1860. The prior portions date from 1852. The section had been previously corrected in phraseology, and otherwise changed in purport, on the amendments of 1849 and 1851.

A small portion of section 272 (227), relative to trial by referees, is also material on the present occasion. That portion runs thus: After stating that the trial must be conducted in the same manner as a trial by the court, it proceeds—

Their decision must be given, and may be excepted to in like manner,

and with like effect in all respects, as in cases of appeal under section 268, and they may in like manner settle a case or exceptions.

It is further provided at the end, that

When the evidence is to report the facts, the report shall have the effect of a special verdict.

The changes in the section have already been considered in the last chapter, where it is cited *in extenso*. The clause added in 1860 relates exclusively to the review in the Court of Appeals, and will be noticed hereafter in that connection. It may be remarked, however, that it gives a special power to review a referee's report on exceptions only, without a case. See last chapter, section 237.

It may also be expedient to mention that, under the Revised Statutes, a new trial is claimable as of right, in ejectment, by the unsuccessful party, at any time within three years after the render of judgment, upon payment of costs and damages. And, upon subsequent application, within two years after the second judgment, the court may grant another, if satisfied that justice will be promoted. But no more than two are to be granted under that section. *Vide* 2 R. S., 309, section 37.

And, by the next section, power is given to the court to grant a new trial, on the application of the defendant, his heirs, or assigns, on similar terms, "if such court shall be satisfied that justice will be promoted, and the rights of the parties more satisfactorily ascertained and established." 2 R. S., 309, section 38.

A new trial in the appellate tribunal, is now claimable, as of right, under the amendments of 1862, on appeal from a justice's court, where the amount litigated below shall exceed fifty dollars. See this subject hereafter fully considered under the head of appeals of that nature.

The rules on the subject are as follows :

Rule 20 (41) provides generally that

The attorney or officer of the court who draws "*inter alia*" any case or bill of exceptions, or other paper, exceeding two folios in length, shall distinctly number and mark each folio on the margin thereof; and all copies, either for the parties or the court, shall be numbered or marked on the margin, so as to conform to the original draft or entry, and to each other, and be indorsed with the title of the cause.

And they must otherwise conform to the general rules prescribed as to papers to be served. See heretofore, book IV.

No. 33 provides thus, in relation to the trial of a feigned issue, or an interlocutory reference :

If either party shall desire to apply for a new trial, on the ground of any error of the judge or referee, or on the ground that the verdict or report is against evidence (except where the judge directs such motion to be made upon his minutes, at the same term or circuit at which the issues are to be

tried), a case or exceptions shall be made, or a case containing exceptions, as the case may require, which case or exceptions shall be served and settled in the manner prescribed by the rules of this court, for the settlement of cases and exceptions in other cases. Such motion shall be made in the first instance at special term; and, if neither party move for a new trial in such case, they shall be deemed to have acquiesced in the decision of the judge or referee, and the verdict of the jury, or report of the referee, and the same shall not be questioned upon the final hearing of the cause, or in any subsequent proceeding therein.

The rules proceed thus :

Rule 34. (15.) Whenever it shall be intended to move for a new trial (except for irregularity, surprise, or upon the minutes of the judge), or to review by appeal, or otherwise, a trial by a jury, by the court, or by referees, a case, or exceptions, or case containing exceptions, as may be proper, and the party may elect, shall be prepared by the party intending to make the motion, or to review the trial, and a copy thereof shall be served on the opposite party within ten days after the trial, if by a jury, or after written notice of the filing of the decision or report, if the trial be by the court or by referees; and the party served, may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing the case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice, that the case or exceptions, with the proposed amendments, will be submitted at a time and place to be specified in the notice, to the justice or referee before whom the cause was tried, for settlement. The justice or referee shall thereupon correct and settle the case, as he shall deem to consist with the truth of the facts. The time for settling the case must be specified in the notice, and it shall not be less than four nor more than twenty days after service of such notice. The lines of the case shall be so numbered that each copy shall correspond.

Cases reserved for argument, and special verdicts, shall be settled in the same manner.

Rule 35. (16.) If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the justice or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed.

Rule 36. (24.) Exceptions shall only contain so much of the evidence, as may be necessary to present the questions of law upon which the same were taken on the trial; and it shall be the duty of the justice, upon settlement, to strike out all the evidence and other matters which shall not have been necessarily inserted.

Whenever amendments are proposed to a case or exceptions, the party

proposing such case or exceptions, shall, before submitting the same to the justice for settlement, mark upon the several amendments his proposed allowance or disallowance thereof.

Rule 37. (17.) Where a party makes a case or exceptions, he shall procure the same to be filed, within ten days after the same shall be settled, or it shall be deemed abandoned.

And, on filing affidavits, that such case or exceptions has not been filed, and showing the time of the settlement thereof, and that more than ten days have elapsed from the time of such settlement, an order, of course, may be entered, declaring the same abandoned, and the party may proceed as if no case or exceptions had been made.

Rule 38 provides for the settlement of a statement of facts, for the purposes of a final appeal to the Court of Appeals, and will be noticed hereafter, in connection with that subject.

Rules 40 to 43 and 46, provide in relation to the hearing of the application founded on the above proceedings, and will come up for consideration *in loco*.

The rules of the Superior Court of the 18th of January, 1851, also contain special provisions on the foregoing matters.

Rule 8 provides thus, as to a stay of proceedings :

A party intending to move to set aside a verdict, as against the evidence, must obtain from the justice who tried the cause, an order staying the proceedings for that purpose. Such a motion will not be entertained, unless the stay of proceedings be obtained and served, within four days after the entry of the judgment by the clerk, or before the insertion of the costs by the clerk in the entry of the judgment. The court by order may permit the judgment to be entered and collected, without prejudice to a motion to set aside the verdict ; and may impose such terms on each party in respect thereof, as to the court may seem meet.

Rule 9 as follows :

The party moving to set aside a verdict, as against evidence, must prepare a case and procure the same to be settled in the usual manner.

If the party making the case, intend to appeal from the judgment, when entered on the verdict, because of errors of law alleged to have occurred at the trial, or in the directions for judgment, he must present such alleged errors, in the case made for setting aside the verdict. If the errors complained of were excepted to in due season when they occurred, the case may be turned into a bill of exceptions, as of course, in the event of the application to set aside the verdict being denied.

Rule 10, thus :

The motion to set aside the verdict, on the case, when settled, must be brought on, on the usual notice, at the special term. No alleged errors of

law presented by such case, will be considered at the special term; unless by the express direction of the justice before whom the cause was tried.

Rules 11 and 12 provide in relation to an appeal from the decision at special term, and to its being brought on at general term, in connection with the review of errors of law, and also in relation to the costs of the proceeding:

And rule 13, as to a special report being obtained, by a party seeking to review the decision of a referee.

N. B. These special regulations are, in a great measure, superseded by the more general provisions inserted in the Supreme Court rules, on the revision of 1858, compared with those which they originally contained.

§ 239. *Motion upon Judge's Minutes.*

This description of motion, for which provision is made by section 264, is applicable to trial by jury alone. It can only be made at the same circuit or term at which the trial is had, and no special papers need be prepared for the purpose. It is brought on upon those used at the actual trial, and nothing but a mere notice is necessary. To this the adverse party is, of course, entitled, as he has of necessity a right to be heard in opposition. The form and length of this notice are not prescribed. An order to show cause, would seem to be the more advisable course, where an arrangement cannot be made with the opposite counsel, to bring on the motion by consent.

This mode of application is comparatively unfrequent, and the recent reports do not contain any reported decisions on the subject. It is more peculiarly applicable to cases of manifest error or irregularity, not requiring any lengthened statement or argument to make it apparent. If either be required, a motion on a case in the regular form will be the proper course.

And, even although the motion be of this nature, it cannot properly be brought on before any other judge than the one who tried the cause, unless upon a case actually prepared and settled. *Vide Nesmith vs. Clinton Fire Insurance Company*, 8 Abb., 141.

A motion on the ground of insufficiency of damages cannot be made in this form, not being within the terms of the section. *Moore vs. Wood*, 19 How., 405.

§ 240. *Stay of Proceedings.*

The first precaution necessary to be taken by the unsuccessful party, seeking a review on a case, where a trial by jury has been had, is to

obtain an order staying his adversary's proceedings. It must be applied for in form, as the mere taking exceptions, or making a case, has no effect of this description. *Oakley vs. Aspinwall*, 1 Sandf., 694.

Under the Code of 1849 this order, or a reservation of the cause for further argument, was held to be even essential for the purposes of a review. See *Ball vs. Syracuse and Utica Railroad Company*, 6 How., 198; 1 C. R. (N. S.), 410; but, since the amendment of 1851, this is no longer a matter of necessity, and a motion upon a case is still entertainable, notwithstanding the court may have allowed the entry of judgment, to stand as security. See *Benedict vs. Caffé*, 3 Duer, 669; 12 L. O., 262. See rule 8 of Superior Court, above cited. See also *Morange vs. Morris*, 20 How., 257 (259); 12 Abb., 164.

But, where no special direction has been made upon the subject, and judgment has been entered in due course, it seems doubtful whether a motion for a new trial can be entertained, simply upon a case, or otherwise than by way of appeal. See *Hastings vs. McKinley*, 3 C. R., 10; *Enos vs. Thomas*, 5 How., 361; 1 C. R. (N. S.), 67; *Jackson vs. Fassitt*, 17 How., 453; 9 Abb., 137; affirmed, 33 Barb., 645; 21 How., 279; 12 Abb., 281.

See, as to the necessity of obtaining a stay, and not allowing judgment to be perfected, when the motion is made on the ground of surprise, *Barnes vs. Roberts*, 5 Bosw., 73.

A stay should, in all cases, be applied for, and, as a general rule, it will be granted, where there exists a fair question to be brought before the court, and the proceeding is not palpably frivolous or dilatory.

The application is usually made at the time of the trial, or as soon after as practicable, to the judge who tried the cause, and it is usual to incorporate with it, an order to extend the time to make and serve a case, if desired. In this event no special papers need be prepared, as the judge acts upon his own knowledge. If made at the time of the trial, in the presence of the parties, the entry on the minutes may be held sufficient; if made subsequently, the order should be formally drawn up, the judge's signature obtained, and a copy served on the adverse party.

This mode of application presents the additional advantage, that the order, when made by the judge who presided at the trial, has the effect of an order of the court, and is not affected by the limitation of twenty days, imposed by section 401, subdivision 6. The judge may, on the contrary, grant the stay, for any period he may deem reasonable. *Harris vs. Clark*, 10 How., 415; *Steam Navigation Company vs. Weed*, 8 How., 49; *Livingston vs. Miller*, 1 C. R., 117; *Mitchell vs. Hall*, 7 How., 490 (492).

The relief thus granted is wholly *ex parte*, and an *ex parte* order

may also be obtained from any other judge, at chambers or elsewhere. But, when the application is thus made, it must, of course, be grounded on affidavit, sufficient to satisfy the judge applied to, as to what actually took place at the trial, and likewise that the application is one proper to be granted.

An order of this description is subject to the twenty days' limitation, and cannot be safely taken *ex parte*, for any longer period. Nor can a series of *ex parte* orders, for twenty days each, be obtained. *Sates vs. Woodin*, 8 How., 349; *Mitchell vs. Hull*, 7 How., 490; *Anonymous*, 5 Sandf., 656; *Mills vs. Thursby* (No. 2), 11 How., 114.

Where, therefore, a general stay cannot be obtained from the judge who tried the cause, and more than twenty days is required, application to any other should be made upon notice, when any period that may be necessary may be asked for. An *ex parte* order for twenty days, in the first instance, accompanying this notice, will answer all objects. If the application be by order to show cause, it will form part of it.

Where the decision is by the court or referees, judgment must be entered, in the first instance, and an appeal taken, and security given on that appeal will usually effect all the purposes of an order.

But, where the party appeals to the general term, without giving security; or where, under the power given by section 348, he desires to obtain relief in this respect, an application must be made.

Where the case has been tried by the court, it will probably be held competent for the judge who tried the cause, to make an *ex parte* order of this nature. But, where another judge is applied to, or where the case has been tried by a referee, a motion on notice will be necessary, if a longer delay than twenty days is required, an *ex parte* stay being obtained in connection with it, as above pointed out.

Where exceptions have been taken, a direction that they be heard, in the first instance, at general term, with a suspension of judgment in the *interim*, under the terms of section 265, will of itself effect all the stay that is necessary. And, it seems, that a direction that they be so heard, entered on the clerk's minutes, may of itself effect a stay, though the consequent direction be omitted, through his inadvertence or neglect. *Roosa vs. Snyder*, 12 How., 285.

The stay to be applied, when the motion is on a case, or case and exceptions, on trial by jury, should be not merely until after the settlement of the case, but also until the hearing, and final decision of the motion founded thereon. This will save the necessity of a second application for the latter purpose. But, of course, the granting of such an order rests entirely in the discretion of the judge, and he may refuse to grant the whole, in the first instance. If so, the application must be repeated.

Where the motion is after judgment, the stay applied for should be until the hearing and decision of the appeal therefrom.

When the motion is made upon notice, it is, of course, competent for the adverse party to oppose, either generally, or with a view to the imposition of terms. If any statements of fact be necessary to sustain such opposition, they should be embodied in an affidavit. Want of good faith, or of merits, in the proposed review, will form ground of opposition. It may also be very important to show want of solvency, either actual or apprehended, on the part of the applicant, or that the subject-matter of the application will be imperilled by delay. On good cause being shown, the court will seldom refuse to impose proper terms. Amongst those likely to be granted, may be suggested, the allowing judgment to be entered up, to stand as security, or power to retain a levy made, or to make one for the same purpose.

It is, of course, equally competent for the adverse party to move to vacate an *ex parte* order, under similar circumstances.

A stay, when obtained, suspends all regular proceedings, until it has expired, or is vacated, including the giving notice of judgment, if entered, with a view to limit the time for appealing. *Bagley vs. Smith*, 2 Sandf., 650. But it will not prevent application being made for a provisional remedy, unconnected with the ordinary progress of the cause. *Lapeous vs. Hart*, 9 How., 541.

§ 241. *Preparation and Settlement of Case or Exceptions.*

(a.) TIME FOR PREPARATION.

The case, or exceptions, or case containing exceptions, must be prepared by the party seeking a review, and served upon his adversary within ten days after the trial, if by a jury, or after "written notice of the filing of the decision or report," if by the court or referees (rule 34), or, in the latter case, "within ten days after notice of the judgment." Sections 268, 272.

If this time be not sufficient, an extension should be obtained, either by consent, or by applying for an *ex parte* order, before the time has elapsed. If neglected, the right to make a case will be waived. Rule 35. As to the total waiver of the right to make a case, by *laches*, at a subsequent stage of the proceedings, see *Whitney vs. Kimball*, 6 Bosw., 690.

A party, seeking to limit his adversary's time, by service of a notice, will be held to strict practice. See *Yorks vs. Peck*, 17 How., 192; *Demelt vs. Leonard*, 19 How., 182. And the death of the party, after service, and before the expiration of the time limited by the notice, may involve the necessity of bringing in and noticing his executors,

before their rights can be precluded. See *Beach vs. Gregory*, 2 Abb., 203; affirmed, 1 Hilt., 201; 3 Abb., 78. As to the time for this purpose not running, until the receipt of the notice of judgment, where intermediate proceedings had been stayed, after notice of the original decision, see *Leary vs. Roberts*, 8 Abb., 310; 2 Hilt., 285.

Nor will the previous pendency, and the having made a case, upon a motion on the ground of newly-discovered evidence, affect the rights of the party to make a second case, for the purpose of an appeal, after failure of the first motion. *Same case*.

As to giving time to the moving party to decide upon his course, for the purpose of obtaining a review, in a case where doubts were entertained by him as to the proper practice, see *Forrest vs. Forrest*, 5 Bosw., 672

(b.) NATURE OF CASE.

The most usual mode of procedure is that of a case containing exceptions. This mode is appropriate when the verdict or decision is impeached for general error, both on the facts and the law. When no error in law is alleged, but the verdict of a jury is impeached for error on their part only, then a case, without exceptions, will be proper. When, on the contrary, the impeachment is for error of law only, exceptions, in the nature of the former bill of exceptions, will be all that is required.

A case and exceptions, on a trial by jury, should, when prepared, contain a correct statement of all that took place upon the trial, giving the evidence, or such portions of it as relate, directly or indirectly, to the questions on which a review is sought; stating all the different exceptions taken throughout that trial, as and when they arose; and comprising, lastly, the charge of the judge, and the verdict rendered by the jury.

If the charge be omitted, or imperfectly stated, the presumption will lie that it was correct, either wholly, or *pro tanto*, as to the omitted portions. *Marine Bank of City of New York vs. Clements*, 6 Bosw., 166.

A case without exceptions will be similar in all respects, omitting, of course, any statement as to the latter.

A case seeking the review of a trial by the court or by a referee, will, as a general rule, enter less into matter of detail. Where the decision is sought to be impeached in relation to a question of fact, the form of statement will be substantially the same as on a trial by jury, averring generally what passed, giving the evidence, so far as it is relevant to the proposed review, and noticing such exceptions as were taken. But, when, or so far as, the decision is impeached for errors of

law only, the mode of preparation will more nearly resemble that which obtains with reference to exceptions, as to which, see below.

To the statement in this form of what took place on the trial, must be added the decision or report of the judge or referee, and the exceptions, if any, of the unsuccessful party, filed under section 268 or 272. The draft of the specification, by the judge or referee, of the facts found by him, and his conclusions of law, required by the same section, should be also prepared and subjoined. It is not sufficient that these facts and conclusions appear upon the face of the decision or report. They must appear separately upon the case as made, and, although it is the duty of the judge or referee to make this specification and its terms rest, of course, entirely within his discretion, it has been also held the duty of the moving party to prepare and submit it. Like any other part of the case, it will be subject to amendment by the adverse party, and to settlement by the judge or referee. See also generally, as to the preparation of such a case, and especially as to the necessity of the statement in question being separately made, *Hunt vs. Bloomer*, 3 Kern., 341; 12 How., 567; *Johnson vs. Whitlock*, 3 Kern., 344; 12 How., 571; *Griscom vs. Mayor of New York*, 2 Kern., 536; *Magie vs. Baker*, 4 Kern., 435; *Smith vs. Grant*, 15 N. Y., 590; *Otis vs. Spencer*, 16 N. Y., 610; 15 How., 425; 6 Abb., 127; *Westcott vs. Thompson*, 16 N. Y., 613; *Titus vs. Orvis*, 16 N. Y., 617; *Bissell vs. Hamlin*, 20 N. Y., 519; *Mills vs. Thursby* (No. 11), 12 How., 417; *Rogers vs. Beard*, 20 How., 282; also p. 98; *Cheesborough vs. Agate*, 26 Barb., 603; 7 Abb., 32; *Pope vs. Dinsmore*, 29 Barb., 367; 8 Abb., 429. See also *Turner vs. Haight*, 16 N. Y., 465, head-note; *Connolly vs. Connolly*, 16 How., 224; *Harden vs. Palmer*, 2 E. D. Smith, 172; *Barker vs. Crosby*, 32 Barb., 184 (190); *Matthews vs. Mayor of New York*, 14 Abb., 209.

Where the judge who tried the cause had made a statement of facts found, subjoining his judgment, it was held that the conclusions enunciated in the latter must be considered as his conclusions of law, and that the only portions of that judgment which could, under the circumstances, be treated as conclusions of fact, were those which, if found at all, must, from their nature, have been necessarily found as facts. See *Griffin vs. Cranston*, 1 Bosw., 281 (304).

When the action has been tried by a jury, a case is absolutely necessary, where questions of fact are sought to be reviewed. If omitted, they cannot be brought up, upon an appeal from the judgment. *Bedell vs. Commercial Mutual Insurance Company*, 3 Bosw., 147.

And, where the complaint was dismissed, as to one distinct cause of action, and a verdict for the plaintiff, subject to the opinion of the court, taken as to another, it was held that the dismissal could not be reviewed, on the application for judgment. A separate case should

have been made, and the question brought up for adjudication separately, by leave of the court, or otherwise. *Dickerson vs. Cook*, 3 Duer, 324. So also, as to the review of the verdict of a jury, finding special facts, in connection with a verdict subject to the opinion of the court. The review as to the former, must be applied for at special term in the first instance. *Purvis vs. Coleman*, 1 Bosw., 321.

As to the necessity of making a case, or a case and exceptions, in all cases where a decision on a question of fact, or a ruling in the course of the trial, is sought to be reviewed, see *Brewer vs. Isish*, 12 How., 481; *Tremain vs. Rider*, 13 How., 148.

And a case must always be made, where the verdict is sought to be impeached, on the ground of misdirection. The question cannot be brought up in any other form. See *Brush vs. Kohn*, 14 Abb., 51.

Where a document produced upon the trial is sought to be impeached for defects, it should be set forth, either *in extenso*, or so far as is necessary to substantiate their existence; if not, the court will assume the contrary. *New York Cur Oil Company vs. Richmond*, 6 Bosw., 213; 19 How., 505; 10 Abb., 185.

As to the propriety of making and settling a case, when a verdict is sought to be set aside for misconduct of the jury, and the motion is not made on the judge's minutes, see *Nesmith vs. Clinton Fire Insurance Company*, 8 Abb., 141; but whether this state of circumstances is not properly ground for a motion on the score of irregularity, and therefore not within rule 34, may possibly be doubted.

Before the last amendment of rule 33, it was held that the only mode of reviewing errors of law, upon the trial of a feigned issue, was by means of a case, and not upon exceptions in the first instance. See *Snell vs. Loucks*, 12 Barb., 385; *Lansing vs. Russell*, 13 Barb., 510. But, by the rule as it now stands, that right is expressly provided for.

Where portions of a judge's charge are not sought to be impeached, it will be as well to restrict the statement in the case, to that part which is sought to be reviewed, or which it is claimed that the jury erred in disregarding. See *Bulkeley vs. Keteltas*, 4 Sandf., 450. See, however, as to the presumption which lies in favor of the correctness of any portions omitted, *Marine Bank of City of New York vs. Clements*, 6 Bosw., 166.

It is not unusual, and will be proper, in preparing the draft of a case or exceptions, not to set forth, but merely to refer to documentary evidence produced on the trial, and intended to be introduced *in extenso*, as thus, "Here insert copy promissory note," or otherwise according to the nature of the document, in terms sufficiently clear to identify it. Of course, this form is not applicable, where it is not intended to give a copy, but only a statement of the effect of such a document.

It is also not infrequent to commence the case with a similar suggestion to insert the pleadings. This practice is, however, clearly incorrect. The pleadings form part of the record, and come up before the court in that shape; and it is clearly superfluous to copy them, and, on an appeal, print them twice over, once in their proper place, and again as part of the case or exceptions.

(c.) EXCEPTIONS.

When the review is sought upon exceptions only, the mode of statement is more restricted; and the same rules apply substantially to those portions of a case and exceptions, which are especially directed to the review of the rulings of a judge or referee on specific questions of law.

When the case is wholly or partially of this nature, the same rules should be observed in its preparation, as were observed in that of a bill of exceptions under the former practice. See *Smith vs. Grant*, 15 N. Y., 590 (592).

Under that practice, a bill was a history of the trial, sufficiently full to present the points of law excepted to, with the evidence on which the points raised arose. *Zabriskie vs. Smith*, 1 Kern., 480 (482). It should give a plain and concise statement of the facts, out of which the questions of law arise. *Price vs. Powell*, 3 Comst., 322. If loosely prepared, any doubt about the facts should be turned against the parties framing the bill. *Same case*.

No better guide can be taken in the preparation of exceptions, or of that portion of a case which consists of exceptions only, as distinguished from the general bearing of the evidence on the merits, than the positive requisitions of rule 36, prescribing that exceptions shall contain only so much of the evidence, as may be necessary to present the questions of law upon which the same were taken at the trial, and making it the duty of the judge, on their settlement, to strike out all evidence or other matters unnecessarily inserted.

Where exceptions are taken to a decision or report, it will of course be inserted in full, and both, taken together, will usually give the court all necessary information; but if, as sometimes may be the case, any portion of the evidence be necessary, to illustrate or explain the exceptions, the same rules must be observed with reference to its insertion. They must be rigorously confined to such matter as is necessary for the purpose, including all that matter, but not wandering beyond it into any irrelevant statements.

The following principles are laid down upon this subject, in *Mead vs. North Western Insurance Company*, 3 Seld., 530 (534). The exceptions, as framed, must show the nature of evidence claimed to be wrongfully excluded, with sufficient detail to enable the court to judge as to its

materiality. They should also show clearly the conclusions of fact at which the court below arrived, and its ruling thereon.

In framing a case for review by the Court of Appeals, the rules are more rigorous than those which prevail below, inasmuch as, at the general term, a review upon questions of fact is permitted, whereas, in the court above, such review can only take place on questions of law. Section 268. See this question more fully considered below, under the head of *Separation of Exceptions*. Since the amendment of 1852, it is no longer necessary to obtain the formal leave of the court for that purpose, but it may be done, in all cases where an ulterior review is sought. See section 264. As to the practice, whilst leave was necessary to be obtained, see *Oakley vs. Aspinwall*, 1 Sandf., 694; *Huff vs. Bennet*, 2 Sandf., 703; 2 C. R., 139.

To enable an exception to the admission or rejection of evidence to be stated, it is not indispensable that it should have been formally entered on the judge's minutes, if actually taken at the trial. *Sanger vs. Vail*, 13 How., 500; 4 Abb., 217; *Toplitz vs. Raymond*, 10 Abb., 60. See, as to the annexation of exceptions to a case, prepared with a view to a rehearing, under the practice antecedent to the Code, *Gilchrist vs. Stevenson*, 7 How., 273.

But, where not taken at the trial, or in due time afterwards, exceptions will not usually be allowed to be inserted by amendment. *Beach vs. Raymond*, 1 Hilt., 201; 3 Abb., 78; *Beach vs. Gregory*, 2 Abb., 203.

Since the amendment of 1852, it is no longer necessary to make a formal bill of exceptions, nor need it any longer be sealed or signed by the judge. *Zabriskie vs. Smith*, 1 Kern., 480. See, as to the former practice, *Milvéhal vs. Milward*, 2 Duer, 607.

In a case where a review is sought, wholly upon exceptions to the decision of the court or referees, and where no reference is necessary to what took place upon the actual trial, for the purpose of making the objection patent, it has been held that a review may take place, upon the record alone, and upon exceptions taken and filed in due time, under section 268, or 272, without the necessity of preparing any formal case. See *Tremain vs. Rider*, 13 How., 148 (152); *Brewer vs. Isish*, 12 How., 481 (487); *Ferguson vs. Hamilton*, 35 Barb., 427.

So far as regards the review of a referee's report, this practice seems now clearly provided for, by section 272, as amended in 1860. See *Ferguson vs. Hamilton*, *supra*. As respects a decision of the court, there seems more doubt upon the question. Rule 34 prescribes the making of a case in the usual form, under these circumstances. See *Connolly vs. Connolly*, 16 How., 224. *Ferguson vs. Hamilton*, also admits in fact that such is the practice, in all cases not controlled by the special amendment of section 272.

But the fact that no case or exceptions has been prepared, will not, *per se*, deprive the appellant of the benefit of an appeal, so far as to authorize its dismissal. He may still impeach the judgment, for errors in the record itself, but he will be strictly confined to such errors, and cannot raise an objection for error on the trial. *Connolly vs. Connolly*, *supra*; *Gilchrist vs. Stevenson*, 7 How., 273; *Brown vs. Heacock*, 9 How., 345; *Robinson vs. Hudson River Railroad Company*, 1 Hilt., 144; 3 Abb., 115; *Rankin vs. Pine*, 4 Abb., 309. But it has been held that he cannot maintain an appeal from judgment by default, where no trial has in fact taken place, but that his only remedy lies by motion. *Pope vs. Dinsmore*, 29 Barb., 367; 8 Abb., 429.

(d.) COPY AND SERVICE.

When complete, the paper must be fairly and legibly copied, and the folios marked in the margin (rule 20). The lines must also be so numbered as that each copy may correspond (rule 34). Both these requisites must be observed, or the paper may be returned for irregularity. The numbering of the lines is with a view to the preparation and settlement of amendments, and, although not in strictness prescribed, it will be obviously expedient to number the pages also. Such is, in fact, the universal practice.

When complete, the paper must be served upon the adverse party within due time, and in the usual manner. It has been held that service of a case may be deemed a sufficient notice of appeal, so as to enable a party to amend, by service of one in regular form, *nunc pro tunc*, after the time had actually expired. *Sherman vs. Wells*, 14 How., 522; *Jackson vs. Fassitt*, 33 Barb., 645; 21 How., 279; 12 Abb., 281. It will be far better practice, however, not to rely upon such an indulgence, and, under similar circumstances, the decision has not been followed. *Holmes vs. Woodward*, New York Common Pleas, unreported.

Wilson vs. Allen, 3 How., 369; 7 L. O., 288; 2 C. R., 26, holding that, under the former rules of the court, a case ought to be verified, is clearly obsolete.

(e.) AMENDMENTS BY ADVERSE PARTY.

On receipt of the copy thus served, the adverse party has ten days within which to consider it, and prepare amendments thereto. If unable to do so within that time, he should on no account fail to obtain an extension, either by stipulation or order of the court.

The amendments proposed must be specific and explanatory, and must refer distinctly to the portions proposed to be altered, by express reference to the numbers of the pages and lines on each page. They must be served in due time upon the adverse party.

The duty of the amending party is to specify in detail, each amendment which he proposes, and to do it in a manner which will facilitate the examination and settlement by the judge. It will not be admissible to prepare and serve a substituted case or exceptions, so as to impose upon the judge the whole labor of comparison, though, in an extreme case, liberty to do so might be granted upon special application. *Stuart vs. Binsse*, doubly reported at 3 Bosw., 657, and 4 Bosw., 616.

(f.) NOTICE OF SETTLEMENT BY MOVING PARTY.

On receipt of the proposed amendments, the adverse party, unless he agree thereto, must serve a notice that the case or exceptions, with the amendments, will be submitted to the judge or referee for settlement, specifying the time and place. This notice must be served within four days, and the time for settlement must be not less than four, and not more than twenty days after its service.

As to the waiver of the rights of the moving party, by *laches*, in omitting to submit the case and amendments for settlement, see *Whitney vs Kimball*, 6 Bosw., 690.

(g.) SETTLEMENT BY JUDGE, OR REFEREE.

Although the appointment must be so made, it is, in practice, rarely attended by the parties. The course more usually pursued, is to leave the case and amendments with the judge or referee, who settles it at his leisure. For this purpose, before leaving the papers with him, the party proposing the case or exceptions, must mark upon the several amendments, his allowance or disallowance thereof. This is now made an express requisition by rule 36, as amended in 1858; but, before that time, it was equally necessary and usual in practice. He may also, if thought expedient, add his reasons for any proposed disallowance. If, as is usual and proper, the pleadings are not inserted in the case, it may be expedient to hand them in to the judge or referee.

In ordinary cases, this mode of proceeding will answer all purposes; but, if the amendments be of such a nature as to render an actual argument upon them advisable, or if the judge's or referee's decision thereon be unsatisfactory to either party, it is competent for them to discuss the matter personally before him, and to obtain his deliberate settlement, upon argument regularly had. In this case, the appointment originally made for settlement may either be actually attended, or a fresh meeting may be arranged for that purpose.

In settling the case, the judge will, of course, exercise his own discretion as to the version to be preferred, and he may, if he chooses, substitute that which appears upon his own minutes. He may also reject and strike out irrelevant or unnecessary matter; and, in settling excep-

tions, it is his express duty to do so. See, as to the substitution of a charge, prepared by the judge from his own minutes, for other versions of it suggested by the parties, *Toplitz vs. Raymond*, 10 Abb., 60.

Where the judge, before whom the cause was tried, had died after the preparation, but before the settlement of a bill of exceptions, the court allowed the moving party to make a fresh case, embodying those exceptions. The proceedings on that case were to be carried on, as to amendments, notices, &c., as on an original case, the notice for settlement to be before any justice of the court. The moving party was directed to furnish that justice with the original minutes on the actual trial, or with a copy; and either side were to be at liberty to present to the judge, affidavits with respect to any thing which occurred upon the trial. *Morse vs. Evans*, 6 How., 445.

The settlement of a case is a judicial, not a ministerial act. Where, therefore, on appeal from the report of three referees, the case was settled by two only, in the absence of and without notice to the third, the proceeding was held irregular, and the case sent back for a resettlement. *Fielden vs. Lahens*, 14 Abb., 48.

(h.) RESETTLEMENT.

It is, of course, competent for either party, if dissatisfied with the judge's settlement of the case or exceptions, to move the court that it be resettled, on affidavits showing what took place, and the errors committed on the settlement.

Such a motion will, however, be rarely advisable, as a very strong case indeed must be made out, before the court will interfere with a matter so purely in the discretion of the judge, and on which he is, of necessity, so much more thoroughly informed, than can be the case with respect to any other judicial officer.

A motion for this purpose, when otherwise admissible, may be made, pending an appeal to the higher tribunal. It will not be necessary first to remit the record for that purpose. *Witbeck vs. Waine*, 8 How., 433.

As to a motion for a resettlement being a proper mode of bringing up for reconsideration, a refusal on the part of the court to pass upon a specific question, see *Heroy vs. Kerr*, 21 How., 409 (422).

As to the power to compel the correct settlement of a case, by *mandamus*, and the necessity of its being clearly shown upon the application, what the facts are, in respect of which a correction is required, see *People vs. Baker*, 35 Barb., 105; 14 Abb., 19

(i.) FILING OF CASE WHEN SETTLED.

When the judge has settled the case, he either returns it to the moving party, or leaves it with the clerk of the court. Where the latter is

the practice, the moving party should be vigilant in his inquiries from time to time, as the ten days prescribed by rule 37 run, in strictness, from the time when the case is actually settled, and not from that when such party first becomes aware of the fact.

On settlement, the moving party should see to the case being copied at once (including copies of any documents merely referred to in the draft), and filed, within the ten days prescribed as above. It is an usual and a proper course for him to communicate the decision of the judge, as to the allowance or disallowance of amendments, to the adverse party, giving the latter an opportunity to amend his copy. But this course is not necessary; all that is required by the rules being the filing within the prescribed period.

Where the case or exceptions are to be heard at special term, a copy must be served upon the adverse party, before or with the notice of argument. See rules 40, 42. The same is also the practice, when exceptions are directed to be heard at the general term, in the first instance. When, on the contrary, the question comes up upon appeal, the papers must be printed, and served upon the adverse party, at or before the same time, under rule 43.

When this occurs, it is an usual practice to dispense with the formal filing of the case, by stipulation, until the printing is complete, and then to file a printed copy; but, of course, this can only be done by mutual agreement.

When a written copy is to be filed, it may sometimes be inconvenient to do so within the ten days. If so, a consent or order for extension must be obtained in due time. As to the power of the judge who tried the cause, or of any other, to make such an order *ex parte*, see *Thompson vs. Blanchard*, 3 How., 399; 1 C. R., 105, and *Huff vs. Bennett*, 2 Sandf., 703; 2 C. R., 139, overruling the stricter doctrine as to the necessity of a special motion, as held in *Doty vs. Brown*, 3 How., 375; 2 C. R., 3.

As to the necessity of a strict compliance with the regulation as to filing the case in due time, and the terms which will be imposed, on excusing a default of this nature, see *Peck vs. New York and Liverpool United States Mail Steamship Company*, 3 Bosw., 622.

If the filing be neglected, the adverse party is entitled to enter an order of course, that the case be deemed abandoned, on pursuing the mode prescribed by rule 37. The power to enter this order was first conferred by the amendment of the rule in 1858. The proceeding must now be taken in all cases. Before 1858, no order was prescribed, but the penalty was the same.

The moving party is entitled to the full benefit of the time allowed him by the rule, or of any extension, if granted. Pending such period,

his adversary cannot properly notice the case for argument, or give notice of motion, founded upon a presumed future default, or omission to serve copies in due course. Extending the time to file, is equivalent to extending the time to print the case, when made. *Donohue vs. Hicks*, 21 How., 438. See also, as to omissions of this nature, not forming a subject for an affirmance by the appellate court, *Warren vs. Eddy*, 13 Abb., 28.

(j.) WAIVER OF RIGHTS BY DELAY.

By rule 34 the periods there specified are made imperative, unless extended by stipulation or order. The right, whether to make a case on the one hand, or to propose amendments on the other, will, accordingly, be gone, unless such proceedings be taken in due time; and if, in like manner, the notice to appear before the justice to settle the case and amendments, be not served within the four days limited, the right to object to those amendments will be lost, and they will be made as of course.

The same was the case, with respect to an omission to file the case in due time, before the revision of the rules in 1858; and is so still, although the precaution of entering an order, as now prescribed, should never be neglected.

The remedy of the adverse party is to refuse service of, and return a case or amendments, if attempted to be served after the proper time. If, on the contrary, the moving party, after loss of his right to have the case and amendments settled, should file, or attempt to proceed upon the former in its original form, a special motion to take it off the file will be proper.

If the moving party do not proceed in due form and time, to make and serve his case, to have it settled in due course and upon due notice, should amendments be proposed, and to file it, when settled, according to the practice above described, he will, by such omission, suffer a waiver of his rights, and his adversary will be regular in disregarding what has been theretofore done, and proceeding to judgment accordingly. Nor will a stipulation for a general stay of proceedings, until argument, prevent him from so doing. *Robinson vs. Hudson River Railroad Company*, 1 Hilt., 144; 3 Abb., 115.

But, if an appeal has been actually taken, it will not form ground for dismissal, though it will prevent the case from being used, and confine the appellant wholly to errors apparent on the record. *Same case. Brown vs. Heacock*, 9 How., 345.

See generally, as to the absolute waiver of the right to make use of a case, by unexplained *laches* in proceeding to have it duly settled, *Whitney vs. Kimball*, 6 Bosw., 690.

(k.) POWER TO COMPLETE CASE AFTER JUDGMENT, IN CERTAIN CASES.

The above observations all proceed, upon the assumption that a stay of proceedings is obtained, and that the case, on which a new trial is sought, is made and brought to a hearing, before the entry of judgment, according to the more usual practice. A neglect on this point, or a refusal on the part of the court to grant such a stay, will not, however, prejudice the appealing party. It has been repeatedly held that a case so made, may be attached to the judgment-roll, after the entry of judgment. See *Renouil vs. Harris*, 2 Sandf., 641; 1 C. R., 125; 2 C. R., 71; *Lynde vs. Cowenhoven*, 4 How., 327; 3 C. R., 7; *Schenectady and Saratoga Plank Road Company vs. Thatcher*, 6 How., 226; 1 C. R. (N. S.), 380; *Gilchrist vs. Stevenson*, 7 How., 273.

It will be necessary, however, to make a special application to the court, by motion, in the usual manner, unless such permission have been previously given.

See, however, decisions heretofore cited, to the effect that a case cannot be brought up for hearing at the special term, after judgment entered, unless upon leave given, or equivalent special provision by the court.

§ 242. *Hearing, when Settled.*

Prior to the amendment of 1851, the proper mode of bringing up a case for review, was much discussed. As the result of a preponderance of decisions, the practice had substantially settled down, in accordance with the mode prescribed by the legislature in that year. At this distance of time, it would be needless to refer in detail to the cases by which this process was effected; should a reference to them be desirable, they will be found enumerated in the first and second editions of this work.

(a.) HEARING AT SPECIAL TERM.

This is the proper mode of hearing whenever the case has been tried by a jury, and a new trial is sought for errors of fact, either solely, or conjointly with errors of law, upon a case, or case containing exceptions. It is the only mode for obtaining an effectual review, and this course of procedure is, in fact, only appropriate to cases where the trial has been had in that form. See *Jackson vs. Fassett*, below cited.

If this preliminary hearing be omitted, and the case allowed to go to the general term, upon appeal only, all power to review questions of fact will be lost, and the applicant will be restricted to his exceptions.

The case then comes up for ulterior review, upon an appeal to the general term, from the order at special term granting or refusing a new trial. This appeal may be brought up for hearing, either separately

before the entry of judgment, or afterwards, in conjunction with an appeal from the judgment, when entered. By either mode, a complete review will be obtained. The former, though unusual, may be resorted to, when the entry of judgment would be of practical inconvenience, but, to enable it to be done with effect, a continued stay of proceedings must be obtained. The latter is the simpler form, as it obviates the inconvenience of a double hearing, which may otherwise be necessary.

Unless special leave of the court be obtained, the hearing at special term should precede the entry of judgment. If the party moving neglect to obtain a stay, and allow judgment to be unconditionally entered, his right to a review upon the facts may be lost altogether. See *Morange vs. Morris*, 20 How., 257; 12 Abb., 164; *Soverhill vs. Post*, 22 How., 386; *Watson vs. Scriven*, 7 How., 9; *Jackson vs. Fassett*, 33 Barb., 645; 21 How., 279; 12 Abb., 281; affirming *same case*, 17 How., 453; 9 Abb., 137. See also *Morrison vs. New York and New Haven Railroad Company*, 32 Barb., 568.

But such hearing may be had after judgment, upon special direction by the court to that effect. Or, where the judgment is directed to be entered, not absolutely, but as security only, subject to the further action of the court. *Benedict vs. Caffé*, 3 Duer, 669; 12 L. O., 262; *Jackson vs. Fassett*, above cited; *Morange vs. Morris*, above cited; *Barnes vs. Roberts*, 5 Bosw., 73 (80).

Where exceptions have been taken, the case may be brought up for a general hearing at special term, pending a stay, if obtained. See *Morange vs. Morris*, *supra*. In ordinary cases, the review on such hearing will be confined to questions of fact, leaving the exceptions to be subsequently disposed of by the general term. On a special issue in an equity case, the reverse rule has been laid down, and that it is then the duty of the judge to pass upon all the questions which come before him, whether of fact or of law. See *Clayton vs. Yarrington*, 33 Barb., 144.

But, so far as exceptions standing alone are concerned, an omission to bring on the case by motion at special term, will not prejudice the rights of the objecting party. Such exceptions will be equally available, on appeal from the judgment. See *Jackson vs. Fassett*, *supra*; *Morange vs. Morris*, *supra*; *Morange vs. Morris*, 32 Barb., 650; *Ryle vs. Harrington*, 14 How., 59; 4 Abb., 421; *Morrison vs. New York and New Haven Railroad Company*, *supra*; *Watson vs. Scriven*, *supra*; *Molony vs. Dows*, 18 How., 27; 9 Abb., 86. But, in such case, the review at general term will be strictly confined to questions of law.

Questions of fact cannot be brought up on such an appeal, or on any other application to the general term, founded on the verdict of a jury. The only mode of obtaining a review on that class of questions, will be by appeal from the order of the judge at special term, denying a motion

for a new trial. See *Morrison vs. New York and New Haven Railroad Company*; *Morange vs. Morris*, and *Watson vs. Scriven*, above cited; *Hastings vs. McKinley*, 3 C. R., 10; *Marquart vs. La Farge*, 5 Duer, 559; *Fry vs. Bennett*, 16 How., 385; 7 Abb., 352; 2 Bosw., 684; *Stettiner vs. Granite Insurance Company*, 5 Duer, 594; *Anthony vs. Smith*, 4 Bosw., 503; *Gilbert vs. Beach*, 16 N. Y., 606; *Dickerson vs. Cook*, 3 Duer, 324; *Purvis vs. Coleman*, 1 Bosw., 321; *Brown vs. Richardson*, 1 Bosw., 402; *Cronk vs. Canfield*, 31 Barb., 171; *Bedell vs. Commercial Mutual Insurance Company*, 3 Bosw., 147; *Taylor vs. Harlow*, 11 How., 285. N. B.—*Castle vs. Duryea*, 32 Barb., 480 (484); *Fellows vs. Emperor*, 13 Barb., 92; and *Morris vs. Brower*, 4 Sandf., 701, are now obsolete.

But it has been held that such appeal cannot stand separately. It must be brought up in connection with, and at the same time as an appeal from the judgment. See *Soverhill vs. Post*, 22 How., 386.

If the unsuccessful party at special term, neglect to take such an appeal, he will be considered as having acquiesced in the decision on the motion, and will be precluded from raising any questions of fact above. *Ogden vs. Coddington*, 2 E. D. Smith, 317; *Fry vs. Bennett*, *supra*; *Rider vs. Union India Rubber Company*, 4 Bosw., 169.

In the Superior Court, it is usual for the single judge, when exceptions have been taken, to direct the entry of an order *pro formâ*, denying the motion for a new trial, without any argument before him; in order that the whole case may come up before the general term, upon a single hearing, both upon the law and the facts. See rules 10 and 11 of that court. And such an order is not unfrequently entered by stipulation.

Motions, not founded on a case or exceptions, as on the ground of surprise, newly discovered evidence, or the like, must in all cases be brought before the special term in the first instance, and for ulterior review, if necessary, upon the order there made. See *Clarke vs. Ward*, 4 Duer, 206; *Taylor vs. Harlow*, *supra*; *Morrison vs. New York and New Haven Railroad Company*, *supra*.

When the question is brought before the special term, on a motion of the latter description, it is brought on in the ordinary manner, on notice. When on a case and exceptions, it should be noticed and placed on the calendar, in the same manner as a cause for trial. The case on file may be procured from the office, for the use of the judge, and he should also be furnished with a copy of the pleadings.

It is, of course, competent for either party to suggest, and for the court to impose conditions, on granting the motion. The decision must be entered as an order, and served on the adverse party in the usual manner.

In the New York Common Pleas, it has been held that the motion ought properly to be brought on before the judge who tried the cause. See *Mead vs. Keyes*, 4 E. D. Smith, 510.

(b.) HEARING AT GENERAL TERM.

So far as regards the review of cases tried by a jury, the consideration of this branch of the question has been anticipated in the last subdivision. The views there stated are, however, exclusively confined to cases tried in that manner. Where the trial has been had by the court or by referees, the only mode of review now admissible, is by appeal from the judgment, and such appeal may be had upon the facts, as well as upon the law. See sections 268, 272. *Morgan vs. Bruce*, 1 C. R. (N. S.), 364, was decided, prior to the amendment allowing such an appeal upon the facts.

The only exception to this rule, is with reference to those courts of peculiar jurisdiction, such as the City Court of Brooklyn, in which there is only one judge, and that judge empowered by statute to grant a new trial, in cases within his cognizance. See *Goulard vs. Castillon*, 12 Barb., 126. See hereafter, under the head of *Appeals*.

Exceptions may also be heard at the general term in the first instance, where the trial has been by jury, judgment being suspended in the mean time, when a special direction to that effect has been made by the court, under section 265.

This course has been held proper, where the whole question sought to be reviewed, turned upon the granting of a motion for a nonsuit. *Molony vs. Dows*, 9 Abb., 86; 18 How., 27.

Where exceptions have been thus reserved, the course prescribed by the section must be strictly pursued, and judgment cannot properly be entered in the mean time. *Roosa vs. Snyder*, 12 How., 285; *In re Welch*, 14 Barb., 396; *Morange vs. Morris*, 20 How., 257; 12 Abb., 164; *Taylor vs. Harlow*, 11 How., 285.

When brought on, the application will be an enumerated motion (rule 40). As such, it must be noticed, and placed upon the calendar in the usual manner. Although the case does not fall directly within the terms of rule 43, it will be more prudent, and may be held necessary, to have the papers and points printed, as on an appeal. See rules 45 and 46.

The decision, when made, will embrace the entry of judgment, and present the same features as one on appeal.

Exceptions cannot be heard in this manner, when the trial has been had by the court or referees, and an order to that effect will be irregular. *Vide Wright vs. Delafield*, 11 How., 465; *Mallory vs. Wood*, 14 How., 67; 3 Abb., 369; 6 Duer, 657.

But, where the decision was right upon the merits, and the parties had consented to a hearing in this form, the appellate court declined to reverse the judgment, holding the error to be amendable. *Lake Ontario, Auburn, and New York Railroad Company vs. Marvine*, 18 N. Y., 585.

As to the difficulties, in relation to the assessment of costs on a hearing of this description, see *Jackett vs. Judd*, 18 How., 385.

A verdict subject to the opinion of the court, comes up for judgment at the general term in the first instance, under section 265. See below, under that head.

(c.) GENERAL INCIDENTS.

If a new trial be granted, the cause is, as it were, remitted back to the stage of the original joinder of issue, and must be brought on a second time for trial, in regular form and in due course. The only difference between the second trial and the first, will be the clearer views which the parties will have, as to what will or will not be considered as admissible, either in point of evidence or of argument. If the decision on the motion have been in writing, it may be made use of for this purpose, and the judge may probably require a copy for his information, which should be in readiness accordingly. The date of the issue on the second trial will be that of the original joinder, without regard to the subsequent proceedings, and the cause will accordingly take a higher place on the calendar, and come on at an earlier period.

If the party who has applied for and obtained a new trial, neglect to proceed, it is competent for his adversary to do so, and set down the cause in due order, in the usual manner. *Gale vs. Hoysradt*, 3 How., 47.

Where a new trial is granted on the defendant's application, it will, however, be necessary for him to serve a copy of the order on the plaintiff, before he can be in a situation to move to dismiss the latter's complaint, for not proceeding to trial. But, where the new trial has been granted on the plaintiff's application, the contrary is the case. *Robb vs. Jewell*, 6 How., 276.

If a new trial be granted on the facts, of course the exceptions taken upon the original hearing are no longer of any practical operation. If, however, the application be refused, a further review may be obtained on those exceptions, which must be brought on in due course, when separated.

The fact that the cause has once been tried by a jury, does not preclude the right of either party to move for a reference, in a case involving the examination of a long account, where a new trial has been granted. *Brown vs. Bradshaw*, 8 How., 176; 1 Duer, 635.

An amendment as to parties is obtainable also, on motion, where proper; but it will not be granted, it seems, on the motion for a new trial, but only on a special application. *Travis vs. Tobias*, 8 How., 333.

§ 243. *Resettlement after Hearing.*

This may take place, either for the purpose of separating exceptions from a case heard at special term, and the decision there made submitted to, in order to bring such exceptions up for review by the general term, on questions of law only, unencumbered by statements of fact; or, after the decision by that branch of the court, for the purpose of putting the case, as originally stated, into a shape conformable to the regulations of the Court of Appeals, for the purposes of ulterior review. The former is in accordance with the previous practice of turning a case into a bill of exceptions, by leave of the court. This leave was an essential preliminary. See *Smith vs. Caswell*, 4 How., 286; *Benedict vs. New York and Harlem Railroad Company*, 3 C. R., 15; 8 L. O., 168; though, in some cases, a disposition was shown to relax the strictness of the rule. See *Hastings vs. McKinley*, 3 C. R., 10; *Hammond vs. Hazard*, 10 L. O., 50; *Oakley vs. Aspinwall*, 1 Sandf., 694.

But, since the amendment of 1852, a bill of exceptions is no longer necessary, and when the case comes up before the general term in the shape of an appeal from an order, granting or refusing a new trial upon the facts, in connection with an appeal from the judgment, no separation will be necessary, inasmuch as the whole document will be material for the purposes of the hearing.

But, when exceptions are directed to be heard at general term, and a case has also been made, and that case is not brought up for review at the same time on appeal, in relation to the questions of fact; or, when the unsuccessful party, on the motion for a new trial, abandons that portion of the case, and does not appeal from the decision of the single judge, then it may be necessary to separate the exceptions from the case, in order that the questions of law may come up before the general term, unencumbered by irrelevant matter.

And special authority for this purpose is conferred by section 264, thus:

If the exceptions be in the first instance stated in a case, and it be afterwards necessary to separate them, the separation may be made, under the direction of the court, or of a judge thereof.

Prior to the revision of 1858, there were special rules providing for this proceeding, but, in that year, they were stricken out, and the practice is left to the discretion of the judge. There can be no doubt, how-

ever, but that the proper course to pursue will be substantially in accordance with that on the original preparation of the case, under rule 34. The draft of the exceptions, as proposed to be separated, should be prepared and served by the moving party; his adversary should prepare amendments, and the exceptions and amendments should be settled by the judge or referee before whom the case was tried, in the same manner, and the same rules as to filing, &c., should be observed.

On a separation of this description, it will not be competent to introduce any exception whatever, which was not taken at the time of the original trial, or in due time afterwards, when heard by the court or referees. *Beach vs. Gregory*, 1 Hilt., 201; 3 Abb., 78; affirming *same case*, 2 Abb., 203. And it will be too late to make an application for the purpose, after the decision of an appeal, with a view to a rehearing, though the court may correct a mis-statement. *Fish vs. Wood*, 2 Abb., 419.

When exceptions have been separated, for the purpose of carrying up the case, on questions of law only, on appeal, it will be regular to enter up judgment, on their being filed, unless it be otherwise provided. Pending the separation, a stay should be applied for in the usual manner. If separated after the entry of judgment, but before the hearing of the appeal, provision should be made either in the original order, or by subsequent application, for annexation to the record of the substituted exceptions, when so settled.

a.) RESETTLEMENT FOR COURT OF APPEALS.

But the more usual form of proceeding, is that by which matter, relating to questions of fact only, is sought to be expunged from the case as originally made, for the purposes of an appeal to the Court of Appeals.

As that tribunal will not take cognizance of errors of fact, but only of errors of law, such a separation is indispensable, whenever the case, as originally prepared, contains detailed statements of evidence.

The rule which prevails there, is thus stated in *Livingston vs. Radcliff*, 2 Comst., 189; 3 How., 417: "As to questions decided by the referee, in receiving or rejecting evidence, and the like, the case is in the nature of a bill of exceptions, and, as to the merits, it is in the nature of a special verdict, which must find facts, and not the mere evidence of facts."

That rule is still more fully stated in *Esterly vs. Cole*, 3 Comst., 502 (505), in relation to a trial by referees. "For the purpose of a review in an appellate court, a case, containing a statement of facts, not the evidence before the referees, but the conclusions of fact drawn from that evidence by the court of original jurisdiction, must be settled by the

court, so as to leave nothing for the appellate court but questions of law, arising out of established facts: Second, this case must be inserted in the judgment record, with proper entries, to show a motion to set aside the report, and its denial, and judgment thereon. (N. B.—The decision was made, when the mode of review of a report was different.) Third, if mere evidence is inserted in the case, the appellate court will not pass upon it; and, Fourth, the appellate court has no authority to review, in any way, the settlement of the case in the court below, but must take the facts to be truly stated." See also *Borst vs. Spelman*, 4 Comst., 284; *Sturgis vs. Merry*, 2 Comst., 189; 3 How., 418; *Johnson vs. Whitlock*, 3 Kern., 344; 12 How., 571.

And the same rule was, and is equally applicable to a case, where the trial was by jury. It is thus stated in *Price vs. Powell*, 3 Comst., 322: A bill of exceptions should give a plain and concise statement of the facts, out of which the questions of law arise, and the evidence should not be set forth, in detached and scattered parcels. If loosely prepared, every doubt about facts, should be turned against the party making the bill. See also *Zabriskie vs. Smith*, 1 Kern., 480 (482). See, as to the rule in the same court in such cases, or on a trial by the court, *Livingston vs. Radcliff*; *Wright vs. Douglass*, and *King vs. Dennis*, 2 Comst., 189. See also below, under the head of *Preparation of a Special Verdict*.

When exceptions have been heard at the general term in the first instance, and the appeal is from the judgment there given, the fact of their being separately stated, will be patent upon the face of the record, and a motion to dismiss will be denied. *Zabriskie vs. Smith*, 1 Kern., 480.

The same rule will of course hold, when the hearing at general term appears to have been had upon exceptions only.

Or, where it appears on the face of the record, that the same matters were necessary to be stated, "whether the object be to move the court below, as upon a case, or as upon a bill of exceptions. In such cases, of course no separation would be possible, because, by the supposition, all the matters contained are material in either aspect." *Vide Zabriskie vs. Smith*, 1 Kern., 480 (483).

The following further *dicta* appear in the opinion in *Zabriskie vs. Smith*, above cited: "In all cases, where matters are contained in a case, containing exceptions, which are not necessary to present the legal questions arising upon the exceptions, a separation should take place, so that, upon the appeal to this court, the questions of law may be presented, unencumbered by irrelevant matter. That this is the only correct course of practice is plain."

Again, towards the close of the opinion: "In all cases, therefore, where the return to this court does not show that the exceptions were stated separately, according to the statute, and not in a case, we must

require that they shall appear upon the return to have been separated from the case, under the direction of the court below, or of a judge thereof, or that the court below, or a judge thereof, has determined that, in the particular case, no separation was possible" (1 Kern., 484).

And, unless this so appears, the appeal will be liable to be dismissed upon motion. *Same case.*

The same rule, as to the dismissal of an appeal, will be acted upon when a case has been tried by the court or by referees. The finding must settle the material facts, and they must come up in that shape, and not in a detail of the evidence. *Griscom vs. The Mayor of New York*, 2 Kern., 586; *Colie vs. Brown*, 1 C. R. (N. S.), 416.

And this finding must be separately made, in the mode prescribed by sections 268 and 272. The court will not look for it elsewhere, not even into the decision or report, though it may contain the same matter. *Johnson vs. Whitlock*, 3 Kern., 344; 12 How., 571; *Hunt vs. Bloomer*, 3 Kern., 341; 12 How., 567; *Otis vs. Spencer*, 16 N. Y., 610; 15 How., 425; 6 Abb., 127; *Westcott vs. Thompson*, 16 N. Y., 613; *Titus vs. Orvis*, 16 N. Y., 617; *Viele vs. Troy and Boston Railroad Company*, 20 N. Y., 184; *Turner vs. Haight*, 16 N. Y., 465; *Bissell vs. Hamlin*, 20 N. Y., 519; *Mills vs. Thursby* (No. 11), 12 How., 417; *Smith vs. Grant*, 15 N. Y., 590; *Cady vs. Allen*, 18 N. Y., 573; and *Magie vs. Baker*, 4 Kern., 435. In this last decision the essentials of the case to be made for review upon a trial of this nature, will be found fully stated in the opinion (pp. 437, 438), which may be safely referred to, as a guide on the occasion of a resettlement. See also, especially, *Westcott vs. Thompson*, *supra*, 16 N. Y., 613 (614). See, however, as to allowing an appeal to stand, when the case made, contained the essentials necessary for a proper review, though informally assembled, *Smith vs. Grant*, 15 N. Y., 590 (592).

When the separation of exceptions, or the insertion of a finding of the above nature is necessary, or the case otherwise requires correction or abbreviation, to conform to the requirements of the court above, an application should be made to the court below for the purpose.

If made before the return is filed, or the case served in the court above, an extension of the time for those purposes will be expedient, and application may be made for it to a judge of the court above, *ex parte*, on affidavit of the facts. It should be asked for, until the next term of the court, or such other time as may be necessary; nor will there be any difficulty in this respect, an order of a judge of that tribunal, not being subject to the twenty days' limitation imposed on *ex parte* orders below, by section 401.

Even when the return has been actually filed, the application to the court below will be equally competent. A judge at special term has

power to make the order, nor will it be necessary to apply to the court above, for a remitter of the record. *Witbeck vs. Waine*, 8 How., 433.

An application of this last nature, is usually the result of leave given by the court above to make it, consequent upon a motion by the adverse party, or otherwise. See below, book XIII., chapter III., section 318, as to the special practice of that tribunal.

In *Livingston vs. Miller*, 7 How., 219, where exceptions actually taken were imperfectly stated, the Court of Appeals stayed the argument, to give the appellant an opportunity to make such an application; and directed that the return, after amendment, should retain its original date of filing.

Under the practice of the Court of Appeals, the making or correction of the requisite finding of facts, must be by the judge or referee, and not by the general term. See *Mills vs. Thursby* (No. 11), 12 How., 417, rejecting such a finding, as prepared by the general term under *Mills vs. Thursby* (No. 9), 11 How., 134.

But in the same case, 12 How., 417, the court above allowed the amended case to take the place of that on the return, so far as it substituted an abridged statement of the evidence, presenting the exceptions taken below in proper form.

Rule 38 of the Supreme Court, inserted on the revision of 1858, provided, on the contrary, for a finding of facts by the general term, to be annexed to the record and returned to the Court of Appeals, and directed a form of procedure, by which such finding should be settled, in a similar manner to the settlement of a case. See *Smith vs. Grant*, 17 How., 381, decided under this rule, and holding that it was not proper for the case to be sent back to the referee for that purpose. See also *Catlin vs. Cole*, 19 How., 82; 10 Abb., 387.

These cases, and the rule itself, seem to be in direct conflict with *Mills vs. Thursby* (No. 11), above cited. See also order of the court above, recited in *Catlin vs. Cole*, *supra*. The legislature has now declared, by the amendment of 1860, that no such finding of facts by the general term, as is provided for by rule 38, shall be required for a review in the Court of Appeals, so that the rule may be considered as superseded.

The application must of course be made on the usual notice, grounded on the pleadings and case, and such additional affidavits, if any, as may be necessary to show clearly what is required. If for a separation of exceptions, it should ask that it be made under the direction of the court or a judge thereof, in the terms of section 268. If for a resettlement of the case, or the addition or amendment of a statement of facts, that it be made by the judge or the referee who tried the cause, asking, in addition, that the exceptions, when separated, or the case, when

resettled, be annexed to the judgment-record, and substituted for that already forming part of it; and, if a return has already been made, then that the clerk of the court do make a further return of the substituted document to the court above. It is properly made at special term.

If the application be made, pursuant to leave granted by the appellate tribunal, it will usually be unnecessary to apply again for leave to substitute the amended return, as the original direction will most probably provide for it; but, should this not be the case, an order should be applied for.

As to the power of the court below, to make amendments in the record pending an appeal, see *Judson vs. Gray*, 17 How., 289; *Luyster vs. Sniffin*, 3 How., 250; *Johnson vs. Whittock*, 3 Kern., 344 (349); 12 How., 571.

See *Bissell vs. Hamlin*, 13 Abb., 22, as to a reargument in the court below, on a case, when resettled.

§ 244. *Law as to New Trial.*

It would of course be perfectly out of place, to attempt in the present work a consideration of this subject, in any thing like detail. It may be convenient, however, to state a few of the more recent decisions, in broad and general classes, without attempting for one moment to go into minor matters of detail.

The statutory right to a new trial in ejectment has been already mentioned, and the provisions referred to. This right is not interfered with by the Code, but is still existent. See *Rogers vs. Wing*, 5 How., 50; *Cook vs. Passage*, 4 How., 360; *Lang vs. Ropke*, 1 Duer, 701; 10 L. O., 70; *Bellinger vs. Martindale*, 8 How., 113; *Evans vs. Millard*, 16 N. Y., 619. But the statute does not apply to ejectment for non-payment of rent. *Christie vs. Bloomingdale*, 18 How., 12. See likewise, as to a new trial in ejectment, on an ordinary application, *Briggs vs. Wells*, 12 Barb., 567; *Lane vs. Gould*, 10 Barb., 254; *Holmes vs. Davis*, 21 Barb., 265. Also, as to the time within which such right is exercisable, *Chataugue County Bank vs. White*, 23 N. Y., 347.

And, in cases where the rights of an heir-at-law, or the validity of a will are involved, the courts will be disposed to grant a new trial, in analogy with the above statutory provisions, upon grounds which, in an ordinary case, would be deemed insufficient. *Clayton vs. Yarrington*, 33 Barb., 144.

Where important error of law has been committed on a trial by jury, there must be a new trial, whether it be as regards the admission or

rejection of evidence, omission to nonsuit, misdirection, refusal to charge, error in charging, or other miscarriage on the part of the presiding judge.

See, as to questions of evidence: the general rule being that, if evidence, which is inadmissible *per se*, has been improperly received, or if general evidence, which might have influenced the minds of the jury, in any manner, has been either improperly admitted or improperly rejected, there must be a new trial: *Dayton vs. Ryerson*, 13 How., 281; *Dunning vs. Pratt*, 4 Duer, 331; *Simmons vs. De Barre*, 6 Abb., 188; *Leonori vs. Bishop*, 4 Duer, 420; *Salmon vs. Orser*, 5 Duer, 511; *Wilmot vs. Richardson*, 6 Duer, 328; *McAllister vs. Sexton*, 4 E. D. Smith, 41; *Healey vs. Kinsley*, *ibid.*, 286; *Whiting vs. Otis*, 1 Bosw., 420; *Luby vs. Hudson River Railroad Company*, 17 N. Y., 131; *Erben vs. Lorillard*, 19 N. Y., 299; *Underhill vs. New York and Harlem Railroad Company*, 21 Barb., 489; *Main vs. Eagle*, 1 E. D. Smith, 619; *Outwater vs. Nelson*, 20 Barb., 29; *Oechs vs. Cook*, 3 Duer, 161; *Van Voorhis vs. Hawes*, 12 How., 406; *Clyde and Rose Plank Road Company vs. Baker*, 12 How., 371; affirmed, 22 Barb., 323; *Stanton vs. Wetherwax*, 16 Barb., 259; *Patchin vs. Astor Mutual Insurance Company*, 3 Kern, 268; *Clark vs. Crandall*, 3 Barb., 612; *Weeks vs. Lowerre*, 8 Barb., 530; *Boyle vs. Coleman*, 13 Barb., 42; *Dresser vs. Ainsworth*, 9 Barb., 619; *Murray vs. Smith*, 1 Duer, 412; *Robison vs. Lyle*, 10 Barb., 512; *Taylor vs. Church*, 4 Seld., 452 (460); reversing same case, 1 E. D. Smith, 279; *Brown vs. Richardson*, 20 N. Y., 472; *Van Valen vs. Schermerhorn*, 22 How., 416; *Cassard vs. Hinman*, 6 Bosw., 8; *Ward vs. Washington Insurance Company*, 6 Bosw., 229.

The same rules as to the admission or rejection of evidence, apply also when the trial is by the court or referees, and an important error of this nature has been committed. See *Belden vs. Nicolay*, 4 E. D. Smith, 14; *Hahn vs. Van Doren*, 1 E. D. Smith, 411 (cases of appeal from a justice's court); *Demilt vs. Leonard*, 19 How., 182; *Williams vs. Fitch*, 18 N. Y., 546; *Brown vs. Colie*, 1 E. D. Smith, 265; *Rippowam Company vs. Strong*, 2 Hilt., 52; *Anderson vs. Busteed*, 5 Duer, 485; *Johnson vs. McIntosh*, 31 Barb., 267; *Gellatly vs. Lowery*, 6 Bosw., 113. See also *Stanton vs. Wetherwax*, 16 Barb., 259; *Currie vs. Cowles*, 6 Bosw., 452.

An erroneous disregard of a material variance, will also form ground for a new trial. See *Johnson vs. McIntosh*, *supra*; *Texier vs. Gouin*, 5 Duer, 389; *Catlin vs. Hansen*, 1 Duer, 309; *Salters vs. Genin*, 3 Bosw., 250; 7 Abb., 193. Or, on the other hand, an omission to disregard, or to grant an amendment, in respect of one wholly immaterial. *Willis vs. Orser*, 6 Duer, 322; *Rogers vs. Verona*, 1 Bosw., 417.

An omission to nonsuit, or allowing the case to go to the jury without evidence, or on a question which clearly belongs to the court, will, of course, be error, involving a new trial. See *Dascomb vs. Buffalo and State Line Railroad Company*, 27 Barb., 221; *Mackey vs. New York Central Railroad Company*, 27 Barb., 528. See above, chapter I. of the present book, and cases there cited. An erroneous nonsuit will, of course, form ground for reversal.

Where a mistrial has been had, as, where a verdict subject to the opinion of the court, has been directed, when the case did not present questions of law only, a new trial must, of course, take place. See *Cobb vs. Cornish*, 16 N. Y., 602; 15 How., 407; 6 Abb., 129; *Gilbert vs. Beach*, 10 N. Y., 606; *Bangs vs. Palmer*, 16 How., 542; *Hull vs. Wheeler*, 7 Abb., 411; *Havemeyer vs. Cunningham*, 8 Abb., 1; *Buchanan vs. Cheeseborough*, 5 Duer, 238.

So also, where, by an interlocutory decision in the progress of the trial, a right, claimable by either party, has been violated, or he has been denied a privilege, which ought in justice to have been accorded to him. See, as to allowing the wrong party to begin, unless it be shown that no injury resulted, *Huntington vs. Conkey*, 33 Barb., 218. As to a refusal to admit further evidence, after a technical resting, in order to supply a patent defect. *Lewis vs. Ryder*, 13 Abb., 1. Or, to introduce additional evidence in contradiction, where the testimony is balanced. *Ward vs. Washington Insurance Company*, 6 Bosw., 229. But, as a general rule, the exercise of discretion will not be reviewed. See cases below cited.

So likewise, where the judge has misdirected the jury; or, when so requested, has refused to charge upon any important point. *Story vs. Brennan*, 15 N. Y., 524; *Gardner vs. Clark*, 21 N. Y., 399; *Hicks vs. Foster*, 13 Barb., 663; *Wallace vs. Mayor of New York*, 2 Hilt., 440 (452); 18 How., 169; 9 Abb., 40; *St. John vs. The Same*, 6 Duer, 315; 13 How., 527; *Conger vs. Hudson River Railroad Company*, 6 Duer, 375; *Walter vs. Post*, 6 Duer, 363; *Castanos vs. Ritter*, 3 Duer, 370; *Hill vs. Beebe*, 3 Kern., 556; *Button vs. Hudson River Railroad Company*, 18 N. Y., 248; *Ives vs. Humphreys*, 1 E. D. Smith, 196 (203); *Brush vs. Kohn*, 14 Abb., 51. Or, where he has omitted to give proper directions. *Marston vs. Vultee*, 12 Abb., 143. See also, as to a charge by a justice of the peace, *Stroud vs. Butler*, 18 Barb., 327; *Pettit vs. Ide*, 12 Abb., 44. See also, as to this subject, the first and third chapters of the present book.

The above principles are, however, subject to one very important modification. If it clearly appear that an error of the above nature, though in fact committed, was either corrected, or rendered unimportant in the subsequent progress of the trial; or that it was in itself imma-

terial; or that it was not calculated to mislead, and did not, in fact, mislead the jury; or that their verdict has not been in any wise affected by it; or that such error has not, in fact, worked any injury whatever to the losing party, the court will be disposed to refuse a new trial, and has frequently done so. But the case must be brought clearly within one of these categories. If it be in any way doubtful, whether the error may, or may not, have had some prejudicial effect, the strict rule will not be relaxed. See *Murray vs. Smith*, 1 Duer, 412; *Vallance vs. King*, 3 Barb., 548; *Allen vs. Way*, 7 Barb., 585; 3 C. R., 243; *Stoddard vs. Long Island Railroad Company*, 5 Sandf., 180; *Lyon vs. Marshall*, 11 Barb., 241; *Bogart vs. Vermilyea*, 6 Seld., 447; *People vs. Cook*, 4 Seld., 67; *Ledyard vs. Jones*, 3 Seld., 550; *Sperry vs. Miller*, 16 N. Y., 407 (412); *St. John vs. American Mutual Life Insurance Company*, 2 Duer, 419 (428); 12 L. O., 265; *Partridge vs. Badger*, 25 Barb., 146 (174); *Gildersleeve vs. Mahony*, 5 Duer, 383; *Morgan vs. Reed*, 7 Abb., 215; *Dias vs. Short*, 16 How., 322; *Castree vs. Gavelle*, 4 E. D. Smith, 425; *Martin vs. Garrett*, 4 E. D. Smith, 346; *Hunt vs. Bennett*, 4 E. D. Smith, 647; *Pendleton vs. Empire Stone Dressing Company*, 19 N. Y., 13; *Belmont vs. Coleman*, 1 Bosw., 188; *Cook vs. Litchfield*, 2 Bosw., 137; *Hopkins vs. Grinnell*, 28 Barb., 533; *Stanton vs. Wetherwax*, 16 Barb., 259 (261); *Horner vs. Wood*, 16 Barb., 386; *Shorter vs. The People*, 2 Comst., 193; *Alston vs. Jones*, 17 Barb., 276; *Gardner vs. Clark*, 17 Barb., 538; *Fay vs. Jones*, 18 Barb., 340; *Needles vs. Howard*, 1 E. D. Smith, 54; *Breidert vs. Vincent*, 1 E. D. Smith, 542; *Miller vs. Eagle Life and Health Insurance Company*, 2 E. D. Smith, 268; *Beach vs. Raymond*, 2 E. D. Smith, 496; *Mayor of New York vs. Mason*, 4 E. D. Smith, 142; 1 Abb., 344; *Forrest vs. Forrest*, 6 Duer, 102; 3 Abb., 144; *Lowery vs. Steward*, 3 Bosw., 505; *Renaud vs. Peck*, 2 Hilt., 137; *Schenectady and Saratoga Plank Road Company vs. Thatcher*, 1 Kern., 102; *City Bank of Brooklyn vs. Dearborn*, 20 N. Y., 244 (246); *Colegrove vs. New Haven and New York and New York and Harlem Railroad Companies*, 20 N. Y., 492; *McConihe vs. New York and Erie Railroad Company*, 20 N. Y., 495; *Durgin vs. Ireland*, 4 Kern., 322; *Kemeys vs. Richards*, 11 Barb., 312; *Mathews vs. Poultney*, 33 Barb., 127 (136); *Holdane vs. Butterworth*, 5 Bosw., 1; *Kent vs. Harcourt*, 33 Barb., 491; *Munro vs. Potter*, 34 Barb., 358; 22 How., 49. So also, as to immaterial irregularity on the part of a juror, *Fash vs. Byrnes*, 14 Abb., 12.

A questionable exercise of discretion constitutes no ground for a new trial, where no positive legal right is violated. *St. John vs. Northrup*, 23 Barb., 25; *Stacy vs. Graham*, 3 Duer, 444; *Silverman vs. Foreman*, 3 E. D. Smith, 322; *Chaneel vs. Barclay*, 1 E. D. Smith, 384; *Peck vs. Richmond*, 2 E. D. Smith, 380; *Henry vs. Lowell*, 16

Barb., 268; *Cheney vs. Arnold*, 18 Barb., 434; *Anthony vs. Smith*, 4 Bosw., 503.

Where improper evidence has been received, without exception taken at the time, the question being reserved, and, at the close of the case, the judge instructs the jury to disregard it, the objection cannot be maintained. *McKnight vs. Dunlop*, 1 Seld., 537. See also *Durgin vs. Ireland*, 4 Kern., 322; *Travis vs. Barger*, 24 Barb., 614. But, if the evidence has been taken under exception, a subsequent direction to the jury to disregard it will not cure the defect. *Erben vs. Lorillard*, 19 N. Y., 299.

And, in general, the rule as to the disregard of a comparatively unimportant error, is more strict, when the matter comes up as a question of law on exceptions, than when a new trial is sought upon the facts. See *Fry vs. Bennett*, 4 Duer, 651; *Billings vs. Vanderbeck*, 23 Barb., 546 (555).

On the hearing of a motion of the latter description, defects at the trial, arising from the omission to produce, or properly authenticate matters of documentary evidence, have even been allowed to be supplied. *Bank of Charleston vs. Emeric*, 2 Sandf., 718; *Markoe vs. Aldrich*, 1 Abb., 55; *Fry vs. Bennett*, 4 Duer, 651. But this rule has no application to a motion on exceptions, nor can defects in parol evidence be thus supplied. See also *Fry vs. Bennett*, 4 Duer, 247; 1 Abb., 289.

In some few instances, a new trial has been granted where, on the former hearing, the case has been imperfectly brought up, and substantial justice has not been done. *Mills vs. Van Voorhies*, 20 N. Y., 412 (423); 10 Abb., 152; reversing *same case*, 23 Barb., 125; *Gorum vs. Curey*, 1 Abb., 285; *Darby vs. Pettee*, 2 Duer, 139; *Kernochan vs. New York Bowery Fire Insurance Company*, 5 Duer, 1; *Corning vs. Troy Iron and Nail Factory*, 34 Barb., 485; 22 How., 217.

See also, as to allowing a new trial, when a defect in the original complaint has been cured by amendment, *Bigelow vs. Law*, 5 Abb., 455; *Corning vs. Corning*, 2 Seld., 97. So likewise, as to similar defects in an answer, *Depew vs. Keyser*, 3 Duer, 335 (341).

Where, upon setting aside a verdict or report upon a case, it is apparent that no possible state of proof, applicable to the issues, can entitle the party to judgment, the appellate court may award it to the other, without granting a new trial. *Edmonston vs. McLeod*, 16 N. Y., 543. See also, as to a motion for the same purpose, *Vandeventer vs. New York and New Haven Railroad Company*, 27 Barb., 244; 6 Abb., 239.

Although, as a general rule, the verdict of a jury, or the decision of the court, or the report of a referee, is conclusive upon a question of fact,

when there is evidence to support it; the powers of the court to grant a new trial, where such verdict or decision is against evidence, or on clearly insufficient evidence, or clearly against a preponderating weight of evidence, or where the jury perversely disregard the directions of the court, are undoubted, and have not been unfrequently exercised. See, as to the verdict of a jury, *Van Neste vs. Conover*, 20 Barb., 547; *Fish vs. Skut*, 21 Barb., 333; *Pine vs. Rikert*, 21 Barb., 469; *Westbrook vs. Douglass*, 21 Barb., 602; *Dolsen vs. Arnold*, 10 How., 528; *Davis vs. Culver*, 13 How., 62; *Fuller vs. Williamson*, 14 How., 289; *Clark vs. Richards*, 3 E. D. Smith, 89; *Conlan vs. Latting*, 3 E. D. Smith, 353; *Dougherty vs. Gallagher*, 3 E. D. Smith, 570; *Bernhardt vs. Rensselaer and Saratoga Railroad Company*, 18 How., 427; *Karl vs. Maillard*, 3 Bosw., 591; *Rogers vs. Murray*, 3 Bosw., 357; *Bunten vs. Orient Mutual Insurance Company*, 4 Bosw., 254; *Sheldon vs. Hudson River Railroad Company*, 29 Barb., 226; *Heritage vs. Hall*, 33 Barb., 347 (349); *Kinsman vs. New York Mutual Insurance Company*, 5 Bosw., 460; *Weldon vs. Harlem Railroad Company*, 5 Bosw., 576; *Wright vs. Orient Mutual Insurance Company*, 6 Bosw., 269; *Hamil vs. Willett*, 6 Bosw., 533 (537); *Marston vs. Vultee*, 12 Abb., 143; *East River Bank vs. Hoyt*, 22 How., 478.

See also, as to the decision of a judge or justice, *Gage vs. Parker*, 25 Barb., 141; *Dresser vs. Van Pelt*, 1 Hilt., 316; *Goldsmith vs. Obermeier*, 3 E. D. Smith, 121; *Jacks vs. Darrin*, 3 E. D. Smith, 557; *Baker vs. Bonesteel*, 2 Hilt., 397; *Wiley vs. Slater*, 22 Barb., 506; *Griffin vs. Cranston*, 1 Bosw., 281.

And as to the report of a referee, *Pearson vs. Fiske*, 2 Hilt., 146; *Smith vs. Schanck*, 18 Barb., 344; *Kennedy vs. New York and Harlem Railroad Company*, 3 Duer, 659; *Dibblee vs. Maillard*, 19 How., 576; *Hartman vs. Proudfit*, 6 Bosw., 191; *Colgrove vs. Tallmadge*, 6 Bosw., 289; *Thompson vs. Menck*, 22 How., 431; *Allen vs. Devlin*, 6 Bosw., 1.

As a general rule, the verdict of a jury on a question of damages is conclusive, and the principle will be strictly adhered to. But, when the damages are so extravagant, as to manifest that they are not the result of deliberation, but of passion, prejudice, or corruption, or are so large or so small as to force upon the mind the conviction that, by some means, the jury have acted under the influence of a perverted judgment, the court may grant a new trial; and it will be its duty to do so. See *Hager vs. Danforth*, 8 How., 435; *Collins vs. Albany and Schenectady Railroad Company*, 12 Barb., 492; *Murphy vs. Kip*, 1 Duer, 659; *Clapp vs. Hudson River Railroad Company*, 19 Barb., 461; *Potter vs. Thompson*, 22 Barb., 87; *Gilligan vs. New York and Harlem Railroad Company*, 1 E. D. Smith, 453; *Wallace vs. Mayor of New*

York, 2 Hilt., 452, note; *Lehman vs. The City of Brooklyn*, 29 Barb., 234; *Harris vs. The Panama Railroad Company*, 5 Bosw., 312. See also, as to the granting of a new trial, on the ground of the damages being inadequate, *Richards vs. Sandford*, 2 E. D. Smith, 349; *Collins vs. Albany and Schenectady Railroad Company*, 12 Barb., 492. See, as to an amendment for this purpose, *Davis vs. Smith*, 14 How., 187. But such an application can only be brought up upon a case made, and not on the judge's minutes. *Moore vs. Wood*, 19 How., 405.

And, on a motion of this description, it is very usual for the court to grant a conditional order, allowing the plaintiff to reduce or to increase the damages by stipulation, to an amount named, and in that case refusing, but otherwise granting a new trial. See *Potter vs. Thompson*; *Richards vs. Sandford*; *Clapp vs. Hudson River Railroad Company*; *Gilligan vs. New York and Harlem Railroad Company*; *Wallace vs. Mayor of New York*, *supra*; *Clark vs. Richards*, 3 E. D. Smith, 89 (93); *Ripley vs. Astor Insurance Company*, 17 How., 444; 29 Barb., 552; *Corning vs. Corning*, 1 C. R. (N. S.), 351; affirmed, 2 Seld., 97. And as to a total remitter on an erroneous verdict, *Sherry vs. Freking*, 4 Duer, 453; *Ives vs. Humphreys*, 1 E. D. Smith, 196 (203).

See similar disposition of an appeal, from an accounting had before a referee, where the error committed had reference to one item only, *Boyd vs. Foot*, 5 Bosw., 110.

And, in several cases, where a verdict or judgment has been erroneous, the court have granted to the adverse party a similar option to consent to its correction, in that case refusing a new trial, but granting it, unless such correction be assented to. *Holmes vs. Weed*, 24 Barb., 546; *Goldsmith vs. Obermeier*, 3 E. D. Smith, 121; *Mills vs. Fox*, 4 E. D. Smith, 220 (224); *Underhill vs. Crawford*, 29 Barb., 664; 18 How., 112; *Stacy vs. Graham*, 3 Duer, 444 (454); *McAuley vs. Meldrum*, 9 Abb., 198; *Weisser vs. Denison*, 6 Seld., 68. See also *Fitzhugh vs. Wiman*, 5 Seld., 559, as to modification of a judgment instead of granting a new trial.

The courts will impose some limitation on the right of applying for a new trial, even where the circumstances are doubtful. Thus, where three successive verdicts had been rendered, on feigned issues, against a defendant, in a suit for divorce on the ground of adultery, a fourth trial was denied by the Court of Appeals, although the evidence was purely circumstantial, and not entirely conclusive. *Ferguson vs. Ferguson*, Court of Appeals, 18th April, 1854.

But, where the action of the jury on a second trial was indicative of bias or partiality, a third was granted, in *Gilligan vs. New York and Harlem Railroad Company*, 1 E. D. Smith, 453.

Where a new trial is granted by way of favor, and not of strict right, on a question of law, the payment of costs will usually be imposed on the applicant, consisting, as a general rule, of costs of the application, and of the former trial. See *Kelley vs. Upton*, 12 How., 140; *Depew vs. Keyser*, 3 Duer, 335 (341); *Corning vs. Corning*, 4 Seld., 97; affirming *same case*, 1 C. R. (N. S.), 351; *Simmons vs. Fay*, 1 E. D. Smith, 107; *Van Schaick vs. Winne*, 8 How., 5; *Ellsworth vs. Gooding*, 8 How., 1; *Hicks vs. Wallermire*, 7 How., 370; *Kennedy vs. Harlem Railroad Company*, 3 Duer, 659.

So also, where the application is to set aside a verdict, as against evidence, the rule is to impose the payment of costs on the applicant. *North vs. Sergeant*, 33 Barb., 350; 20 How., 519; *Same vs. Same*, 14 Abb., 223; *East River Bank vs. Hoyt*, 22 How., 478; *Harris vs. Panama Railroad Company*, 5 Bosw., 312 (318); *Hamil vs. Willett*, 6 Bosw., 533 (538).

In awarding a new trial, the court cannot, as a general rule, order that it be had, either wholly or in part, on evidence used on the former occasion. *Putnam vs. Crombie*, 34 Barb., 232; *Bissell vs. Hamlin*, 13 Abb., 22. The only mode in which such evidence can be made available, will be by consent or stipulation between the parties. Where, under the circumstances of the case, an omission to make some provision of this nature, would work positive injustice, as, for instance, in the event of the decease of a material witness; and the new trial is applied for, on grounds which render its granting a matter of favor, and not of strict right, a condition of this nature might possibly be imposed by the court, not strictly as an order, but as part of the terms resting in its discretion, on which, relief, not otherwise claimable by the moving party, may be extended.

§ 245. *Other Motions for New Trial.*

It remains to notice the class of motions, not founded on a case, or exceptions, but on extrinsic matter, shown by affidavit. The class in question are those on the ground of irregularity or fraud, of surprise, or of newly discovered evidence.

(a.) MOTION FOR IRREGULARITY, OR FRAUD.

A motion of this nature will usually be more appropriately made on the judge's minutes. See above, section 237. It is evident that, in almost all instances, that form of application will be the most proper in that description of cases. The irregularities, if any have been committed, will then be fresh in the mind of the judge, and the actual proceedings on the trial, will necessarily form the ground on which the motion is made. As a general rule, too, objections of this description will be

held to be waived, unless taken immediately, and urged in the most expeditious and expedient form. In cases, however, should any such occur, where the irregularity committed has remained latent, an application, grounded on affidavits, may possibly, though not probably, be entertained at a subsequent period.

In relation to a motion on the ground of misconduct of the jury, and the rule that will be applied in such cases, see *Nesmith vs. Clinton Fire Insurance Company*, 8 Abb., 141. It is also there held, that when the motion is made before any other judge than the one who tried the cause, it must be grounded on a case actually settled. It seems doubtful, however, whether this doctrine is correct, and whether the better way of presenting such facts will not be by affidavits, served upon the adverse party in the usual manner.

In *Hastings vs. McKinley*, 2 E. D. Smith, 45, an order was made, by which the verdict was conditionally set aside, on the ground of a clandestine suppression of papers, which, by consent, were to be handed to the jury; and an issue was awarded to try the question, which disposition was affirmed at general term.

A motion on this ground, is the proper mode of bringing up any minor irregularities committed in the course of the trial. See *Miller vs. Porter*, 17 How., 526.

(b.) OTHER MOTIONS.

Motions on the ground of surprise, or newly discovered evidence, differ somewhat from the above, inasmuch as they necessarily proceed on facts, external to those which transpired at the actual trial, and which therefore require to be proved, and can only be proved, by external evidence.

In applications of this nature, the usual notice of motion must, of course, be given, and a stay of proceedings may be applied for, if necessary. The facts as to the surprise, or as to the discovery of new evidence, on which the motion is grounded, must be shown, fully and distinctly, by affidavit. The strongest possible case must be made out in either event, the application being of a nature which the court will not be disposed to grant, unless its interference be shown to be absolutely indispensable, to prevent a failure of justice. It must also be shown, distinctly and affirmatively, that the motion has been made with all practicable speed, after the surprise complained of, or after the discovery of the additional evidence sought to be introduced. The nature of the proof, of the benefit of which the applicant has been deprived, must be clearly and unmistakably indicated, and it must be proved that such proof is material to the issue; and not merely this, but enough ought to be shown, to raise, at the least, a fair and *bonâ fide* inference,

that, had the surprise not occurred, or had the newly-discovered evidence been introduced, the result of the trial might, and probably would, have been different. Unless all these conditions be fulfilled, the presumption in favor of the past proceeding will be almost irresistible, and the burden of negating that presumption lies, of course, upon the applicant.

The motion, when made, must be brought on in the ordinary manner at special term. See *Clarke vs. Ward*, 4 Duer, 206; and the order, resting in discretion, will not be appealable. *Seely vs. Chittenden*, 10 Barb., 303.

A motion for a new trial on the above grounds, may, it was held in *Mersereau vs. Pearsall*, 6 How., 293, be made after judgment entered, and even after that judgment has been affirmed on appeal; but, if the grounds of that motion were known to the parties, at the time such appeal was argued, without any steps being taken, the motion will be denied; nor will the application be granted, at that period, on a mere allegation that a witness was mistaken or surprised on his examination, especially where the testimony of that witness was merely cumulative.

As a general rule, however, such an application cannot be made after judgment, especially in the class of common law actions: see *Anthony vs. Smith*, 4 Bosw., 503 (509); *Peck vs. Hiler*, 30 Barb., 655; *Barnes vs. Roberts*, 5 Bosw., 73.

But, in proceedings in the nature of a suit in equity, the rule is less strict, in accordance with the former chancery practice. *Nash vs. Wetmore*, 33 Barb., 155.

Although a motion for a new trial may be grounded on alleged irregularity or surprise, as regards the evidence, it will not be entertained, on any alleged miscarriage on the part of the judge. The decision of the latter, can only be corrected on a case or bill of exceptions, in the usual form. *Craig vs. Fanning*, 6 How., 336; *Wilcox vs. Bennett*, 10 L. O., 30.

In *Platt vs. Monroe*, 34 Barb., 291, the subject is fully examined, and it is laid down that motions of this nature are addressed to the discretion of the court, and, in modern practice, are liberally granted, when in furtherance of justice. A new trial was there allowed, on the ground that a note, sued on as a lost note, had been subsequently discovered; the peculiar circumstances of the case, the defence set up being forgery, rendering its production at the trial of vital importance.

(c.) SURPRISE.

A motion will not be granted on this ground, when the point, on which the alleged surprise took place, was one that might have been reasonably anticipated. *De Leyer vs. Michaels*, 5 Abb., 203. Or,

where the party was previously aware, that the evidence complained of, would in fact be given. *Meakim vs. Anderson*, 11 Barb., 215. See also *Gardner vs. Ryerson*, 19 How., 108.

A party has no right to be surprised at evidence within the issues ; if, however, he be so, he must find it out at the trial, and then apply for relief, by withdrawing a juror, or submitting to a non-suit. *People vs. Marks*, 10 How., 261.

Nor will a new trial be granted, on the ground that proof, expected to be made by one witness, was, in fact, given by another ; or with a view to impeach a witness. *Beach vs. Tooker*, 10 How., 297.

Nor will the fact that the party has been induced to believe that certain facts would not be disputed, and thereby induced not to introduce evidence. So long as the conduct of the adverse party or his counsel, has been free from fraud, or positive stipulation, the court will not interfere. *Taylor vs. Harlow*, 11 How., 285.

As to the denial of such a motion, on the ground of *laches*, see *Peck vs. Hiler*, 30 Barb., 655.

(d.) NEWLY-DISCOVERED EVIDENCE.

The settled principles in respect to a motion of this description are thus stated, in *Seely vs. Chittenden*, 4 How., 265 ; affirmed, 10 Barb., 303.

1. The testimony must have been discovered since the former trial.
2. It must appear that the new testimony could not have been obtained with reasonable diligence, on the former trial.
3. It must be material to the issue.
4. It must go to the merits of the case, and not to impeach the testimony of a former witness.
5. It must not be cumulative.

A motion of this nature was denied, on the grounds that the testimony was cumulative, and that the moving party had been guilty of a want of diligence, in *Leavy vs. Roberts*, 2 Hilt., 285 ; 8 Abb., 310. See also on the latter ground, *Pettigrew vs. Mayor of New York*, 9 Abb., 141 (144, note) ; *People vs. Marks*, 10 How., 261 ; *Campbell vs. Genet*, 2 Hilt., 290 ; *Munn vs. Worrall*, 16 Barb., 221 ; *Peck vs. Hiler*, 30 Barb., 655.

As to the denial of such a motion, on the ground of the further evidence being merely cumulative, see *Nason vs. Cockcroft*, 3 Duer, 366 ; *Burnett vs. Phalon*, 2 Bosw., 622 ; *Peck vs. Hiler*, *supra* ; *Adams vs. Bush*, 23 How., 262. See also, as to testimony merely going to impeach a witness, *Meakim vs. Anderson*, 11 Barb., 215. Or testimony given by consent at the trial, the alleged surprise being merely as to the decision of the court on its effect. *Barnes vs. Roberts*, 5 Bosw., 73 (80).

Relief of this description was granted in the following cases: *Simmons vs. Fay*, 1 E. D. Smith, 107; *Butterworth vs. Worth*, 4 Bosw., 624; *Nash vs. Wetmore*, 33 Barb., 155.

When granted, it will usually be on the terms of payment of costs. They may not, however, be imposed, but may be ordered to abide the event, where the conduct of the opposing party has tended to render the motion necessary. *Vide Seely vs. Chittenden*, 4 How., 265 (269).

And any such misconduct or duplicity of the adverse party, will weigh with the court on the general decision of the motion. See *Pettigrew vs. Mayor of New York*, 9 Abb., 141 (144, note).

CHAPTER VII.

PROCEEDINGS UPON SPECIAL VERDICT, OR OTHERWISE BEFORE JUDGMENT.

It remains to consider the proceedings, necessary to be taken by the technically or actual prevailing party, upon a trial by jury, preparatory to, and with a view to the ultimate entry of judgment. Those having immediate regard to that entry, will be considered in the succeeding book.

§ 246. *Amendment of Verdict.*

Under section 173, power exists in the court, to correct a mistake committed by the jury; or to disregard any error or defect in it, under section 176.

And, in some few cases, these powers have been exercised; as by amendment of the record, by applying a general verdict to good counts contained in a complaint. *Snell vs. Snell*, 3 Abb., 426. But not, it seems, as against joint tort feors. See *Carpenter vs. Sheldon*, 5 Sandf., 77. By treating a verdict, rendered in a special form, as a general verdict and rendering judgment accordingly. *Williams vs. Willis*, 7 Abb., 90. Or, where there were, in fact, two issues, but, by oversight, a verdict was only taken upon one, by amending that verdict, so as to conform to the facts, and to dispose of both, when there was no doubt of such facts, and of the real intentions of the jury. *Burhaus vs. Tibbits*, 7 How., 21.

But such power will not be exercised, where there is the slightest

doubt as to what transpired upon the trial, or whether the whole case was, in fact, disposed of by the court or jury. *Same case.*

And, however erroneous the verdict may be, it cannot be amended in matters of substance. *United States Trust Company vs. Harris*, 2 Bosw., 78.

Though admissible, this proceeding is necessarily of rare occurrence. When made at or immediately upon the close of the trial, before the parties have left the court, no notice will be requisite. If subsequently taken, it must be brought on, by motion in the usual form, the necessary facts being proved by affidavit, or by certificate of the judge who presided. See *Burhaus vs. Tibbits*, *supra*. A motion to correct, on the ground of misdirection of the judge, cannot be sustained. The question must be brought up in the ordinary manner, on a case. See *Brush vs. Kohn*, 13 Abb., 51.

§ 247. *Special Verdict.*

When a verdict of this nature has been rendered, it must be put into form, and a copy served by the prevailing party, and it must be then settled, precisely in the same manner, in all respects, as a case or exceptions. See rule 34. The mode of settlement, and filing, when settled, having been fully considered in the preceding chapter, it will be needless to enter into any formal recapitulation of the practice. See, as to the nature of a special verdict, *Williams vs. Willis*, 7 Abb., 90.

A special verdict must be prepared with great care and succinctness, and all statements of evidence, as such, must be excluded. It is to contain facts, and not the evidence of facts, so as to present questions of law only, to the court by which the judgment is to be directed, or by which that judgment, when entered, is to be reviewed. See *Hill vs. Covell*, 1 Comst., 522; *Sisson vs. Barrett*, 2 Comst., 406; *Langley vs. Warner*, 3 Comst., 327. Being brought up for adjudication, in connection with the pleadings, it is not necessary for the special verdict to contain any statement of facts admitted by them. See *Barto vs. Himrod*, 4 Seld., 483. See also, definition of a special verdict, in section 260.

The report of a referee, on a reference to report facts, has, under section 272, the effect of a special verdict. See *Marshall vs. Smith*, 20 N. Y., 251; *Kirby vs. Fitzpatrick*, 18 N. Y., 484. It should, therefore, be drawn and brought up for adjudication, in the same manner, and may be reviewed, as to the facts found, on appeal, without exceptions. *Same cases.* But not so, with respect to errors in the proceedings, or in the determination of the facts. These last questions, if sought to be made the subject of review, must be raised by exception. *Kirby vs. Fitzpatrick*, *supra*.

And, so far as regards the merits, a case, for the purpose of reviewing the decision of a referee of the whole issue, has been held to be in the nature of a special verdict. *Sturgis vs. Merry*, 2 Comst., 189; 3 How., 418.

§ 248. *Reservation for Argument.*

A case, when prepared, on a cause reserved for argument or further consideration, under section 264, must be settled in the same manner. See rule 34. This provision, though still retained, was more peculiarly applicable to the state of the Code before 1851, under which a judgment became final after four days, unless a direction of this description was made. See *Ball vs. Syracuse and Utica Railroad Company*, 6 How., 198; 1 C. R. (N. S.), 410.

Under the provisions as they now stand, the power is rarely exercised; nor do the cases, reported since the amendment of 1857, contain any dicta or decisions upon the subject. The practice seems more peculiarly applicable to a case, in which the directions as to the proper judgment to be rendered, upon findings of the jury, on particular questions, in connection with a general verdict, under the power to that effect given by section 263, are attended with difficulty, by reason of their inconsistency (see section 262), or under analogous circumstances.

(a.) HEARING UPON SPECIAL VERDICT.

The motion for judgment upon a special verdict, when rendered, should be made at special term (see section 265), the cause being set down, noticed, and placed upon the calendar accordingly. The application is an enumerated motion, rule 40. The papers are to be furnished by the plaintiff, and served at least eight days before the term, in connection with or previous to the notice. Rule 42. If he neglect to do so, the adverse party may, under the same rule, move that the cause be stricken from the calendar, and that judgment be rendered in his favor. Being a hearing at special term, the papers need not be printed, but, of course, a copy will be required for the judge, and likewise a copy of the pleadings.

The decision, when pronounced, should be entered and served as an order, by the prevailing party, who will proceed to enter his judgment in due course.

§ 249. *Verdict Subject to the Opinion of the Court.*

This practice, which remained in abeyance, from the original passage of the Code, until 1851, was recognized in that year, and provided for, as it now stands, by section 265, on the amendment of 1852.

It may be convenient to recapitulate the power, which runs in these words :

When, upon a trial, the case presents only questions of law, the judge may direct a verdict, subject to the opinion of the court at the general term, and, in that case, the application for judgment must be made at the general term.

The remainder of the section, introduced in 1857, provides for an ulterior review in the Court of Appeals, without the necessity of any special exception. See also section 333, as to preparation, and annexation to the judgment-roll, of a special statement of the facts found, and the conclusions of law thereon, in connection with a review of this nature.

The case, when prepared for submission to the general term, should show what took place at the trial, and should be settled and filed in the usual manner. The duty of making it, devolves upon the party in whose favor the verdict has been given.

It must show upon its face, an uncontroverted state of facts, involving only questions of law, so as to present nothing for consideration, but the proper judgment to be rendered. Any attempt to bring up alleged errors, for adjudication, will render the proceeding irregular, and, if carried up to the ultimate tribunal, will subject the party to a reversal, on the ground of mistrial ; so, likewise, when any of the facts are left uncertain or contested. Upon this description of verdict, the question is never whether a new trial shall be granted, but which party, upon a conceded state of facts, shall have final judgment. See *Cobb vs. Cornish*, 16 N. Y., 602 (605); 15 How., 407; 6 Abb., 129; *Gilbert vs. Beach*, 16 N. Y., 606; *Bangs vs. Palmer*, 16 How., 542; *Beebe vs. Ayres*, 28 Barb., 275; *Whitaker vs. Merrill*, 28 Barb., 526; *Sackett vs. Spencer*, 29 Barb., 180; *Brower vs. Orser*, 2 Bosw., 365; *Buchanan vs. Cheeseborough*, 5 Duer, 238; *Clark vs. Dearborn*, 6 Duer, 309; *Bell vs. Shibley*, 33 Barb., 610; *Eiseman vs. Swan*, 6 Bosw., 668.

Where consistent concessions or special findings have been made, in connection with a general verdict of this nature, the whole of the facts will be taken as conceded. *Sharp vs. Whipple*, 3 Bosw., 474. See likewise *Purvis vs. Coleman*, 1 Bosw., 321. In *Porter vs. Lobach*, 2 Bosw., 188, the court also disregarded an objection, that a material fact was unproved, when no objection had been made on the trial. In *Geffcken vs. Slingerland*, 1 Bosw., 449, the general term also assumed to decide on questions of fact, though it did not appear that they had been properly determined by the jury.

Where two separate issues had been separately disposed of, the one by a verdict of this nature in favor of the plaintiff, the other by a di-

missal of that portion of his complaint, it was held that he could not review the latter decision, on moving for judgment on the former, unless by permission of the court, or by a special case made, and noticed for that purpose. *Dickerson vs. Cook*, 3 Duer, 324.

It is immaterial, in point of form, for which party the verdict may be rendered, the only effect being, that it devolves upon the party for whom it is so rendered, to prepare and bring in the case. *Cobb vs. Cornish*, 16 N. Y., 602 (604); 15 How., 407; 6 Abb., 129, *supra*.

But, when taken in favor of either party, the court will draw in its support, every inference from the evidence, which a jury would be justified in drawing. *Williams vs. Insurance Company of North America*, 1 Hilt., 345. And, if right on the merits, the verdict may stand, though technically it should have been the other way. See *McConihe vs. New York and Erie Railroad Company*, 20 N. Y., 495.

On the hearing, the court will pronounce the right judgment upon the acts as conceded; and if the plaintiff fails to make a case, will dismiss his complaint, though the verdict was in form for him, and no technical leave was given to move for a dismissal. *Chittenden vs. Empire Stone Dressing Company*, 6 Duer, 30; *Kelley vs. Upton*, 12 How., 140.

And the court should not permit any questions to be litigated, which, if raised at the trial, might have been obviated. *McKensie vs. Farrell*, 4 Bosw., 192.

The case, when ready, must be set down for argument on the general term calendar, and notice of the motion for judgment, served in the usual manner upon the adverse party. Being a calendar cause, the papers should be printed, and points made and served as upon an appeal.

The decision should be entered as an order of the general term, served in the usual manner, and judgment perfected thereupon.

This mode of procedure seems to have virtually superseded the practice of moving for a nonsuit, notwithstanding verdict rendered, though such a motion may still be admissible. See *Downing vs. Mann*, 3 E. D. Smith, 36; 9 How., 204.

On carrying up his appeal to the ultimate tribunal, from the decision on a case brought up in this form, the appellant must take care to comply with the provisions of section 333, and have the questions or conclusions of law decided at general term, together with a concise statement of the facts, prepared, and settled under the direction of the court below, as it is upon this statement that such review must take place. He should prepare and serve his statement, and submit it, with any proposed amendments, for settlement, by the judge, in the same manner, and pursuing the same line of practice, as on the settlement of a case or exceptions, in the ordinary mode.

BOOK XI.

OF JUDGMENT AND ITS INCIDENTS.

CHAPTER I.

JUDGMENT GENERALLY CONSIDERED.

§ 250. *Statutory and Other Provisions.*

THE following is the definition of a judgment, as given by the Code :

§ 245. (201.) A judgment is the final determination of the rights of the parties in the action.

This definition is contained in chapter I., title VIII., part II., of the Code, and has come down unaltered.

The rest of the same chapter refers to judgments by default, and runs thus :

§ 246. (202.) Judgment may be had, if the defendant fail to answer the complaint, as follows :

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk, proof of personal service of the summons and complaint, on one or more of the defendants, or of the summons, according to the provisions of section 130, and that no answer has been received. The clerk shall thereupon enter judgment for the amount mentioned in the summons, against the defendant or defendants, or against one or more of several defendants, in the cases provided for in section 136. But, if the complaint be not sworn to, and such action is on an instrument for the payment of money only, the clerk, on its production to him, shall assess the amount due to the plaintiff thereon; and, in other cases, shall ascertain the amount which the plaintiff is entitled to recover in such action, from his examination under oath, or other proof, and enter the judgment for the amount so assessed or ascertained. In case the defendant give notice of appearance in the action, he shall be entitled to five days' notice of the time and place of such assessment.

Where the defendant, by his answer in any such action, shall not deny the plaintiff's claim, but shall set up a counter-claim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counter-claim, in like manner, in any such action, upon the plaintiff's filing with the clerk of the court a statement admitting such counter-claim, which statement shall be annexed to and be a part of the judgment-roll.

2. In other actions, the plaintiff may, upon the like proof, apply to the court, after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. And, where the action is for the recovery of money only, or of specific real or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury, or, if the examination of a long account be involved, by a reference, as above provided. If the defendant give notice of appearance in the action, before the expiration of the time for answering, he shall be entitled to eight days' notice of the time and place of application to the court for the relief demanded by the complaint.

3. In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint; and, if the defendant be not a resident of the state, must require the plaintiff or his agent to be examined on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment, the court may, in its discretion, require the plaintiff to cause to be filed satisfactory security, to abide the order of the court, touching the restitution of any estate or effects, which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply, and be admitted to defend the action, and shall succeed in such defence.

The clause at the close of the first subdivision, authorizing judgment for any excess over a counter-claim, was inserted in 1858, the other portions of the section date from the revision of 1851.

In 1849, the provisions were substantially to the same effect. In 1848, the third subdivision was absent, and the whole shorter and less explicit.

N. B. Section 136, referred to in subdivision 1, refers to the entry of judgment against joint debtors, and will be cited below in that connection.

§ 247. If a demurrer, answer, or reply, be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the

court, either in or out of the court, for judgment thereon, and judgment may be given accordingly.

First inserted in 1849.

Section 269 provides thus, as to the entry of judgment on an issue of law :

§ 269. (224.) On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by the first two subdivisions of section two hundred and forty-six, upon the failure of the defendant to answer, where the summons was personally served. If judgment be for the defendant, upon an issue of law, and if taking of an account or the proof of any fact be necessary, to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as in that section provided.

Dates, as it stands, from 1857.

In 1849, the provisions were substantially the same, with verbal differences. They were less full in 1848.

The following provision is made by the rules, in relation to the application for judgment, under the last two subdivisions of section 246 :

Rule 24. (85.) When the plaintiff in the action is entitled to judgment, upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the court, such application may be made at any special term, in the district embracing the county in which the action is triable, or in an adjoining county : such application may also be made at a circuit court, in the county in which the action is triable. But when a reference, or writ of inquiry shall be ordered, the same shall be executed in the county in which the action is triable, unless the court shall otherwise order.

Preliminary to the entry of judgment, notice of adjustment of the costs of the successful party must be given. The Code provides thus upon the subject, in the chapter relating to costs :

§ 311. (266.) The clerk shall insert in the entry of judgment, on the application of the prevailing party, upon five days' notice to the other, except when the attorneys reside in the same city, village or town, and then upon two days' notice, the sum of the allowances for costs, as provided by this Code, the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing, when required by a rule of the court. The disbursements shall be stated in detail, and verified by affidavit. A copy of the items of the costs and disbursements shall be served, with a notice of adjustment.

The remainder of the section provides for adjustment of the costs of interlocutory and special proceedings, and was added in 1862.

The provision above cited, dates, as it stands, from 1857. From 1849, to that year, two days' notice only was required, the enumeration of disbursements was less specific, and the party was not, as now, obliged to serve a copy of his costs. In 1848, its purport was the same.

The Code makes the following general provisions, as to the entry of judgment, in chapter VI., title VIII., part II., devoted to that subject:

§ 274. (230.) Judgment may be given, for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper. The court may also dismiss the complaint with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff, to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.

In an action brought by or against a married woman, judgment may be given against her, as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise. And in any proceeding to enforce such judgment, the Supreme Court shall have jurisdiction, though the amount be less than one hundred dollars.

The concluding clause was added on the amendment of 1862.

The prior portion of the section dates, as it stands, from 1852.

In 1849, it was in substance the same, but the power to grant affirmative relief to a defendant was omitted.

In 1848, it consisted of the first sentence only, omitting as above.

Section 263, under the head of *Trial by Jury*, provides also for the granting of affirmative relief to a defendant, as follows:

If a set-off, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

§ 275. (231.) The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint: but in any other case, the court may grant him any relief, consistent with the case made by the complaint, and embraced within the issue.

§ 276. (232.) Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages, which he might have heretofore recovered for the same cause of action.

§ 277. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

Was first inserted in 1849.

§ 278. (233.) Judgment upon an issue of law, or of fact, or upon confession, or upon failure to answer, (except where the clerk is authorized to enter the same, by the first subdivision of section two hundred and forty-six, and by section three hundred and eighty-four, and except where it may be given at the general term, as provided in section two hundred and sixty-five), shall, in the first instance, be entered upon the direction of a single judge, or report of referees, subject to review at the general term, on the demand of either party, as herein provided.

Dates as it stands from 1852. Substantially the same in the previous years, except that section 265 was not referred to.

§ 279. (234.) The clerk shall keep among the records of the court, a book for the entry of judgments, to be called the "judgment book."

§ 280. (235.) The judgment shall be entered in the judgment book, and shall specify clearly the relief granted, or other determination of the action.

§ 281. (236.) Unless the party or his attorney shall furnish a judgment-roll, the clerk, immediately after entering the judgment, shall attach together, and file the following papers, which shall constitute the judgment-roll:

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits, and necessarily affecting the judgment.

Dates from 1852. Substantially the same in the previous years, but with verbal differences. In 1848, there was no power to file copies of the summons or pleadings. In 1849, a special provision for this purpose was added at the close of the section, which was stricken out, and the present general phraseology adopted, in 1851 and 1852.

§ 282. (237.) On filing a judgment-roll, upon a judgment, directing in whole or in part the payment of money, it may be docketed with the clerk of the county where it was rendered, and in any other county, upon filing with the clerk thereof a transcript of the original "docket," and shall be a lien on the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of docketing thereof, in the county in which such real estate is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county where it was rendered. But, whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in the Code, the court in which such judgment was recovered may, on special motion, after notice to the person owning the judgment, in such terms as they shall see fit, direct an entry to be made by the clerk on the docket of said judgment, that the same is "secured on appeal," and thereupon it shall cease, during the pend-

ing of the appeal to be a lien on the real property of the judgment-debtor, as against purchasers and mortgagees in good faith.

Dates from 1851. Shorter and less explicit in the previous years, and consisting only of a portion of the first clause.

Section 63 provides thus as to the docketing of justices' judgments, and their effect when docketed :

§ 63. (56.) A justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon, and entered in the docket; and from that time, the judgment shall be a judgment of the county court. A certified transcript of such judgment may be filed and docketed in the clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered, except that it shall be a lien, only from the time of filing and docketing the transcript. But no such judgment for a less sum than twenty-five dollars, exclusive of costs, hereafter docketed, shall be a lien upon, or enforced against, real property.

Dates, as it stands, from 1849. In 1848 the last clause was omitted, and the phraseology was different.

The following further provisions of the Code require notice.

The entry of judgment on a controversy submitted without action, under chapter I., title XII., part II., is thus provided for :

§ 373. (326.) Judgment shall be entered in the judgment-book, as in other cases, but without costs for any proceeding prior to notice of trial. The case, the submission, and a copy of the judgment shall constitute the judgment-roll.

§ 374. (327.) The judgment may be enforced, in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

Chapter II. of the same title, relative to proceedings on a judgment against joint debtors, and representatives of a deceased judgment debtor, will be cited below in a separate chapter, and likewise section 136, in connection with them.

The next provision requiring notice, is section 384, in relation to judgments on confession. See this subject already considered, and the section cited, in book III., chapter II., section 47.

The portion of it which is material on the present occasion, runs thus :

The statement may be filed with a county clerk (or with a clerk of the superior court of the city of New York), who shall indorse upon it, and enter in the judgment-book, a judgment of the Supreme, or said Superior court, for the amount confessed, with five dollars costs, together with dis-

bursements. The statement and affidavit, with the judgment indorsed, shall thenceforth become the judgment-roll.

Section 385 also provides thus, as to the entry of judgment on an offer to compromise, when accepted. In relation to such an offer, and its incidents, see above, book VIII., chapter I., section 164.

If the plaintiff accept the offer, and give notice thereof in writing within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly.

Under section 244, an order to satisfy an admitted portion of the plaintiff's demand may be enforced as a judgment.

Section 333 also provides for a statement of the facts found, and conclusions of law come to, by the general term, on a verdict subject to the opinion of the court, being added to the judgment-roll, for the purpose of a review in the Court of Appeals. See, hereafter, under that head.

Section 442 prescribes the form of judgment against a delinquent corporation, in a proceeding by the attorney-general, under chapter II., title XIII., part II., of the Code, being thus:

Judgment shall be rendered, that the corporation be excluded from such corporate rights, privileges, and franchises, and that the corporation be dissolved.

And by section 444, further powers are given, with reference to the provisions of the Revised Statutes, to restrain the corporation, to appoint a receiver of its property, and to take an account, and make distribution of such property amongst its creditors.

Section 450 provides as to the judgment in an action in respect of waste, which may be "for damages, forfeiture of the estate of the party offending, and eviction from the premises."

Section 452 provides thus, as to such judgment:

Judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion, against the tenant in possession, when the injury to the estate in reversion, shall be adjudged in the action, to be equal to the value of the tenant's estate, or unexpired term, or to have been done in malice.

Section 454 provides that, in actions for a nuisance, there may be judgment "for damages, or for the removal of the nuisance, or both."

The provisions of the Revised Statutes, in relation to the action of waste, are saved so far as regards matter of substance, by section 451. They will be found in title V., chapter V., part III., 2 R. S., 334 to 338.

Section 8 of that chapter provides for the issue of a writ of inquiry to the sheriff, on judgment by default in an action of this nature; and section 11 gives an election to a plaintiff, tenant in common or joint ten-

ant, to take a judgment for partition instead of for damages, the title going on to provide the machinery for carrying out such judgment, if elected to be taken.

By section 455 of the Code, the general provisions of the Revised Statutes, relating to actions concerning real property, are also saved, so far as regards matters of substance, not of form.

These provisions will be found in chapter V., part III., of the Revised Statutes, above referred to. 2 R. S., 303 to 347, inclusive.

Section 33 of title I., of that chapter, 2 R. S., 308, section 33, prescribes that the judgment in ejectment shall be for the recovery of possession of the premises, according to the verdict of the jury, if there was such a verdict, or, if by default, then according to the description in the declaration, with costs to be taxed.

Under section 43, p. 310, the plaintiff is also to be entitled to recover damages against the defendant, for the rents and profits of the premises recovered, with a limitation as to the recovery in ejectment for dower. Proceedings, now obsolete, are provided for bringing such claim to an issue, by suggestion on the record, section 51 providing that, if no issue of fact be joined thereon, a writ of inquiry shall be issued.

Title II. of that chapter, relative to the determination of claims upon real estate, has been substantially remodelled by chapter 511 of 1855, p. 943.

Section 6, as amended, prescribes that, when judgment shall be rendered by default in these proceedings, it shall be, that the person on whom the notice thereby prescribed was served, "and all persons claiming under him, by title accruing subsequently to the service of such notice, shall be forever barred from all claim to any estate of inheritance or freehold in the premises;" and, where the plaintiff claims in remainder or reversion, the time when he will be entitled to possession, is also to be specified in the judgment. Section 13.

Title III. of the chapter in question, relates to partition.

Sections 23 and 24 of that title provide for the entry of judgment, and its effect, and the rest of the title provides the machinery for the purpose of carrying out such judgment, when rendered. These provisions will be considered hereafter, in a subsequent chapter.

Titles IV. and V., refer to nuisance and waste, and, so far as regards the mode of entry of judgment, are superseded by the provisions above cited. Under title VI., relative to trespass, the plaintiff, if such trespass be forcible, is, under section 4, entitled to recover "treble damages." Title VII. consists of general provisions, and title VIII., giving a remedy for discovery as to whether *cestuis que vie* are living or not, is altogether in the nature of a special proceeding.

The form of a decree in foreclosure is prescribed by sections 151 and 152 of chapter I. of part III. of the Revised Statutes, 2 R. S., 191.

The court has power to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the amount due on the mortgage, and the costs of suit; and also, on the coming in of the report of sale, to decree and direct the payment by the mortgagor, of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises, in the cases in which such balance is recoverable by law.

The lien of judgments is thus provided for by the Revised Statutes, in article I., title IV., chapter VI., part III., 2 R. S., 359, sections 3, 4:

§ 3. All judgments hereafter rendered in any court of record, shall bind, and be a charge upon the lands, tenements, real estate, and chattels real, of every person against whom any such judgment shall be rendered, which such person may have at the time of docketing such judgment, or which such person shall acquire at any time thereafter; and such real estate and chattels real, shall be subject to be sold upon execution, to be issued upon such judgment.

§ 4. From and after ten years from the time of docketing every such judgment, it shall cease to bind, or be a charge upon any such property, as against purchasers in good faith, and as against encumbrances subsequent to such judgment, by mortgage, judgment, decree, or otherwise.

Under the next section (section 5), the time during which the party recovering such judgment shall be restrained from proceeding thereon, by the operation of any injunction or writ of error, shall not form part of the ten years in question; but, to entitle a party to this deduction, it is necessary for him to file with the clerk, a notice specifying the nature and the duration of such restraint, in the manner there provided, which, under section 6, is to be entered in the margin of the docket of such judgment.

As to the lien of a decree for the payment of money, and its duration and satisfaction, see provisions, analogous to the above, at 2 R. S., 183, sections 96 to 100, also sections 25 and 27 of chapter 386 of 1840.

Article II. of the same title and chapter, further provides, in relation to the docketing and satisfaction of judgment. See 2 R. S., 361 to 364.

Under section 11, the clerk is to mark upon the back of every judgment record filed in his office, the time of filing the same; and no judgment is to be deemed valid, so as to authorize further proceedings, until the record shall have been signed and filed.

Under section 12, no judgment is to affect any real estate, or chattels real, or to have any preference, until the record be filed and docketed.

By the next section (13), the mode of docketing is thus directed:

§ 13. At the time of filing a record of judgment, the clerk shall enter in
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an alphabetical docket, in books to be provided and kept by him, a statement of such judgment, containing :

1. The names, at length, of all the parties to such judgment, designating particularly those against whom it is rendered, with their places of abode, titles, trades, or professions, if any such are stated in the record ;
2. The amounts of the debt, damages, or other sum of money recovered, with the costs ;
3. The hour and day of entering such docket ;
4. If the judgment be against several persons, such statement shall be repeated, under the name of each person against whom such judgment was recovered, in the alphabetical order of their names respectively.

At 2 R. S., 181, sections 93 and 94, similar provisions are made, in relation to the docketing of a decree.

By chapter 386 of 1840, sections 25, 26, 28, and 29, further provisions are made.

No judgment is to be a lien on real estate, unless docketed in the county where the lands are situate. Section 25.

Section 26 provides, as to the giving of transcripts by the clerk, and the docketing of such transcripts in other counties, and sections 28 and 29 provide for the lien and docketing, in the same manner, of the judgments of the Superior Court and the Courts of Common Pleas and Mayors' Courts.

Returning to article II., title IV. of chapter VI., above referred to, section 14 provides, that judgments for taxes shall not be entitled to the priority given to them by statute, unless, at the time of docketing, the plaintiff cause an entry to be made by the clerk, specifying such priority, as a lien upon the premises affected, which entry shall be a part of the docket.

By section 19 it is thus provided :

The books in which dockets of judgments shall be entered, shall, during the usual hours for transacting business, be open to the search and examination of all persons requiring the same.

Under the amended judiciary act, chapter 470 of 1847, section 39, transcripts of judgments rendered in this state, in any court of the United States, may be docketed by the clerk of any county, with the same effect as judgments of the Supreme Court. Such judgments have also, an independent lien, under the laws of the United States, co-extensive and of the same duration as that of judgments under the state laws. See act of the 4th of July, 1840, Dunlop's Collection, p. 974.

The satisfaction of judgments is thus provided for, in the article above referred to.

Section 22 provides thus :

The docket of a judgment entered in any court of record, may be can-

called and discharged by the clerk thereof, upon filing with him an acknowledgment of satisfaction, signed by the party in whose favor such judgment was obtained, or by his executors or administrators, duly authenticated as hereinafter directed.

Section 23, amended by section 3 of chapter 262 of 1834, directs that such acknowledgment shall be made before the clerk, or some judge of the court in which the judgment was rendered, or before some judge of the county courts, or commissioner of deeds, who shall certify that the party making the same was known, or was made known, to such officer, by competent proof.

Section 24 provides :

Such acknowledgment may also be made by the attorney of record of the party in whose favor the same was rendered, within two years after the filing of the record of such judgment, in the same manner and with the like effect, as if made by such party himself; but such satisfaction is not to be conclusive against the party in whose favor the judgment was rendered, in respect to any person, acting with notice of the revocation of the attorney's authority, before any payment or purchase of property affected by the judgment.

The acknowledgment of a party residing out of the state, may be taken, in the same manner as that of a conveyance of real estate, under section 1 of chapter 262 of 1834. Section 2 of the same statute, provides as to the entry of satisfaction, on a letter or power of attorney, similarly acknowledged.

Section 25 of the article of the Revised Statutes now in question provides thus :

“When payment of the judgment is made, satisfaction thereof shall be acknowledged, by the plaintiff or attorney receiving the amount, on payment of the fees by the defendant.”

Section 26 provides that, on the return of an execution, as satisfied in whole or in part, the judgment shall be deemed satisfied accordingly, unless the return be vacated by the court :

And, upon any execution being so returned, the clerk of the court shall enter in the docket of such judgment, the fact that the amount stated in such return to have been levied has been collected.

Section 27 made it the duty of the clerk of the court to transmit to the other clerks of the court, transcripts of such satisfaction, but this particular provision is now virtually superseded. But section 5 of chapter 104 of 1844, provides thus :

Whenever any judgment or decree shall be reversed, vacated, or satisfied of record, the certificate of the clerk, register, or assistant-register of the

court, with whom said judgment was rendered, or decree entered, of that fact, under his seal of office, shall be sufficient authority, on being filed with the clerk of any county, with whom such judgment or decree may have been duly docketed, to discharge and cancel such docket thereof; for which certificate, the officer furnishing the same shall be entitled to charge twelve and a half cents.

(a.) PROVISIONS OF THE RULES.

The following rules also require notice.

Rule 9 provides for the keeping of proper books by the clerk, in addition to the judgment-book, required by section 279 of the Code. It concludes thus :

Judgments shall only be filed and entered or docketed in the offices of the clerks of the courts in this state, within the hours during which, by law, they are required to keep open their respective offices for the transaction of business.

Under rule 20, the folios are to be marked in the margin of any judgment.

Rule 25 provides thus, in relation to the entry of judgment, on service by publication :

Rule 25. In actions for the recovery of money only, when the summons has been served by publication, under section 135 of the Code, no judgment shall be entered, unless the plaintiff, at the time of making the application for judgment, shall show by affidavit, that an attachment has been issued in the action, and levied upon property belonging to the defendant; which affidavit shall contain a specific description of such property, and a statement of its value, and shall be attached to and filed with the affidavits of publication; nor unless the plaintiff shall, at the same time, produce and file with the clerk an undertaking, with two sureties to be approved by the court, that the plaintiff will abide the order of the court, touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant, or his representatives shall apply, and be admitted, to defend the action, and shall succeed in such defence.

Rule 32 provides in relation to the entry of judgment, on a trial by referees.

It prescribes that a copy of their report, containing the facts found and their conclusions of law thereon, shall be served, with notice of the judgment, when entered.

Rule 56, after providing in relation to the entry of orders on petitions, proceeds thus :

Any order or judgment directing the payment of money, or affecting the

title to property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed, as other judgments.

Rules 71 to 76, inclusive, provide thus, as to the entry of judgment on foreclosure, and its incidents:

Rule 71. (46.) If, in an action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff, as stated in the complaint, is admitted by the answer, the plaintiff may have an order, referring it to the clerk, or to some suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior encumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If the defendant is an infant, and has put in a general answer by his guardian, or if any of the defendants are absentees, the order of reference shall also direct the person to whom it is referred, to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale.

Where no answer is put in by the defendant, within the time allowed for that purpose, or any answer denying any material facts of the complaint, the plaintiff, after the cause is in readiness for trial as to all the defendants, may apply for judgment at any special term, upon due notice to such of the defendants as have appeared in the action, and without putting the cause on the calendar. The plaintiff, in such case, when he moves for judgment, must show, by affidavit or otherwise, whether any of the defendants who have not appeared are absentees; and, if so, he must produce the report, as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff or his agent, on oath, as to any payments which have been made. And, in all foreclosure cases, the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mortgage, and the time and place of recording the same, has been filed, at least twenty days before such application for judgment, and at or after the time of filing the complaint, as required by section 132 of the Code of Procedure.

Rule 72. (47.) In every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far at least as the same can be ascertained from the mortgage, shall be inserted. And, unless otherwise specially ordered by the court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient

to raise the amount due to the plaintiff, for principal, interest, and costs, and which may be sold separately, without material injury to the parties interested, be sold by or under the direction of the sheriff of the county, or a referee, and that the plaintiff, or any other party, may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that, out of the proceeds of the sale, he pay to the plaintiff, or his attorney, the amount of his debt, interest, and costs, or so much as the purchase-money will pay of the same, and that he take the receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of sale; and that the purchaser at such sale be let into possession of the premises, on production of the deed.

All surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making the sale, within five days after the same shall be received and be ascertainable, in the city of New York, to the chamberlain of the said city, and in other counties, to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court; and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court. No report of sale shall be filed or confirmed, unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited, or disposed of in pursuance of the judgment. The referee to be appointed in foreclosure cases shall be selected by the court, and the court shall not appoint as such referee, a person nominated by the party to the action, or his counsel.

Rule 73. (51.) Where lands in the city of New York are sold under a decree, order, or judgment of any court, they shall be sold at public vendue, at the Merchants' Exchange, between twelve o'clock at noon and three in the afternoon, unless otherwise specially directed. The notice of the sale of lands, lying in any of the cities of this state, in which a daily paper is printed, except where a different notice is required by law, or by the order of the court, shall be published in one or more of the daily papers of that city, for three weeks immediately previous to the time of sale, at least twice in each week. When lands in any other part of the state are directed to be sold at auction, notice of the sale shall be given, for the same time, and in the same manner, as is required by law, on sales of real estate by sheriffs on execution.

In consequence of the Merchants' Exchange being now leased to the United States, the above rule has been modified, by the following supplementary regulation of the 25th of March, 1862:

March 25th.—*Ordered*, That all sales to be made by virtue of or under any order, judgment, or other proceeding of this court, after the first day of May next, may be noticed for and made at the Merchants' Exchange Sales Room, No. 111 Broadway, and that any order heretofore made, so far as it conflicts with this order, is vacated.

But nothing in this order shall apply to any notice of sale heretofore published, and, where any notice of sale has been given for a day subsequent to the first day of May next, at the Merchants' Exchange, the same may be adjourned to the room above designated.

Rule 74. (50.) Where mortgaged premises, or other real estate directed to be sold, consist of several distinct lots or parcels, which can be sold separately, without diminishing the value thereof on such sale, it shall be the duty of the sheriff, or other person conducting the sale, to sell the same in separate lots or parcels, unless otherwise specially directed by the court. But, if the sheriff or other person is satisfied the property will produce a greater price, if sold together, than it will in separate lots or parcels, he may sell it together, unless otherwise directed in the order of sale.

Rule 75. (49.) Whenever a sheriff or referee sells mortgaged premises, under a decree, or order, or judgment of the court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such mortgage in the office of the clerk, unless such mortgage has been duly proved or acknowledged, so as to entitle the same to be recorded; in which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded, at full length, in the county or counties where the lands so sold are situated, before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and, if filed with the clerk, he shall enter in the minutes the filing of such mortgage, and the time of filing. But this rule shall not extend to any case where the mortgage appears, by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.

Rule 76. (48.) On filing the report of the sale, any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed, a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference, to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. Every party who appeared in the cause, or who shall have filed such notice with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference, and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus. But, if such claimant has not appeared, or made his claim by an attorney of this court, the notice may be served, by putting the same into the post-office, directed to the claimant at his place of residence, as stated in the notice of his claim.

Rules 78 and 79 relate to proceedings in partition, and the course to be pursued, on taking judgment therein, and run thus:

Rule 78. (73.) Where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a special term for an order of reference, to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the bill or petition; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held.

Rule 79. (74.) Where the whole premises of which partition is sought, are so circumstanced, that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality; or where any lot, or separate parcel of the premises, which will exceed in value the share to which either of the tenants in common may be entitled, is so circumstanced, the plaintiff, upon stating the fact in the affidavit which is to be filed for the purpose of obtaining an order of reference under the next preceding rule, may have a further provision inserted in such order of reference, directing the officer or person to whom it is referred, to inquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made; and that, if he arrives at the conclusion that the sale of the whole premises or of any lot or separate parcel thereof will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and, in such a case, that he also ascertain and report, whether any creditor, not a party to the suit, has a specific lien, by mortgage, devise or otherwise, upon the undivided share or interest of any of the parties, in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report, whether the undivided share or interest of any of the parties in the premises is subject to a general lien, or encumbrance, by judgment or decree; and that he ascertain and report the amount due to any party to the suit, who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference. He shall also, if requested by the parties, who appear before him on such reference, ascertain and report the amount due to any creditor, not a party to the suit, which is either a specific or general lien or encumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an encumbrance thereon in the hands of the purchaser; to the end that such directions may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds thereof on such sale.

The following rule prohibits the staying of sales of the above nature, unless on motion upon sufficient notice :

Rule 80 (first introduced in 1858). No order to stay a sale under a judgment in partition or for the foreclosure of a mortgage, shall be granted or made by a judge out of court, except upon a notice of at least two days to the plaintiff's attorney.

The next three rules relate to the payment of moneys into court, and their investment and disposition. A lengthened citation of them will not be necessary. The county treasurer of the county of venue is the proper depository, unless the court shall otherwise direct. Securities on real estate, directed to be taken, are to be taken in his name, and all moneys are to be deposited by him, in his name of office, in the New York Life Insurance and Trust Company, the United States Trust Company, or in such bank or trust company as the court may direct, unless the order or judgment under which the moneys are brought into court shall prescribe a different disposition of them.

Rule 84 directs thus, as to the provision to be made for parties holding a life interest :

Whenever a party, as a tenant for life, or by the courtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but, if such party is willing, and consents to accept a gross sum, in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of six per cent. on the principal sum, during the probable life of such person, according to the Portsmouth or Northampton tables.

The following are the rules for computing such value, and the table here referred to :

APPENDIX TO RULE 84.

RULES FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY.

Calculate the interest at six per cent. for one year, upon the sum to the income of which the person is entitled. Multiply this interest by the number of years' purchase set opposite the person's age in the table given below, and the product is the gross value of the life estate of such person in said sum.

EXAMPLES.—Suppose a widow's age is 37, and she is entitled to dower in real estate worth \$350.75. One-third of this is \$116.91 $\frac{2}{3}$. Interest on \$116.91, one year at six per cent. (as fixed by 75th rule), is \$7.01. The number of years' purchase which an annuity of one dollar is worth, at the age of 37, as appears by the table, is 11 years, and $1\frac{3}{4}$ parts of a year, which, multiplied by \$7.01, the income for one year, gives \$77.35, and a fraction, as the gross value of her right of dower.

Suppose a man, whose age is 50, is tenant by the courtesy in the whole of an estate worth \$9,000. The annual interest on the sum, at six per cent., is \$540.00. The number of years' purchase which an annuity of one dollar is worth, at the age of 50, as per table, is $9\frac{417}{1000}$ parts of a year, which, multiplied by \$540, the value of one year, gives \$5,085.18 as the gross value of his life estate in the premises, or the proceeds thereof.

NOTE.—The values in the table are calculated on the supposition that the annuities are payable yearly; if payable half-yearly, one-fifth of a year's purchase should be added to those values.

ANNUITY TABLE.

A table corresponding with the Northampton tables referred to in the 75th rule, showing the value of an annuity of one dollar, at six per cent., on a single life, at any age from one year to ninety-four, inclusive.

| Age. | No. of years' purchase the annuity is worth. | Age. | No. of years' purchase the annuity is worth. | Age. | No. of years' purchase the annuity is worth. | Age. | No. of years' purchase the annuity is worth. |
|------|--|------|--|------|--|------|--|
| 1 | 10.107 | 25 | 12.063 | 49 | 9.563 | 73 | 4.781 |
| 2 | 11.724 | 26 | 11.992 | 50 | 9.417 | 74 | 4.565 |
| 3 | 12.348 | 27 | 11.917 | 51 | 9.273 | 75 | 4.354 |
| 4 | 12.769 | 28 | 11.841 | 52 | 9.129 | 76 | 4.154 |
| 5 | 12.962 | 29 | 11.763 | 53 | 8.980 | 77 | 3.952 |
| 6 | 13.156 | 30 | 11.682 | 54 | 8.827 | 78 | 3.742 |
| 7 | 13.275 | 31 | 11.598 | 55 | 8.670 | 79 | 3.514 |
| 8 | 13.337 | 32 | 11.512 | 56 | 8.509 | 80 | 3.281 |
| 9 | 13.335 | 33 | 11.423 | 57 | 8.343 | 81 | 3.156 |
| 10 | 13.285 | 34 | 11.331 | 58 | 8.173 | 82 | 2.926 |
| 11 | 13.212 | 35 | 11.236 | 59 | 7.999 | 83 | 2.713 |
| 12 | 13.130 | 36 | 11.137 | 60 | 7.820 | 84 | 2.551 |
| 13 | 13.044 | 37 | 11.035 | 61 | 7.637 | 85 | 2.402 |
| 14 | 12.953 | 38 | 10.929 | 62 | 7.449 | 86 | 2.266 |
| 15 | 12.857 | 39 | 10.819 | 63 | 7.253 | 87 | 2.138 |
| 16 | 12.755 | 40 | 10.705 | 64 | 7.052 | 88 | 2.031 |
| 17 | 12.655 | 41 | 10.589 | 65 | 6.841 | 89 | 1.882 |
| 18 | 12.562 | 42 | 10.473 | 66 | 6.625 | 90 | 1.689 |
| 19 | 12.477 | 43 | 10.356 | 67 | 6.405 | 91 | 1.422 |
| 20 | 12.398 | 44 | 10.235 | 68 | 6.179 | 92 | 1.136 |
| 21 | 12.329 | 45 | 10.110 | 69 | 5.949 | 93 | .806 |
| 22 | 12.265 | 46 | 9.980 | 70 | 5.716 | 94 | .518 |
| 23 | 12.200 | 47 | 9.846 | 71 | 5.479 | | |
| 24 | 12.132 | 48 | 9.707 | 72 | 5.241 | | |

Rules 86 to 91, inclusive, refer to proceedings in divorce.

Rule 86 provides thus, as to a reference to take proof on the application for judgment, where no defence is interposed :

Rule 86. (64.) When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, if the defendant fail to answer the complaint, or if the facts charged in the complaint are not denied in

the answer, the court to which application is made for judgment, shall order a reference, to take proof of all the material facts charged in the complaint.

The court shall in no case order the reference to a referee nominated by either party.

And, when the action is for a divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity, or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed; and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and also where, at the time of the offence charged, the defendant was living in adulterous intercourse with the person with whom the offence is alleged to have been committed, that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff; and the complaint containing such averments be verified by the oath of the plaintiff, in the manner prescribed by the 157th section of the Code, judgment shall not be rendered for the relief demanded, until the plaintiff's affidavit be produced, stating the above facts.

Rule 87. (65.) To obtain an order of reference, if the complaint seeks to annul a marriage, on the ground that the party was under the age of legal consent, an affidavit must be produced, showing that the parties thereto have not freely cohabited for any time, as husband and wife, after the plaintiff had attained the age of consent. If the complaint seeks to annul the marriage, on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show, by affidavit, that there has been no voluntary cohabitation between the parties as man and wife; and, if it seeks to annul a marriage, on the ground that the plaintiff was a lunatic, an affidavit must be produced, showing that the lunacy still continues; or the plaintiff must show, by his affidavit, that the parties have not cohabited as husband and wife, after the plaintiff was restored to his reason.

Rule 88. (66.) On a reference to take proof of the facts charged in a complaint for separation, or limited divorce, the examination of the plaintiff on oath may be taken, as to any cruel or inhuman treatment, alleged in the complaint, which took place, when no witnesses were present, who are competent to testify to the facts on such reference.

Rule 89 provides as to the defences available to the defendant, and the trial of the issues joined thereon.

Rule 90 provides that if an issue of the legitimacy of the children of the marriage be joined, and if thereon a reference is ordered, proofs, shall be taken upon that question also.

Rule 91 provides thus:

No sentence or decree of nullity, declaring void a marriage contract, or decree for a divorce, or for a separation or limited divorce, shall be made,

of course, by the default of the defendant, or in consequence of any neglect to appear at the hearing of the cause, or by consent.

And, after sundry directions as to the trial when had, it concludes as follows :

No judgment, in an action for divorce, shall be entered, except upon the special direction of the court.

§ 251. *General Observations.—Distinction between Judgment and Order.*

A judgment is, as defined by section 245, “the final determination of the rights of the parties in the action.”

The term decree, as applicable to the final determination of a suit in equity, though in strictness obsolete, as not employed in the Code, may be looked upon as practically synonymous.

As to the extent to which the entry of judgment is technically a termination of the suit, see *Adams vs. Fort Plain Bank*, 23 How., 45.

A judgment once entered is, though irregular, valid, until it is reversed or vacated. *Gallarati vs. Orser*, 4 Bosw., 94.

Its finality constitutes the broad distinction between it and an order, which, as defined by section 400, is “every direction of a court or judge, made or entered in writing, and not included in a judgment.”

This distinction is, as a general rule, so clear, that there is little or no risk of confusion. In two classes of cases there has, however, been some difficulty in drawing the exact line, the one being as to the decision on a motion for judgment on a frivolous pleading, the other that on the argument of a demurrer.

The great test as to either seems to be, as to whether leave to amend or to plead over is or is not granted, to which, in the case of demurrer, may be added that as to whether the demurrer is or is not to the whole pleading. If the unsuccessful party is permitted or still retains the right to go to trial upon issues of fact, either upon the residue of the pleading, not impeached by the demurrer, or upon another pleading, substituted in its place, by way of amendment, then, it is self-evident that the decision, whatever its nature, is not a final determination, within either the terms or the spirit of section 245, and, being so, is not a judgment.

But, if the decision goes the whole length of declaring the pleading impeached to be frivolous, or allows a demurrer to the whole of it, without granting leave to amend or to plead over, so that the adjudication finally determines the rights of the unsuccessful party, leaving him no ulterior remedy except by way of appeal, then it is clearly a judgment. The same observation may be made, as to the decision of a motion

under section 152, striking out a whole answer as sham or irrelevant without terms, or leave to amend, whenever such a decision is made.

(a.) MOTION ON FRIVOLOUS PLEADING.

A motion under section 247 is expressly for a judgment, as is clear from the terms of the section itself. The following cases hold the decision upon it to be a judgment, carrying costs, and appealable from as such, and not as an order. *Harris vs. Hammond*, 18 How., 123; *Witherhead vs. Allen*, 28 Barb., 661; *King vs. Stafford*, 5 How., 30. See also *same case*, 6 How., 127; *Lawrence vs. Davis*, 7 How., 354; *Roberts vs. Morrison*, 7 How., 396; 11 L. O., 60; *Bruce vs. Pinckney*, 8 How., 397; *Raynor vs. Clark*, 7 Barb., 581; 3 C. R., 230; *Phipps vs. Van Cott*, 4 Abb., 90 (92). See also *Martin vs. Kanouse*, 2 Abb., 390. And such decision must be applied for as a judgment, and not as an order. *Darrow vs. Miller*, 5 How., 247; 3 C. R., 241; *Rae vs. Washington Mutual Insurance Company*, 6 How., 21; 1 C. R. (N. S.), 185.

The contrary, viz.: that the order under these circumstances may be appealed from as an order, and is analogous to an application for judgment under the second subdivision of section 246, and also that the successful party is only entitled upon it to the costs of a motion, and cannot charge a trial fee, is maintained in the following series of cases: *Gould vs. Carpenter*, 7 How., 97; *Roberts vs. Clark*, 10 How., 451; *Western Railroad Corporation vs. Kortright*, 10 How., 457; *Rochester City Bank vs. Rapelje*, 12 How., 26; *Marquise vs. Brigham*, 12 How., 399; *Witherspoon vs. Van Dolar*, 15 How., 266.

In *Witherhead vs. Allen*, 28 Barb., 661, the former conclusion, i. e., that the decision is a judgment upon an issue of law, and not an order only, is thought to be the better opinion. It is held, however, that the decision on a frivolous demurrer may, under the terms of section 349, as amended in 1852, be appealed from as an order, if such appeal be taken before the entry of judgment, but not afterwards. See also *Lee vs. Ainslee*, 1 Hilt., 277; 4 Abb., 463; *Same case*, 4 Abb., 90, note. But, if so appealed from, it will not bring up the case finally before the Court of Appeals, but a second appeal from the judgment, when entered, will be necessary. See *Hollister Bank of Buffalo vs. Vail*, 15 N. Y., 593; *Ford vs. David*, 5 Duer, 684; 13 How., 193; 3 Abb., 385.

As regards a frivolous answer or reply, if leave to amend be granted, the decision is clearly not final, and an appeal may lie from it; but, in taking such an appeal, the unsuccessful party may put his ulterior rights in peril, as, unless he succeed in obtaining a stay, his adversary will, at the expiration of the time prescribed, be regular in entering his judgment. See *King vs. Stafford*, *supra*.

Or sometimes, the order may be made, without prejudice to the right of the party to make an independent motion for leave to answer. See *Marquise vs. Brigham*, *supra*; *Tompkins vs. Acer*, 10 How., 309 (310). In this case the decision can scarcely be looked upon as final, until that motion has been made. Still, unless stayed by order of the court, the successful party will be regular in entering up his judgment.

And, when the judgment is once entered regularly, it seems very doubtful whether it can be got rid of, except by appeal. See *Dolph vs. White*, 8 How., 275. Where no leave or stay is granted, it is clear that the party may go on and enter his judgment at once.

(b.) DECISION ON ISSUE OF LAW.

Where the demurrer is to the whole pleading, and leave to amend or plead over is not granted by the decision, it is clear that, to all intents and purposes, it is a judgment and not an order. See *Dolph vs. White*, 8 How., 275; *Bauman vs. New York Central Railroad Company*, 10 How., 218; *Reynolds vs. Freeman*, 4 Sandf., 702; *Moza vs. Sun Mutual Insurance Company*, 22 How., 60 (62); 13 Abb., 304 (308).

And the same is the case, with reference to a decision, by which leave to amend or to plead over is given, and the party declines or neglects to avail himself of that leave, within the time and upon the terms prescribed. The successful party may, in that case, proceed at once to the entry of judgment, unless his proceedings are stayed. See *Drummond vs. Husson*, 1 Duer, 633; 8 How., 246. And, the judgment once entered, it must be appealed from as such. *Reynolds vs. Freeman*, 4 Sandf., 702; *Moza vs. Sun Mutual Insurance Company*, *supra*; *Keteltas vs. Myers*, 3 E. D. Smith, 83; 1 Abb., 403. (N. B.—The reversal at 19 N. Y., 231, is on the merits, and does not affect this point.)

But, where the demurrer is partial, and does not go to the whole pleading, the decision on it is an order and not a judgment, and an appeal is expressly given from it, as such, by section 349, as amended in 1851. See *Paddock vs. Springfield Fire and Marine Insurance Company*, 2 Kern., 591; *Sutherland vs. Tyler*, 11 How., 251; *Cook vs. Pomeroy*, 10 How., 221; *Bauman vs. New York Central Railroad Company*, 10 How., 218 (220); *Belknap vs. McIntyre*, 2 Abb., 366; *Drummond vs. Husson*, 1 Duer, 633; 8 How., 266; *Ives vs. Miller*, 19 Barb., 196 (198).

But, before the amendment of 1851, it was held that such decision was not appealable from in that form; that it was, in fact, a judgment *pro tanto*, but that its operation was suspended, until the final decision of the other issues in the cause, at which time it might be perfected, and would then come up for review. See *Bentley vs. Jones*, 4 How., 335; 3 C. R., 37; *Masters vs. Barnard*, 6 How., 113; 1 C. R. (N. S.),

407; *Wood vs. Lambert*, 3 Sandf., 724; 1 C. R. (N. S.), 214; *King vs. Stafford*, 5 How., 30.

When leave to amend or plead over is granted, the decision, whilst that leave is pending, retains the character of an order, and is appealable from as such. See *Reynolds vs. Freeman*, 4 Sandf., 702; *Nellis vs. De Forest*, 6 How., 413; *Nolten vs. Western Railroad Corporation*, 10 How., 97; affirmed generally, 15 N. Y., 444; *Cook vs. Pomeroy*, 10 How., 221; *Bauman vs. New York Central Railroad Company*, 10 How., 218 (220); *Ives vs. Miller*, 19 Barb., 196 (198); *Ford vs. David*, 5 Duer, 684; 13 How., 193; 3 Abb., 385; *Phipps vs. Van Cott*, 4 Abb., 90. By these cases, *Lewis vs. Acker*, 8 How., 414, is clearly overruled. See especially per S. B. Strong, J., 4 Abb., 91.

But, as above shown, this privilege to appeal is only temporary, and ceases, if the unsuccessful party declines or neglects to avail himself of the privilege allowed, and suffers judgment to be regularly entered against him.

(c.) DIVISION OF THE SUBJECT.

It is proposed to arrange the subject, as treated in the succeeding chapters, in the following order:

1. The preliminary and formal proceedings which are for the most part common to the entry of judgment in all cases.
2. Judgment by default, or in the nature of default, with its preliminaries and incidents.
3. Judgment in contested cases.
4. Proceedings consequent upon, and for the carrying out of judgment, and not in the nature of execution.
5. The entry of judgment, and the special ulterior proceedings provided for by statute, in the case of joint-debtors.
6. The amendment, vacating, or satisfaction of judgments.

CHAPTER II.

GENERAL INCIDENTS OF JUDGMENT.

§ 252. *Preliminaries in Certain Cases.*

WHEN the case is tried by a jury, the clerk's entry, under section 264 constitutes the authority to enter up judgment, in accordance with the verdict, and no further direction on the part of the court is necessary.

When the cause has been tried by the court without a jury, the decision must, under section 267, be given in writing.

In ordinary cases, that decision, as filed, may form sufficient ground for the entry of judgment by the clerk. When, however, the directions are special, and especially in equity cases, it will frequently be necessary or expedient, to reduce the substance of the decision into more detailed form, so as to assume the shape of a decree, under the former practice. In this case, the proposed form of decree, or order for judgment, should be prepared by the prevailing party, and submitted to the judge for his signature.

Where the case is complicated, and the decree or order for judgment requires special consideration, the court will frequently direct it to be settled, on notice to the adverse party, and, it may frequently be expedient to follow the same course, even where no special direction has been given. In this case, the proposed form, when prepared, must be served on the adverse party or parties, with a notice of the time and place, at which it will be submitted to the judge for settlement. The adverse party, if he objects to the form proposed, usually prepares a memorandum of any proposed alterations, or a substituted form, and submits them to the judge at the time appointed, or, his objections may be urged orally. The judge then settles the form of order or decree, either on the spot, or afterwards, on advisement. When settled, the form approved is signed by the judge, and is either delivered by him to the prevailing party, or left with the clerk. So signed, it constitutes the clerk's authority for the formal entry of judgment in that form, which is then perfected.

If dissatisfied with the settlement, it is competent for either to bring the question again before the judge, on an application to resettle, notice being given to the adverse party; but this course will rarely be appli-

cable, and is only proper, in case of some evident misapprehension of matters of fact. The decision, as such, can only be impeached on appeal.

These proceedings are taken before the judge who tried the cause, and generally at his chambers, or at the sitting of the court, before the commencement of regular business. When the case is of importance, it is sometimes specially placed upon the calendar for that purpose, but, of course, all questions as to the mode of settlement, depend entirely upon the discretion of the judge.

When the entry of judgment is dependent upon, and follows as the consequence of an order, as, on a motion for judgment under section 247, or on the decision of a demurrer, the judge's signature to that order should be obtained, and it should be regularly entered with the clerk, unless such order be actually embodied in the judge's decision, as signed by him.

The decision of the general term on exceptions, directed to be heard there in the first instance, or upon a verdict subject to the opinion of the court, should be entered as an order in the first place. When so entered; it constitutes the clerk's authority, for perfecting judgment in accordance with the decision.

And the same course must be pursued, with reference to the decision of the general term, upon an appeal, by which a judgment is affirmed, reversed, or modified.

The report of a referee, is, of itself, sufficient authority to the clerk to enter up judgment accordingly, without any special direction by the court: section 272. It is equivalent, in fact, to the decision of a judge. *Hancock vs. Hancock*, 22 N. Y., 568.

§ 253. *Adjustment of Costs.*

The first step to be taken by the prevailing party, with a view to the judgment to which he is entitled, is to give the notice of adjustment of his costs, prescribed by section 311, in all cases where the adverse party has appeared. This proceeding must not be confounded with the notice of assessment, necessary under section 246, on taking judgment by default, against a party who has appeared, but has not answered.

When, under the provisions of the Code, the defendant is entitled to costs against the plaintiff, though the latter recover the amount of his claim, the former is then, for this purpose, the prevailing party, and should give the notice and proceed to a taxation, in order to the due insertion of his costs in the judgment-roll. See *Johnson vs. Sagar*, 10 How., 552; *Peet vs. Warth*, 1 Bosw., 653.

The notice must be given for the period prescribed in the section, *i. e.*, for five days, except when both attorneys reside in the same city, vil-

lage, or town, and, in that case, for two days prior to the period appointed for taxation. This time is to be calculated in the same manner, and the notice served as an ordinary paper in the cause, either personally or by mail, with the usual incidents of double time in the latter event. The case of two attorneys residing in different places, but doing business in the same city, is not provided for by the section. According to its letter, a five days' notice would seem to be requisite under these circumstances, but the point does not appear to have arisen.

The notice, when served, must be accompanied by a copy of the costs and disbursements to be adjusted (§ 311). Before 1857 this was not strictly necessary, but the practice was usual, and held to be the correct course. See *Gildersleeve vs. Halsey*, 3 Sandf., 756; 1 C. R., 126. As to the nature and items of the costs to be comprised, see hereafter, Book XIV., devoted to that subject. The bill must be made out in full, according to the scale of allowances there given. When any costs have been awarded to the party on motion, and have not been collected, or where costs of any proceeding have been ordered to abide the event, those costs should be included, and the order under which the party is entitled to tax them, submitted to the clerk at the time of taxation. See, however, *per contra*, *Johnson vs. Jillitt*, 7 How., 485. The disbursements must be stated in detail, and verified by affidavit (§ 311). The proper place for such statement is on the face of the bill itself, and if only shown upon the affidavit, they may possibly be disallowed. See *Shannon vs. Brower*, 2 Abb., 377. See, however, to the contrary effect, *Hager vs. Danforth*, 8 How., 448.

Prior to 1857, two days' notice was all that was requisite in any case. Under these circumstances, cases of hardship occasionally occurred. In *Goodyear vs. Baird*, 11 How., 377, relief was given, and the party allowed to come in and retax, where a notice, technically regular, had been served for a period at which he could not be expected to be able to attend. In *Whipple vs. Williams*, 4 How., 28, a notice served on Saturday evening for Monday morning was held to be bad, and that Sunday should be excluded; but this view seems to be scarcely tenable.

It has been held that notice may be given in anticipation of an expected default, and that it will be good, if that default be existent at the time appointed. *Anon.*, 4 Sandf., 693.

The giving of such notice, and the adjustment of costs, are not stayed by the giving of security on appeal, but, of course, no further proceedings can be taken for the recovery of the amount, when adjusted. *Curtis vs. Leavitt*, 1 Abb., 118; 19 Barb., 530.

To be available, the service of notice, if denied, must be fully and regularly proved. *Van Wyck vs. Reed*, 10 How., 366.

In all cases where the defendant has appeared, notice of taxation

should be given, whether he has or has not answered. In the latter case, it may be combined with the notice of adjustment prescribed by section 246. Under the Code of 1848, in which the present section 414 was not contained, it was held unnecessary to serve it, on judgment by default, even when there had been an appearance. See *Richards vs. Swetzer*, 3 How., 413; 1 C. R., 117; *Wilcox vs. Curtis*, 1 C. R., 127; but, since the insertion of that section, this cannot be safely relied on.

In some few cases, the omission of notice has been held to be a fatal defect. See *Elson vs. New York Equitable Insurance Company*, 2 Sandf., 654; 2 C. R., 30; *Bank of Massillon vs. Dwight*, 2 C. R., 49. See also *Doke vs. Peck*, 1 C. R., 54; *Mitchell vs. Hall*, 7 How., 490.

The contrary proposition, that such an omission, though clearly an irregularity, is not fatal, and that a retaxation, at the expense of the adverse party, is the proper course, and also, that by means of such retaxation, the irregularity may be cured, the judgment remaining valid for other purposes, is maintained in the more numerous class of cases. See *Richards vs. Swetzer*, 3 How., 413; 1 C. R., 117; *Goldsmith vs. Marpe*, 2 C. R., 49; 7 L. O., 351; *Dix vs. Palmer*, 5 How., 233; 3 C. R., 214; *Hughes vs. Mulvey*, 1 Sandf., 92; *Tracy vs. Humphrey*, 1 C. R. (N. S.), 197; *Ford vs. Monroe*, 6 How., 204; 10 L. O., 155; *Gilmartin vs. Smith*, 4 Sandf., 684; *Potter vs. Smith*, 9 How., 262; *Stimson vs. Huggins*, 16 Barb., 658; 9 How., 86; *Van Wyck vs. Reed*, 10 How., 366; *Chapin vs. Churchill*, 12 How., 367. See also *Hicks vs. Brennan*, 10 Abb., 420; *Same case*, 10 Abb., 304; *Henry vs. Bow*, 20 How., 215.

In relation to a readjustment by the prevailing party, where, to prevent anticipated fraud, he has entered up judgment at once, without waiting to give notice of taxation, see *Stimson vs. Huggins*, 16 Barb., 658; 9 How., 86.

(a.) TAXATION OF COSTS.

The notice having been thus given, the attorney for the prevailing party must attend at the time and place appointed; as, if he omit to do so, and his adversary be present, the notice will, of course, fall to the ground, and, if insisted on, must be renewed for the full period. If, on the contrary, the other side fail to attend, the attorney for the prevailing party may proceed *ex parte*, and may complete his taxation, after a reasonable delay, at the discretion of the clerk.

The clerk by whom the costs are taxable, and to appear before whom the notice is given, is the clerk of the court where the action is pending, and, in the Supreme Court, the clerk of the county of venue. Code, § 466.

But costs of the Court of Appeals are not taxable by the clerk of

that tribunal, but by the clerk of the court below, where the judgment-record is filed, and to whom the *remittitur* is made. *Union India Rubber Company vs. Babcock*, 4 Duer, 620; 1 Abb., 262.

Section 310 makes the following provision as to interest:

§ 310. (285.) When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered, shall be computed by the clerk, and added to the costs of the party entitled thereto.

Singularly enough, the section makes no provision for the computation of interest, on an amount found due, on trial by the court. The omission is, however, disregarded in practice, and interest calculated in this as in other cases.

The prevailing party should have his computation of interest ready for insertion by the clerk, and likewise the formal *postea*. See next section. It is also convenient, but not strictly necessary, to have a statement made out, of the exact amount for which judgment is proposed to be entered, especially when more than one item enters into the computation of the recovery.

It has been held that, where the debt itself does not carry interest, it should be computed from the actual making of a referee's report, and not from its assumed date, if antedated. *Fuller vs. Squire*, 9 How., 121.

When a *remittitur* from the Court of Appeals directed that the respondent should recover his costs, and also interest on the judgment, by way of damages, it was held that the respondent could not recover double interest, once under the statute, and once as damages. The *formula* in question, as generally used, was held to be so far nugatory. *Hoard vs. Garner*, 4 Sandf., 677.

Where the appointment is attended, any objections to the costs, or any specific items, must be raised at the time. If omitted to be mentioned, they may be held waived, and cannot be urged on an application for readjustment. *Cuyler vs. Coats*, 10 How., 141. See also *Dresser vs. Jennings*, 3 Abb., 140; *Toll vs. Thomas*, 15 How., 315.

In *Case vs. Price*, 17 How., 348; 9 Abb., 111, it was held that an objection as to the improper joinder of superfluous parties in foreclosure, might be raised on taxation, on objection to the allowance for additional defendants, under section 307, subdivision 1.

Though the judgment of the court, as to costs, be clearly erroneous, the clerk cannot correct the error on taxation; he is forced to follow the directions as given. *Chapin vs. Churchill*, 12 How., 367. But he is not bound to notice a stipulation between the parties, unless produced to him. *Toll vs. Thomas*, 15 How., 315.

The taxation of costs, and the insertion of their amount in the entry

of judgment, are not stayed by an appeal, even with security. It is not a proceeding under the judgment, but is, on the contrary, necessary for its completion. *Curtis vs. Leavitt*, 19 Barb., 530; 1 Abb., 118.

The same case is also authority, for the taxation, according to the old fec-bill, of costs incurred antecedent to, and which, therefore, are not affected by the Code.

The costs of a foreclosure by advertisement are taxable by the clerk, under 2 R. S., 652, section 3, upon requisition of the party liable to pay them, and such party is entitled to the usual notice, and, if such notice be omitted to be given, may obtain a retaxation. A person entitled to a share in the surplus of the fund, out of which the costs are to be paid, stands in the position of a party liable to their payment, and is entitled to require such taxation. *In re Moss*, 6 How., 263.

The amount and items of a bill of costs, as taxable on a proceeding of this description, are given in *Collins vs. Standish*, 6 How., 493.

The clerk has power to tax costs on a *mandamus*, the same as costs in an ordinary proceeding. *People vs. Colborne*, 20 How., 378. But in street opening cases, and others, in which the amount of costs is not limited by law, he has no such authority. *Vide* chapter 470 of 1847, § 38; *Matter of Fourth Avenue*, 11 Abb., 189; *Central Park Case*, 12 Abb., 107.

In connection with the taxation, the moving party must present an affidavit, verifying his disbursements. This is expressly prescribed by section 311. The usual practice is to indorse it upon the costs, which are taxed by the clerk, but, of course, it may be made separately and annexed. It must clearly include all the disbursements charged for; and, where travel-fees of witnesses are claimed, its statements must be specific. See hereafter, as to these particulars, in book XIV., under the head of *Disbursements*.

If the party against whom the costs are taxed, is entitled to any counter-demand, for costs of interlocutory proceedings, awarded to him during the action, and not yet collected, he should apply, upon the taxation, to have the amount set off, producing the order under which he is so entitled. See, however, *per contra*, *Johnson vs. Jillitt*, 7 How., 485.

On completion of the taxation, the taxed bill of costs, and all affidavits presented to the clerk on taxation, should, in all cases, be attached to, and filed with the judgment record. *Vide* Amended Judiciary Act, chapter 470 of 1847, section 38. It should not, however, form part of it. See below, under head of *Judgment-Roll*.

If either party be dissatisfied with the adjustment of the clerk, his decision is reviewable by a judge of the court. This review is frequently had informally, both parties going at once before a judge at

chambers, and submitting the question. If not, a motion for a retaxation will be the proper course.

It is well settled that such a motion is entertainable, though the Code makes no express provision upon the subject. The objections to the taxation must be raised in this manner, and cannot be brought up, on appeal from the judgment. *Beattie vs. Qua*, 15 Barb., 132. See also *Matter of Fourth Avenue*, 11 Abb., 189. And an order denying such a readjustment is appealable. *Sluyter vs. Smith*, 2 Bosw., 673. See generally, as to the power of a judge to entertain such a motion, *Whipple vs. Williams*, 4 How., 28; also note at 3 C. R., 24. It is likewise necessarily implied in the numerous class of cases above referred to, holding that judgment on insufficient notice is not void, but merely irregular, and that the irregularity may be cured by a readjustment. See, as to such a proceeding, on behalf of a party who has entered up judgment, without waiting to tax his costs, *Stimson vs. Huggins*, there referred to. As to a retaxation, in cases where the clerk had no power to tax, see *Matter of Fourth Avenue*, 11 Abb., 189; *Central Park case*, 12 Abb., 107.

A motion for readjustment, may be founded on the costs as served, together with the pleadings and proceedings, if necessary, any extraneous information necessary to the due presentation of the objections taken being shown on affidavit.

The right to a readjustment may, however, be waived by *laches* or delay. See *Dresser vs. Wickes*, 2 Abb., 460; *Matter of Seventy-Sixth Street*, 12 Abb., 317. See also, as to the effect of a payment, *Collomb vs. Caldwell*, 5 How., 336; 1 C. R. (N. S.), 41; *Schermerhorn vs. Van Voast*, 5 How., 458; 1 C. R. (N. S.), 400; *Harris vs. Scofield*, MS., noticed in *Ford vs. Monroe*, 6 How., 204; 10 L. O., 155. The receipt of the amount by the attorney's clerk, in ignorance, was, however, held not to preclude the motion. *Ford vs. Monroe*, *supra*.

§ 254. Formal Entry of Judgment.

(a.) ENTRY IN THE JUDGMENT-BOOK.

On the render of judgment, the clerk is bound to enter such judgment in the judgment-book, "specifying clearly the relief granted, or other determination of the action." See sections 279, 280.

This entry is usually made by him, on completion of the adjustment, and ascertainment of the precise amount recovered, and sometimes even afterwards, from the judgment-roll as filed. There can be no question, however, but that this latter practice is technically incorrect, and that the entry should be made at once. And, not merely so, but it has been even

held that, properly, the judgment should be entered by the clerk in the judgment-book, directed to be kept by him by section 278, at the time that judgment is actually pronounced, and that the adjustment of costs is, in strictness, a subsequent proceeding. See *Gilmartin vs. Smith*, and *Stimson vs. Huggins*, above cited. The provisions on the subject are, however, merely directory (see *same cases*), and the practice of completing the whole of the proceedings in relation to the entry of judgment, at one time and upon one single occasion, has become general, and, it may almost be said, universal, except in those comparatively rare instances, where it is desirable for the party to enter up judgment and make a levy at once, to prevent anticipated fraud on the part of his adversary, either abandoning, or subsequently applying for a retaxation of his costs. See, as to this practice, *Stimson vs. Huggins, supra*.

In relation to the entry of judgment, in a controversy submitted without action, see section 373, above cited.

The entry of judgment by the clerk, can only be made during regular office hours (see rule 9), and the lien of a judgment takes place from the time when it is actually made. *Blydenburgh vs. Northrop*, 13 How., 289.

Since the amendment of 1851, judgment, when awarded, is final, subject to the right of review by the unsuccessful party, the intermediate term of four days, provided for by the Code of 1849, having been then stricken out. The successful party is therefore entitled to perfect his judgment at once, on taking the necessary steps for that purpose, unless his proceedings are stayed. But, even under the previous measure, this right had been held to be existent. See *Lynde vs. Cowenhoven*, 4 How., 327; 3 C. R., 7; *Renouil vs. Harris*, 2 Sandf., 641; 1 C. R., 125; *Droz vs. Lakey*, 2 Sandf., 681; 2 C. R., 83. See also *Traver vs. Silvernail*, 2 C. R., 96.

(b.) POSTEA.

At the time when he applies for the entry of judgment, the prevailing party should also prepare and bring with him the formal *postea*, in which the judgment itself, as determined by the verdict of the jury or decision of the court or referee, is embodied and awarded (called in section 281, "a copy of the judgment"). This paper is of a technical nature, and various forms are given in the appendix. It recites, in all cases, the manner in which the trial has been had, and the verdict or decision which has been pronounced. It then formally awards judgment, in accordance with that verdict or decision, so far as any specific or pecuniary recovery is concerned, fixing the amount of that recovery, for principal and interest, and also for costs, or for costs only, as the case may require.

This last form of *postea* is more peculiarly applicable to equitable cases, in which the relief granted is separately embodied in the form of a decree, and no money judgment is requisite to be entered, except for the amount of costs, when awarded.

The *postea* forms the conclusion of the judgment-roll, and supplies the materials for docketing the judgment, under section 282.

(c.) JUDGMENT-ROLL.

The proceedings for adjustment of costs being completed, the amount of the recovery of the prevailing party ascertained, and the judgment entered in the judgment-book, the judgment-roll must be made up and filed.

Under the Code of 1848, the making up of the judgment-roll was the duty of the clerk, and he was responsible for its correctness. *Renouil vs. Harris*, 2 Sandf., 641; 1 C. R., 125. See also, generally, as to his responsibility, in relation to the entry of judgment, *Neele vs. Berryhill*, 4 How., 16; *Lynde vs. Cowenhoven*, 4 How., 327; *Douoy vs. Hoyt*, 1 C. R. (N. S.), 286, and *Cook vs. Dickerson*, 1 Duer, 679.

Under the provision as it now stands, the judgment-roll may be furnished by the party or his attorney. Where, however, this is done, the clerk should still see that the roll so furnished contains all the necessary component parts, and, if clearly defective, he may properly refuse to receive it. See *Whitehead vs. Pecare*, 9 How., 35.

It is, however, optional with the prevailing party to furnish the roll or not, and he cannot be compelled so to do. In the event of his neglect, it then becomes the duty of the clerk to collect the necessary papers from the files, to attach them together, and to annex thereto a copy of the judgment. See *Heinemann vs. Waterbury*, 5 Bosw., 686; *Earle vs. Barnard*, 22 How., 437. The adverse party may compel the performance of this duty, and the filing of any necessary papers. See *same cases*. See also *Lentilhon vs. Mayor of New York*, 3 Sandf., 721; 1 C. R. (N. S.), 111.

The filing of a proper judgment-roll is essential to the validity and lien of the judgment. Unless this be done, and unless that judgment-roll comprises all the papers directed by the section, the judgment cannot be docketed, nor can any lien be acquired or enforced under it. *Townshend vs. Wesson*, 4 Duer, 342. Nor can an incompletely entered judgment be regularly appealed from. *Lentilhon vs. Mayor of New York*, 3 Sandf., 721; 1 C. R. (N. S.), 111.

The component parts of the judgment-roll are prescribed by section 281, above cited.

Subdivision 1, relative to the entry of judgment by default, will be noticed in the succeeding chapter.

See also sections 373, 384, and 385, above referred to, as to the com-

ponent parts of the judgment-roll, on the entry of judgment on a controversy submitted without action, on a confession, or on an offer respectively.

Where possible, the original papers should in all cases be used, and those on the files of the court will, on a request to that effect, be procured by the clerk for that purpose. If the opposite party have neglected to file his pleading, he may be compelled to do so, under the provisions of section 416.

But, where the originals cannot be obtained, copies may now be substituted in all cases.

Where amendments have taken place, the amended pleadings only are requisite. The filing of the original and superseded documents will, in this case, be clearly unnecessary, and might even be held vexatious, as imposing additional expense, on obtaining a transcript of the judgment-record, for the purposes of an appeal, if taken.

The section omits to notice the decision of the court, in a case so tried. It is clear, however, that such decision necessarily affects the judgment. It must accordingly be included, and evidenced by the signature or *allocatur* of the judge. But a mere opinion will not have that effect, and cannot properly be annexed. *Thomas vs. Tanner*, 14 How., 426. See also *Sands vs. Church*, 2 Seld., 347 (356). An omission to file it will not, however, be a fatal defect, and, if made, may be supplied by amendment. See *Lewis vs. Jones*, 13 Abb., 427.

A strict view upon the subject, is taken in some of the earlier cases, and it was held that the copy of the clerk's entry of judgment must, in all cases, form part of the judgment-roll, as being "the only record evidence that judgment has been perfected," even when a signed decision of the court had been included. See *Schenectady and Saratoga Plank Road Company vs. Thatcher*, 6 How., 226; 1 C. R. (N. S.), 380. See also, as to the clerk's entry, *Lentilhon vs. Mayor of New York*, and *Gilmartin vs. Smith*, above cited.

An omission on the part of the clerk to sign the record, was held a fatal defect, in *Manning vs. Guyon*, 1 C. R., 43. In *Schenectady and Saratoga Plank Road Company vs. Thatcher*, above cited, it was, however, held amendable; and in *Artisans' Bank vs. Treadwell*, 34 Barb., 553, disregarded.

But, when the *postea* is signed by the clerk, and the signed decision of the judge is prefixed, both together seem to supply all that is really necessary. A less restricted view than the above, is taken in the following cases, which hold that, where the roll substantially supplies all necessary information, the judgment, though irregular, will not be void by reason of a technical omission. So held in *Cook vs. Dickerson*, 1 Duer, 679, where the roll did not contain a copy of the verdict. So

also, as to the omission to enter a rule for judgment on the decision of a demurrer, *Whitehead vs. Pecare*, 9 How., 35.

See also generally, as to this class of provisions being directory only, so that an omission, not affecting a substantial right, may be amended or disregarded, *Stimson vs. Huggins*, 16 Barb., 658; 9 How., 86; *Catlin vs. Billings*, 16 N. Y., 622; *Calkins vs. Packer*, 21 Barb., 275; *Renouil vs. Harris*, 2 Sandf., 641; 1 C. R., 125; *Martin vs. Kanouse*, 2 Abb., 390 (393); *Artisans' Bank vs. Treadwell*, 34 Barb., 553. See likewise, as to the question of jurisdiction, *Clyde and Rose Plank Road Company vs. Packer*, 22 Barb., 323.

In making up the judgment-roll, full effect must be given to the words, "all orders and papers in any way involving the merits, and necessarily affecting the judgment." Any document of this nature, such as orders for judgment, orders for a collateral reference, or for a collateral issue, with the report or verdict thereon, or others of the like nature, must of necessity be included. In short, the judgment-roll should contain every proceeding, which directly conduces to the result arrived at by the actual adjudication. Prior to 1852, orders relating to a change of parties were expressly directed to be included; but the striking out of the provision seems now to render it unnecessary.

Orders or papers, merely collateral in their nature, and not directly affecting the actual adjudication, and also matters of mere evidence, will, of course, be omitted. See *Cook vs. Dickerson*, 1 Duer, 679 (688); *Corwin vs. Freeland*, 2 Seld., 560 (565); *Kerrigan vs. Ray*, 10 How., 213.

And it is improper to annex to the judgment-roll, the costs or affidavit of disbursements, as forming part of the roll itself. *Schenectady and Saratoga Plank Road Company vs. Thatcher*, 6 How., 226; 1 C. R. (N. S.), 380; *Cook vs. Dickerson*, 1 Duer, 679, *supra*.

The proper course is to attach them to, and file them with the judgment-record. *Vide* chapter 470 of 1847, section 38. And, where an order for an allowance has been made, the better course will be for it to accompany the bill of costs, as a justification for the taxation of that item.

When joint-debtors have been sued, and one makes default, but the other answers and goes to trial, it has been held unnecessary to annex an affidavit of no answer to the roll, on taking judgment against both at the trial. See *Catlin vs. Billings*, 13 How., 511; 4 Abb., 248; and an ultimate appeal to the Court of Appeals was dismissed. *Same case*, 16 N. Y., 622. There can be little doubt, however, but that it will be the better practice, to make the usual evidence of service and default a part of the record, with a view to lay ground for its enforcement by execution. See section 136, subdivision 1.

When the necessary papers are collected, they must be attached together and filed, being, of course, properly indorsed with the title of the cause, and the amount of the judgment, when pecuniary. The *postea* ought, in all cases, to be signed by the clerk, before filing, which is, in effect, his signature to the whole.

And, upon the same occasion, the clerk must also comply with the provisions contained in the Revised Statutes, at 2 R. S., 361 to 364, above noticed.

He must mark upon the back of the record, the time when it is filed, and should also sign it. Section 11.

And, at the time of filing, he must enter the particulars in an alphabetical docket, as prescribed in full by section 13. Where the judgment is for taxes, the specific property charged with their payment, must also be noted. Section 14.

See also, as to the signature of the record, *Schenectady and Saratoga Plank Road Company vs. Thatcher*, above cited; *Decker vs. Judson*, 16 N. Y., 439 (450); *Manning vs. Guyon*, 1 C. R., 43; *Artisans' Bank vs. Treadwell*, 34 Barb., 553.

When judgment is signed on confession, under section 384, the clerk, besides entering the judgment, must also indorse it upon the confession, which constitutes the judgment-roll. This indorsement is essential, and must be made and signed. But the court will not allow the party to be prejudiced by an omission or mistake of the clerk, but will direct an amendment. See *Neele vs. Berryhill*, 4 How., 16.

(d.) ADDITIONS TO JUDGMENT-ROLL.

In the event of any mistake or irregularity in making up the judgment-roll, or of any paper, such as a case or exceptions, which is necessary for the purposes of a review, being incomplete, at the time of the entry of judgment, but afterwards perfected, it is competent for the court, on a proper application, to allow it to be annexed *nunc pro tunc*, or otherwise, so as to form part of the clerk's return on an appeal. See *Renouil vs. Harris*, 2 Sandf., 641; 1 C. R., 125; *Lynde vs. Cowenhoven*, 4 How., 327; 3 C. R., 7; *Schenectady and Saratoga Plank Road Company*, 6 How., 226; 1 C. R. (N. S.), 380; *Gilchrist vs. Stevenson*, 7 How., 273; *Lewis vs. Jones*, 13 Abb., 427.

Section 333, as amended in 1857, makes express provision for an annexation of this description, as regards the facts found and the conclusions of law of the general term, on a verdict subject to the opinion of the court.

And the same may be said with reference to exceptions, when separated, or as to a substituted case, when resettled, to comply with the requirements of the court above.

(e.) JUDGMENT ON APPEAL, WHERE ENTERED.

Where the cause has been tried, and the original judgment-roll filed in any particular county, the judgment on an appeal must be perfected, and the roll filed, in the same clerk's office. If entered elsewhere, although in the county where the appeal has been decided, it will be irregular. *Andrews vs. Durant*, 6 How., 191.

(f.) SUSPENSION OF ENTRY.

When exceptions are directed to be heard, in the first instance, at general term, under the special power conferred by section 265, the entry of judgment must, of course, be suspended, until they are finally disposed of, according to the provisions of the section.

§ 255. *Docketing and Lien.*

When entered and signed as above, the judgment is perfect, so far as regards its due record, and its effect, independent of the mode of enforcement. Nor is any further ceremony necessary, to secure its priority in the administration of an intestate's estate. *Hamed's case*, 4 Abb., 270.

And, when judgment is entered in the Supreme Court, in the office of the clerk of the county, the collateral entry in the docket which the clerk is bound to make, under the provisions of the Revised Statutes above noticed, effects a complete docket of it, for all purposes, so far as regards that particular county.

But, with this single exception, the further proceeding of docketing is necessary, and should at once be taken in all cases. Until docketed, the judgment cannot be enforced by execution, nor does it effect a lien on real property.

Whenever, therefore, the judgment is entered in a court of limited or inferior jurisdiction, or whenever, in the Supreme Court, the judgment is sought to be enforced in any other county, besides that in which it has been signed, that judgment must be docketed, in every county into which execution is proposed to be issued. And, whenever the judgment-debtor holds, or is supposed to hold, or to be likely to hold lands in any county or counties, the judgment should, for the purposes of effecting a lien, be docketed in every such county, whether execution be actually issued or not. But, as regards a justice's judgment, such lien cannot be enforced as against real estate, where the judgment is for a less sum than twenty-five dollars, exclusive of costs. Code, section 63.

The statutory provisions in relation to the docketing and lien of judgments, have been already cited in section 250. See especially, sections 282 and 63 of the Code, and the provisions of the Revised Statutes at

2 R. S., 359 to 364, there cited. See likewise, rule 56, providing that orders on petitions, directing the payment of money, or affecting the title to property, may be enrolled and docketed as judgments. See also section 244, as to the enforcement of an order to satisfy an admitted demand.

In the last two cases, application should be made to the clerk, at the time of the entry of the order, to give it the effect contemplated by these provisions, by making a regular entry of its effect upon the judgment-docket, in the usual manner.

And, under the amended judiciary act, as also above noticed, judgments of the United States courts, may be also docketed and enforced in the same manner. And it has been held that the provisions of section 281 apply to such judgments. *Crandell vs. Coopsey*, 10 L. O., 1.

A forfeited recognizance may also be filed and docketed as a judgment. *The People vs. Lott*, 21 Barb., 130. As to the control of the court over such a judgment, *vide The People vs. Petry*, 2 Hilt., 523.

To be available, the docket must be in the office of the clerk of a county legally constituted at the time. See, as to Schuyler County, *Lansing vs. Carpenter*, 12 How., 191; *same case*, 20 N. Y., 447.

The proceedings for the purpose of docketing a judgment as above, are simple and easy. A transcript, or more than one, if necessary, is obtained from the clerk of the court in which the judgment is entered, and such transcript, or a duplicate original, is then filed in each county, in which the judgment is sought to be docketed for the above purposes. On filing such transcript, and payment of the fee thereon, the operation is complete.

The transcript should, properly, be certified by the clerk of the court in person, who is entitled to a fee of six cents for that service, and a similar fee is payable to the clerk of each county in which the judgment is docketed. See Laws of 1840, chapter 386, section 5, 2 R. S., p. 638. In the absence of the clerk, the deputy clerk may certify to a transcript, and such transcript will be good, although the fact of the clerk's absence is not shown upon its face. The law will presume it, and that the document has been duly issued. *Miller vs. Lewis*, 4 Comst., 554.

The transcript of a justice's judgment must, in the first instance, be filed and docketed in the office of the clerk of the county in which the judgment was rendered. By this operation, the judgment becomes a judgment of the county court. See sections 63, 64, and 68. Transcripts, for the purpose of enforcement in other counties, may then be obtained from the county clerk, in the usual manner. As to the form and evidence of the transcript in such cases, see *Dickinson vs. Smith*, 25 Barb., 102.

When docketed in the above manner, and for an amount of \$25 exclusive of costs, a justice's judgment ranks, as regards ulterior proceedings, upon the same footing as the judgment of a court of record. *Conway vs. Hitchins*, 9 Barb., 378. Supplementary proceedings are accordingly maintainable upon it. In the New York Common Pleas, however, it is the practice not to allow those proceedings to be taken before a judge, but only before a referee. When entered up for a less sum than \$25 exclusive of costs, such judgment is not a lien upon or enforceable against real property. Code, section 63. It has been held that supplementary proceedings cannot be maintained, in this class of cases. See *Butts vs. Dickinson*, 20 How., 230; 12 Abb., 60; *Vulte vs. Whitehead*, 2 Hilt., 596; *Anonymous*, 32 Barb., 201. These decisions appear to overrule *Candee vs. Gundelsheimer*, 17 How., 434; 8 Abb., 435, to the contrary effect.

A judgment of the above nature, when docketed in the county court, is subject to the same incidents, as a judgment originally rendered in that tribunal. It may, therefore, be set off, and a judgment of affirmance may be amended. *Bagley vs. Brown*, 3 E. D. Smith, 66; *Hayden vs. McDermott*, 9 Abb., 14. And, when docketed, it is coextensive, as regards the acquisition and duration of a lien upon real estate. *Waltermire vs. Westover*, 4 Kern., 16. A suit cannot be maintained upon such a judgment, without first obtaining the leave prescribed by section 71. *Lyon vs. Manley*, 32 Barb., 51; 10 Abb., 337; 18 How., 267.

But, it has been held that the judgment so docketed, becomes a judgment of the county court, only for the purposes of enforcement. That court is not authorized to open or vacate it. *Martin vs. Mayor of New York*, 20 How., 86; 11 Abb., 295. But, in the same case, relief was granted, by way of injunction, restraining further proceedings against the defendant, except by way of action on the judgment. See note, 11 Abb., 300.

The docket of a judgment may be amended, by correction of an error, in the transcript or otherwise, in matter of form. *Sears vs. Burnham*, 17 N. Y., 445; *Geller vs. Hoyt*, 7 How., 265.

It seems from *Bulkeley vs. Keteltas*, 3 Sandf., 740; 1 C. R. (N. S.), 119, that the perfecting an appeal, though it effects a stay in other respects, will not prevent the respondent from filing a transcript of the judgment, previously obtained. But of course no further proceedings can be taken.

To enable the docket of a judgment, the sum due upon it must be ascertained, and the right to issue execution upon it immediate. It cannot be so in respect of a contingent liability. *De Agreda vs. Mantel*, 1 Abb., 130.

(a.) LIEN.

Where a formal error in the original entry or docket has been corrected, the court may, in its discretion, allow the judgment to retain its original priority. See *Sears vs. Burnham*, and *Geller vs. Hoyt*, *supra*; *Neele vs. Berryhill*, 4 How., 16.

Where a judgment had been actually vacated, but the order vacating it was subsequently set aside, the original lien of the creditor was restored, and enforced, as against junior judgment-creditors, no equities in favor of *bonâ fide* purchasers or encumbrancers having intervened. *King vs. Harris*, 30 Barb., 471.

The lien as to real estate, is only acquired from the time the judgment is docketed, in the county in which such real estate is situate. See statutory provisions before referred to.

When duly docketed, judgments rank according to their legal priorities. See *Stevens vs. Bank of Central New York*, 31 Barb., 290. And the date and order of the lien is, in all cases, a question of time, depending upon the day and hour when the judgment was docketed. *Blydenburgh vs. Northrop*, 13 How., 289.

As against *bonâ fide* purchasers and encumbrancers, the lien of a judgment lasts for ten years, from the time when it is actually docketed in the county. Section 282. And this rule is equally applicable to judgments originally rendered in a justice's court. *Waltermire vs. Westover*, 4 Kern., 16.

But, as against the judgment-debtor himself, such lien continues for the full period of twenty years prescribed by section 90 of the Code. *Same case*.

Unless the lien be revived by means of a fresh action, it will, at the close of the statutory period, be absolutely gone, as against *bonâ fide* purchasers or mortgagees, and a perpetual stay of execution will be granted, as against them, unless the judgment-creditor satisfy the court, by specific proof, and not by mere allegation, that the purchases or mortgages in question do not bear that character. *Wilson vs. Smith*, 2 C. R., 18.

The suffering an execution to remain dormant in the sheriff's hands, does not affect the validity of the lien, under such judgment, when duly docketed. *Muir vs. Leitch*, 7 Barb., 341.

In *Haverly vs. Becker*, 4 Comst., 169, a mistake on the part of a judgment-creditor, in not duly docketing his judgment in the proper county, was held not to affect his lien on certain lands, the purchaser of which had notice of the judgment, supposed it to be valid, and had undertaken to pay it, as part of his purchase-money. He held the lands subject to an equitable lien, and that, although the judgment eventu-

ally turned out to be for a larger amount than he had supposed, at the time of his purchase.

Where the land itself has been sold, under a prior judgment, the liens of subsequent judgment-creditors will be transferred to the surplus, which must be applied amongst them, in their order of priority. *Averill vs. Loucks*, 6 Barb., 470.

The lien of a judgment does not extend to an estate at will, or on sufferance, nor to a contract for the purchase or leasing of land, whilst it remains executory. *Bigelow vs. Fitch*, 17 Barb., 394; *Moyer vs. Hinman*, 3 Kern., 180; modifying *same case*, 17 Barb., 137. Nor does it attach upon the mere legal estate, when the equitable title is in another person. *Lounsbury vs. Purdy*, 11 Barb., 490; *Towsley vs. McDonald*, 32 Barb., 604.

§ 256. *Notice and Entry on Appeal.*

(a.) NOTICE OF JUDGMENT.

As soon as the judgment is entered, the prevailing party should at once give written notice of it to his adversary, in order to limit his time for appealing. See section 332. See this subject hereafter considered and cases cited, under the head of *Appeal*.

Such written notice is likewise essential, on entering judgment upon the decision of the court, or referees, in order to limit the time to file and serve exceptions to the decision. See sections 268, 272.

Where the judgment is entered up upon the report of a referee, a copy of the decision and final report must be served with the notice of the judgment, and the time for taking exceptions is computed from that service. Rule 32.

Under section 348, as amended in 1862, notice of judgment of affirmance by the general term, is also a necessary prerequisite to a suit on an undertaking on appeal.

The party serving such notice must take care that it comprises all necessary particulars, so as to give the adverse party full and correct information as to the exact nature of the judgment or decree, when specific, and its exact amount, when pecuniary.

An omission to state the clerk's office in which the judgment is entered, will be a fatal defect, and, until a regular notice is served, time will not commence to run. *Valton vs. National Loan Fund Life Assurance Society*, 19 How., 515.

And a notice, not signed by the party or attorney, and not mentioning the place of business of the latter, will be a nullity. In serving a notice of this description, the party will be held to strict practice. *Yorks vs. Peck*, 17 How., 192.

(b.) ENTRY OF SECURED ON APPEAL.

Since the amendment of 1851, the court possesses the power of directing an entry of this description, when an appeal has been taken, and the prescribed security given, and, when entered, it suspends the lien of the judgment, pending the appeal, and protects intermediate purchasers or mortgagees in good faith. See section 289.

The granting or refusing of the application for this purpose, rests entirely in the discretion of the court. *Fitch vs. Livingston*, 4 Sandf., 712; *Munn vs. Barnum*, 2 Abb., 409.

In the latter case it was held, that the sureties on the appeal were entitled to notice, and a reference was directed, to inquire into the circumstances of the debtor, with a view to the protection of such sureties, and that of the creditor.

In *Livingston vs. Roberts*, 5 Duer, 680; 3 Abb., 231, it was held that no such notice was necessary, not being required by the section; and no other objection being made, the motion was granted. The same was held in *Burrall vs. Vanderbilt*, 1 Bosw., 637; 6 Abb., 70, on the defence of want of such notice being set up by the sureties themselves, in an action against them.

There can be no doubt that this last is the correct conclusion, and the construction of the clause in *Munn vs. Barnum* seems to be unsound; the wording is, "the court, &c., may on special motion, after notice to the person owning the judgment, in such terms as they shall see fit, direct," &c. This seems clearly to refer to the notice itself, not to the imposition of terms, for which the preposition "on," not "in," would have been employed.

The motion will not be maintainable, unless full security has been given, sufficient to stay execution, as well as to perfect the appeal. *Hoppock vs. Cottrell*, 13 How., 461.

The motion must be brought on in the usual manner, on notice grounded on the appeal papers and security, and on an affidavit showing the time of service, so as to show that the appeal has been perfected. During the time within which it is open for the respondent to except to the sureties, or until they have justified on exception, the motion would seem to be clearly inadmissible. The direction of the court, if obtained, should be reduced to the form of an order, and regularly entered. When the entry is to be made in the county of venue, the order will of itself be sufficient authority to the clerk to make it. If the judgment be docketed in other counties, it will, of course, be requisite to obtain and forward certified copies, to each county clerk, for the same purpose. The party obtaining the order will, of course, see, for his own protection, that the entries are duly made.

CHAPTER III.

JUDGMENT ON DEFAULT OR CONFESSION.

THE judgments which fall under this general category may be thus subdivided:

1. Entry of judgment by the clerk, on failure to answer.
2. Entry by same officer, as the result of a previous application or proceeding.
3. Do. on inquest, or default on call of the cause.
4. Entry on application to the court on failure to answer, including collateral proceedings for this purpose, when requisite.
5. Entry on service by publication.
6. Entry on confession or offer.

Which subjects it is proposed to consider in the above order.

§ 257. *Entry by Clerk on Default to Answer.*

This proceeding is authorized by subdivision 1 of section 246, on default made in an action for a money demand on contract. That subdivision may be considered as coincident with subdivision 1 of section 129, comprising the same class of cases. Whenever a summons has been issued under the subdivision last referred to, judgment on default may be taken in this form. Whenever, on the contrary, a summons for relief has been issued, the clerk has no authority, and application to the court must be made.

(a.) PROOF OF DEFAULT SUFFERED.

The first thing necessary in a proceeding of this description, is to be prepared with proof of due and regular service of the summons, or of the summons and complaint, if served together, upon the defendant or defendants, against whom judgment is to be entered. As to the mode of such service, and the form of such proof, see above, book III., chapter III., sections 54, 58.

The plaintiff must likewise be prepared with proof that no answer or demurrer has been received. Although not mentioned in the section, the service of a demurrer will, of course, be equivalent to an answer. See *Brodhead vs. Broadhead*, 4 How., 308; 3 C. R., 8.

The plaintiff or his attorney must, of course, be careful not to take

this proceeding prematurely, and until the time of his adversary to answer is actually expired. If the right to plead, or to amend the complaint, be in any manner existent, judgment, if taken, will be set aside. See *Dickerson vs. Beardsley*, 6 L. O., 389; 1 C. R., 37; *Morgan vs. Leland*, 1 C. R., 123; and this, even although an order for an extension may be irregular, *Wilcock vs. Curtis*, 1 C. R., 96; or, though such extension may have been granted by the plaintiff, without the knowledge of his attorney. *Braisted vs. Johnson*, 5 Sandf., 671.

And, where the action is against joint-debtors, and one has answered, judgment by default cannot be taken against the others, till the issue thus joined has been disposed of. *Bacon vs. Comstock*, 11 How., 197; *Mechanics' and Farmers' Bank vs. Rider*, 5 How., 401 (413); *Catlin vs. Billings*, 13 How., 511; 4 Abb., 248. See also in court above, *same case*, 16 N. Y., 622. Nor can the plaintiff take judgment against one, before the time of the others to answer has expired. He must wait until that time, and then his judgment will be regular against all. *Jaques vs. Greenwood*, 12 Abb., 232.

And the party against whom a default is taken, must be regularly before the court. See, as to the case of an infant, *Kellogg vs. Klock*, 2 C. R., 28.

However imperfect the statements in an answer may be, it cannot, if served, be disregarded, and a default taken. See *Strout vs. Curran*, 7 How., 36; *Bergman vs. Howell*, 3 Abb., 329; *Spencer vs. Tooker*, 21 How., 333; 12 Abb., 353. But, if an answer, defectively verified, or not verified at all, is put in to a verified complaint, or if the answer be otherwise irregularly served, the plaintiff, if he chooses to take the risk, may disregard it, and enter up judgment. See *Strout vs. Curran*, *supra*; *Phillips vs. Prescott*, 9 How., 430; *Farrand vs. Herbeson*, 3 Duer, 655. He does so, however, at his peril, in case his objection prove untenable, and, if his own pleading be irregular, both may be allowed to stand. *Bank of State of Maine vs. Buell*, 14 How., 311.

In cases where service by mail is admissible, the plaintiff also moves at his peril, unless he waits a reasonable time for the receipt of an answer of the defendant; as, if such answer be actually mailed within the time allowed, though not received until afterwards, it will be sufficient to prevent a default, or to render one taken before its receipt irregular.

Where the defendant, on receipt of summons, duly demands a copy of the complaint, the time runs from service of that copy. But, where the summons is served alone, subsequent service of such a copy, without demand, but in connection with other proceedings, will not change the time, which will run in such case from the service of the summons. *Van Pelt vs. Boyer*, 7 How., 325.

On the expiration of the time allowed, the plaintiff must wait the whole of the last day, but will be regular in entering up judgment, the first thing on the succeeding morning.

The proof of default suffered should be made by affidavit of the plaintiff's attorney, or of his managing clerk, or of the plaintiff himself, if he appears in person, stating that no copy of the answer or demurrer of the defendant has been received by him, or at the place named in the summons, stating it in accordance with the specification required by section 128; but where sufficient, it need not rest solely in affidavit. See *Philips vs. Prescott*, 9 How., 430.

The affidavit, when made, should show that the default is existent, at the time of making application for judgment. When sworn at an antecedent period, it has been held insufficient. *Brien vs. Casey*, 2 Abb., 417.

(b.) ASSESSMENT BY CLERK, WHEN NECESSARY.

When the complaint is verified, no further proceeding or regular assessment is necessary, to enable the entry of judgment for the amount claimed.

But, when such is not the case, and the action is on a bill, note, bond, or other instrument for the payment of money only, such instrument must be produced to the clerk, who thereupon assesses the amount due thereon. Having done so, he makes a memorandum of such assessment upon the back of the instrument, and returns it to the party.

In other cases, where the demand is not dependent upon a written instrument, as on an action for goods sold and delivered, work, labor, and services, money lent, or the like, the clerk, before entering judgment, ascertains the amount which the plaintiff is entitled to recover, from his examination under oath, or other proof.

See generally, as to the assessment by the clerk, under these different circumstances, *Trapp vs. New York and Erie Railroad Company*, 6 How., 237; 1 C. R. (N. S.), 384.

In cases where, under the above provisions, the amount of the plaintiff's recovery is to be assessed by the clerk, it will be irregular to order a reference. *Croden vs. Drew*, 3 Duer, 652; 6 Abb., 338, note.

Where he merely assesses the amount due on an instrument produced to him, a formal report has been held unnecessary. The Code does not require it, and the due performance of his duty will be presumed. *American Exchange Bank vs. Smith*, 6 Abb., 1.

But, where the examination of the plaintiff or other proof has been taken, it has been held that such proof should be taken in due form, and that the clerk should make and file, as part of the record, a report of his finding. *Squire vs. Elsworth*, 4 How., 77. As to the possible

necessity of such proof, where a demand upon a written instrument is contingent, see *Quin vs. Tilton*, 2 Duer, 648.

(c.) NOTICE OF ASSESSMENT.

Whenever the defendant has given notice of appearance in the action, either in direct form, or by proceedings equivalent to an appearance, he is entitled to notice of such assessment, in all cases where the complaint is either not verified at all, or is unduly verified, and, if such notice is omitted to be given, the judgment will be irregular, and liable to be set aside. *Van Horne vs. Montgomery*, 5 How., 238; *Quin vs. Tilton*, 2 Duer, 648; *Cook vs. Pomeroy*, 10 How., 103. So also, on the entry of judgment on a frivolous demurrer. *King vs. Stafford*, 5 How., 30.

In *White vs. Featherstonhaugh*, 7 How., 357, it is held that, to entitle himself to such notice, the defendant must appear, before he is actually in default. See also *Cook vs. Pomeroy*, *supra*. In *Abbott vs. Smith*, however, 8 How., 463, the contrary is maintained, and that an appearance, at any time before actual assessment, entitles the defendant to notice.

Where the complaint is duly verified, the defendant, though he may have appeared, is not entitled to any notice of assessment whatever, but only to the ordinary notice of taxation. *Dix vs. Palmer*, 5 How., 233; 3 C. R., 214; *Southworth vs. Curtis*, 6 How., 271; 1 C. R. (N. S.), 412; *Cook vs. Pomeroy*, 10 How., 103.

And the same is the case, when the plaintiff signs judgment for an admitted balance of his demand, allowing in full a counter-claim made by the defendant, under the power for that purpose conferred, on the amendment of 1858. *Robbins vs. Watson*, 22 How., 293.

Under the doctrine of *Anonymous*, 4 Sandf., 693, that notice of taxation may be given in anticipation of an expected default, it may possibly be held, that a similar notice of assessment might be available. But the easier course will be to verify the complaint at the outset, in all cases.

(d.) OTHER PRELIMINARIES.

When judgment is proposed to be taken, for the excess of the plaintiff's admitted claim over a counter-claim set up by the defendant, as provided for on the amendment of 1858, the plaintiff, on the entry of such judgment, must file with the clerk, a statement, admitting the counter-claim, as prescribed by that amendment. This statement must clearly be in writing, and signed by the attorney or party in person. Its necessity is apparent, as without it, a triable issue would stand upon the face of the pleadings, on a counter-claim so set up.

(e.) MODE OF ENTRY.

When the time for taking the default has arrived, the plaintiff's attorney, on applying to the clerk for the entry of judgment, should make up the necessary judgment-roll, following the directions in section 281, subdivision 1.

He must, in the first instance, attach together the summons and complaint, or copies thereof (but using the originals where practicable), subjoining to them the usual proof of service, and proof that no answer has been received.

Where judgment is taken for the excess above a counter-claim, the statement admitting the counter-claim should be subjoined, and, in that case, the answer, or a copy thereof, will likewise form a component part of the roll.

He should likewise fill in or separately prepare a statement of the amount for which judgment is proposed to be taken, with the necessary calculations of interest, and showing any deductions allowed by him to the defendant, if any.

To these papers he must subjoin the formal *postea* or entry of judgment, styled in the section a copy of the judgment.

Having attached these papers together, his roll is technically complete.

In the printed forms in general use, the costs and disbursements, and the affidavit of verification of the latter, are generally made part of the paper. Though technically wrong, there is no substantial objection to this practice. Those costs must be either filled in, or separately drawn, and the affidavit of disbursements sworn to, before or at the time of entry.

Where the complaint is not verified, the documentary or parol proof required by the section, must be in readiness, and tendered to the clerk at the time of the application to sign judgment. When any report or certificate is made by him, that report or certificate must be also incorporated in the judgment-roll.

Where the defendant has appeared, and is entitled to notice, either of taxation or of assessment, or of both, the necessary proof of service of such notice or notices, in due form, should be ready, so as to be available, and form ground for an *ex parte* entry, in the event of his non-attendance.

Having heard the allegations of the parties, when they attend, having made the necessary assessments as above prescribed, where requisite, and having taxed the costs, and seen to the general correctness of the proceeding, the clerk then proceeds to sign and enter the judgment, and file the judgment-roll in the usual manner.

§ 258. *Entry as Result of Previous Proceeding.*

Judgment may also be entered by default, without application to the court, by the following parties, under the following circumstances :

1. By the plaintiff, when a demurrer to the whole complaint has been overruled, or judgment granted upon it as frivolous, without leave to the defendant to answer over.

2. By the plaintiff, when a demurrer to the whole of the defendant's answer has been allowed, or where the whole of such answer has been stricken out as sham or irrelevant, or judgment has been granted upon it as frivolous, without leave to the defendant to amend.

3. By the defendant, when a demurrer to the whole complaint has been allowed, without leave to amend.

4. By the defendant, on an order being made, under rule 27, dismissing the complaint for want of prosecution.

5. By the defendant, when the plaintiff has failed to reply to a counter-claim exceeding the whole of his demand, or where a demurrer to such a reply has been allowed, without leave to amend, and an application for judgment has been made and granted by the court, under section 154 ; or where judgment has been granted upon such a reply, as frivolous, without leave to amend.

6. By either party, when he has prevailed on the decision of a demurrer or motion for judgment, but liberty has been allowed to his adversary to plead over or to amend, upon terms, and, at the expiration of the time allowed, such terms have not been performed or complied with.

7. By either party, when his adversary's pleading has been stricken out for contempt, or he has been otherwise declared entitled to judgment.

Under any of these circumstances, when the judgment proposed to be taken is for a simple money demand, or for costs only, the prevailing party may have it signed by the clerk, without making any special application to the court, taking the same formal proceedings as on an ordinary judgment by default, and generally pursuing the same course as that noticed in the last section. The same notice must be given, the same statement for judgment made up, and the costs made out and taxed in the same manner.

But, where the judgment to be taken is not for a simple money demand, or for costs only, in connection with a simple dismissal, and any special relief is required, not already awarded by the order of the court, the clerk cannot act of his own authority, and the court must be applied to. See section 269, as to judgment for the defendant on a demurrer.

When judgment is rendered in favor of the plaintiff on demurrer, he

will be confined to the prayer of his complaint, as in the case of an ordinary default, and he cannot take judgment, for relief not demanded by him, though embraced within the scope of his case. See *Walton vs. Walton*, 32 Barb., 203 (206); 20 How., 347.

In *Hicks vs. Brennan*, 10 Abb., 304, it was held that judgment could not be thus entered by the defendant for his costs, on a discontinuance by the plaintiff, without their payment, but that his course was to place the cause on the calendar, or move to dismiss. The costs having been readjusted, judgment was moved for and granted, the original discontinuance not having been by mere notice but actual order, and that judgment, on subsequent motion, was sustained. *Hicks vs. Brennan*, 10 Abb., 420.

When the judgment is taken, on default to comply with the terms of an order, proof must be tendered of the following matters: that the order imposing the terms in question has been duly served on the adverse party, giving the date of such service; that, where costs are directed to be paid as one of the conditions, such costs have been made out and served, and payment demanded, and, if the amount be disputed, that such costs have been adjusted, or offered to be adjusted, by the clerk; that the time allowed by the order has elapsed, and, that the terms imposed by it have not been performed or complied with, specifying exactly the facts showing such non-compliance, and that no substituted or amended pleading has been received, and such proof must be annexed to the judgment-roll.

And, wherever the right to enter judgment is the result of a previous order, proof of the due service of that order should be produced to the clerk, and, if such order is in any manner conditional, proof of non-compliance with the conditions must be clearly made, and the affidavit must then be annexed.

The judgment-roll, in these cases, should be as follows:

Where the judgment to be entered arises in respect of a demurrer, it must comprise the summons, the pleadings, the decision or order for judgment, together with the formal statement and *postea*. If terms have been imposed and not complied with, proof of service and non-compliance, as above, must also be added, and the same must also be done, in all other cases, when such is the fact.

When the judgment is on a frivolous pleading, the roll consists of the summons, pleadings, order for judgment, statement, and *postea*. When an answer is stricken out as sham or irrelevant, the answer will be omitted, the order standing in its place, and establishing a technical default for want of answer.

On an order dismissing the complaint, the roll should comprise the summons and pleadings, and the order in question. Where a pleading

is stricken out, it must, of course, be omitted, the order standing in its place, as above; and where the judgment is otherwise the result of an order, the order of course forms the basis of the roll, all the other component portions being either prefixed or subjoined.

On a judgment on a failure to reply, the additions to be made to the usual judgment-roll will be, the usual proof by the defendant's attorney that none has been served, and the order of the court under section 154.

In short, in all these cases, it may be laid down as a general rule, that all the proceedings in the cause, down to the period when a default has been suffered by either party, and all that is necessary fully to demonstrate the existence of that default, whether by means of the decision of the court to that effect, or otherwise, are necessary component parts of the judgment-roll. That document, to be complete, must contain a full and exact statement of every particular on which judgment has been given, or which is necessary to explain or sustain that judgment.

§ 259. *Entry on Inquest, or Default at the Call of the Cause.*

The entry of judgment in these cases, though strictly in the nature of a default, does not differ in essentials from that upon an actual trial.

The judgment-roll on an inquest, consists of the summons and pleadings, a copy of the entry of judgment by the clerk, and also the judge's decision, if tried by the court, or, if tried by a jury, the usual memorandum of the verdict from the clerk's notes, adding the usual statement and *postea*.

The judgment-roll on a default taken on the call, will, in like manner, consist of the usual component parts, with a copy of the entry of judgment, extracted from the clerk's minutes.

Where, as is frequently the case, the judge indorses the award of judgment on the copy pleadings used by him, it may be the better course, to substitute that copy for the originals in making up the roll.

The actual entry will be similar to that on default, the usual notice of taxation being given. Notice of assessment will, of course, be unnecessary, when taken by the plaintiff, as the amount will have been awarded by the judge or jury, as the case may be.

§ 260. *Entry on Application to the Court.*

This mode of procedure is necessary, in all cases where the summons has been issued under subdivision 2 of section 129, and the judgment sought to be entered up is for specific relief, or for unliquidated damages, or an unliquidated amount, arising out of a demand on contract.

The same proof of service and of default will be necessary, as in the case of an entry of judgment by the clerk. It will be needless to recapitulate what has been already stated on that subject in section 257; the only difference is, that such proof has to be submitted to the judge instead of to the clerk.

An application will also be necessary in this form, on the entry of judgment, in the cases above considered in section 258, when such judgment is of the nature above alluded to, instead of being for a mere money demand, or for costs only, in connection with a simple dismissal, and its form has not already been provided for in the order, if any, under which it is taken.

The application must be made to the court, see section 246, subdivision 2. It cannot, therefore, be entertained by a judge out of court, or even at chambers. See *Aymar vs. Chase*, 12 Barb., 301; 1 C. R. (N. S.), 330. In the first district, however, this inconvenience is obviated, by the practice of the judge at chambers holding a special term on the same occasion. See *Porter vs. Lent*, 4 Duer, 671; 2 Abb., 115. The application may be made, either at any special term within the district in which the action is triable, or in an adjoining county, or at the circuit, in the county of venue. See rule 24. As to the practice before that rule, which was originally made on the revision of 1849, see *Ryan vs. McCannell*, 1 Sandf., 709; 1 C. R., 93; *Anon.*, 1 C. R., 82; and *Warner vs. Kenny*, 3 How., 323; 1 C. R., 96.

Where the defendant has not appeared at all, this application is of necessity *ex parte*, and no notice whatever is then necessary; nor need the cause be placed on the calendar in any event, there being, in fact, no existent issue.

But, where the defendant has given notice of appearance, he is, as will be seen, entitled to eight days' notice of the application. This notice must be carefully drawn, and it must be distinctly stated that the application will be made for judgment, and not for an order. It is clear that this relief cannot be obtained in the shape of an order, or on a motion, noticed as such.

If the defendant be entitled to notice, and the proceeding be taken *ex parte*, it will be irregular. *Vide Saltus vs. Kipp*, 5 Duer, 646; 12 How., 342; 2 Abb., 382.

The relief asked for will, of course, be that demanded in the prayer of the complaint. And, if the default be for want of an answer, it cannot exceed that which is so demanded. See Code, section 275. If relief not so demanded be taken, the judgment will be void as unauthorized. See *Simonson vs. Blake*, 20 How., 484; 12 Abb., 331; *Bullwinker vs. Ryker*, 12 Abb., 311; *Hurd vs. Leavenworth*, 1 C. R. (N. S.), 278; *Walton vs. Walton*, 32 Barb., 203; 20 How., 347. Nor, in a suit on a

mechanic's lien, can judgment be taken for a larger amount, than that for which the lien has been effected. *Protective Union vs. Nixon*, 1 E. D. Smith, 671.

Where the complaint is verified, and the demand is specific, no further proof of that demand will be necessary on the application. *Hurd vs. Leavenworth*, *supra*. *Didier vs. Warner*, 1 C. R., 42, was decided under a past state of the Code, and is now obsolete.

But, where the complaint is not sworn to, the usual proof of the amount due must be given, and the applicant should have his calculation of interest ready, and be prepared to verify it, in either case. No notice of assessment will be requisite, the party, if he has appeared, having notice of the application. Where such proof is simple, the court may hear it at the time; if not, a reference may probably be ordered.

On such an application, and when an accounting is prayed for, the plaintiff cannot take judgment for an assumed minimum balance. A reference must be directed. See *Porter vs. Lent*, 4 Duer, 671; 2 Abb., 115.

If the defendant appear, he cannot of course contest the plaintiff's right to recover, but it will be open to him to oppose the granting of any portion of the relief claimed by the prayer, upon the facts, as admitted by the failure to answer, and the court may refuse or modify that relief accordingly. And, when the right of the plaintiff to a particular form of judgment is contingent, he must bring the case within that contingency. See *Harder vs. Harder*, 26 Barb., 409.

And the granting of relief, in general, will be subject to the same incidents, as to its nature or extent, as when the cause is regularly tried. See next chapter.

In *Diblee vs. Mason*, 1 C. R., 37; 6 L. O., 363, an application of this nature was refused, when the summons was irregular, and should have been made out under subdivision 1 of section 129, instead of subdivision 2. See likewise, as to the converse of this proposition, *Wyant vs. Reeves*, 1 C. R., 49.

In *Tracy vs. Humphrey*, 5 How., 155; 3 C. R., 190, the power of the court to grant judgment on motion, for admitted portions of a money demand on contract, was asserted as existent under this section. Whether that portion of the decision was sound, may be questionable. The case is now provided for, by the subsequent amendments in section 244.

The form of the judgment to be rendered in proceedings for determination of claims upon real estate, is specially prescribed, by the provisions of the Revised Statutes, amended by chapter 511 of 1855, as above noticed. As to opening a judgment so taken, see *Mann vs. Provost*, 3 Abb., 446.

In replevin, the plaintiff may, if he chooses, take immediate judgment for a return, if he chooses to waive his damages. If not, a jury must assess them, and judgment must be suspended, till the assessment has been made. *Horn vs. Doody*, 4 Duer, 670; 2 Abb., 92.

Where the action is against joint defendants, and one has answered, judgment against the other can only be separately entered, by means of an application analogous to one of this nature. Otherwise, the plaintiff must wait, till after the trial of the issue joined. *Bacon vs. Comstock*, 11 How., 197.

And such an application may be proper, to obtain judgment, after adjustment of the costs, on the actual entry of an order for discontinuance, without their payment. *Hicks vs. Brennan*, 10 Abb., 420. See also, as to a motion to enter up judgment for the defendant's costs, on an insufficient recovery by the plaintiff, and payment of such recovery, *Runnell vs. Griffin*, 8 Abb., 39.

With reference to the special power of the plaintiff, in a suit against a banking corporation, to enter an order or rule for judgment, at the expiration of twenty days from service, unless his proceedings are stayed by order, see chapter 226 of 1849, p. 340, section 5.

When proof of service is made and filed, on an application of this description, the plaintiff will be concluded by the facts stated in such proof, with regard to their collateral application, as respects the regularity of other portions of his proceedings. So held with regard to a notice of *lis pendens*. *Burroughs vs. Reiger*, 12 How., 171; 3 Abb., 393, note.

(a.) PRELIMINARY REFERENCE IN CERTAIN CASES.

A proceeding of this nature will be necessary, prior to the final motion for judgment for failure to answer, in suits for foreclosure, partition, or divorce.

(b.) FORECLOSURE.

The nature and terms of this preliminary reference, are specially provided for by rule 71. It is obtainable, either when the defendant fails to answer at all, or when the right of the plaintiff, as stated in the complaint, is admitted by the answer.

Where none of the defendants appear, it is moved for *ex parte*. Where they have appeared, the application must be upon due notice. The usual notice of application for judgment will, as a general rule, be sufficient, without any formal notice of motion, but, of course, it is competent to bring the application on as an independent motion, if desired.

The application is grounded on the summons and complaint, proof of ~~due~~ service of the former on all the defendants, and, if any answer has

been put in, upon that answer also. The necessary affidavit or certificate, showing that the complaint and notice of *lis pendens* have been duly filed, should also be in readiness. It must likewise be shown whether any of the defendants are infants or absentees, or prior encumbrancers, and also whether the whole amount has or has not become due. The two last facts may probably appear upon the pleadings; the others, unless so apparent, must be shown by affidavit.

It is possible that, in extreme cases, the court might allow proofs of this description to be made orally, or by affidavit, and compute the amount without a reference, as, under section 246, it clearly possesses the power, but this discretion is rarely if ever exercised.

The form of the order is clearly prescribed by the rule. Where the whole amount is due, and none of the defendants are infants or absentees, it will be for a simple computation of the amount due to the plaintiff, and to the defendants who are prior encumbrancers, if any.

Where the whole amount is not due, an inquiry, as to whether the mortgaged premises can be sold in parcels, must be added.

And, when any of the defendants are infants or absentees, the order, besides providing for a computation, must also direct the referee to take proof of the plaintiff's allegations, and to examine him or his agent as to any payments.

The reference is usually made to the clerk, occasionally to a referee nominated by the court, but, since the revision of the rules in 1858, it is not to be made to any person nominated by the party or his counsel.

If the right of the plaintiff be contested, such a reference will not be proper, but the cause must be regularly placed on the calendar, and tried in its order.

And an order of this nature, as against defendants in default, cannot be combined with a reference of the whole issue, as to others who contest the plaintiff's rights. The proceedings are separate, and, if joined in the same order, the report will stand, as to the contesting defendants, but be irregular as to the defaulting one, who may claim a separate reference to compute. *Cram vs. Bradford*, 4 Abb., 193. But, on the coming in of the report on the whole issue, the proceedings may then be regularly perfected, by taking a supplementary report of this nature, as against the parties in default. See *Hill vs. McReynolds*, 30 Barb., 488.

Printed forms are in general use, and the order is usually prepared beforehand, or filled in at the time. Where the reference is simply to compute, and none of the defendants appear, it is usual to proceed immediately, give the formal proof, and complete the report at once. As to the power to proceed immediately, where the defendant merely

appears, but no answer has been put in, see *Kelly vs. Searing*, 4 Abb., 354. When the referee is required to report upon the other matters prescribed by the rule, the proceeding may take a little more time, but, being *ex parte*, no formal notice to the adverse party is necessary. He rarely appears, though, of course, it is competent for him to do so, and to object as to any of the matters of proof tendered, or claim to be heard, as to any provision to be made as to the sale of the mortgaged premises in parcels, if applicable.

The report needs no special confirmation, but is to be produced and used upon the further application for judgment.

(c.) PARTITION.

A similar preliminary reference is proper in cases of partition, where the rights and interests of the parties, as stated in the complaint, are not denied or controverted, and when any of the defendants are infants, or absentees, or unknown. The application, which is regulated by rules 78 and 79, must be made at special term, on notice to such of the parties as have appeared. If none have so appeared, it will be *ex parte*. It should be founded on the summons, the pleadings, and proof of service on such of the parties as have not appeared. An affidavit must also be made, bringing the case within the terms of rule 78.

The order provides, in all cases, for taking proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the complaint, and to ascertain and report the rights and interests of the several parties in the premises, and also an abstract of the conveyances by which the same are held. Rule 78.

When a sale is desirable, the plaintiff, on stating the fact in the moving affidavit, may also comprise in the reference, an inquiry upon that subject, and likewise as to the existence of any liens on the premises, as to which provision should be made on a decree for sale, if taken. Rule 79.

The proceedings upon the reference should be in the ordinary form, on the usual notice to the parties who have appeared, or waiver of such notice. If none have appeared, the proceeding will, of course, be *ex parte*, and no notice will be necessary. The plaintiff must submit to the referee, the same evidence of the matters to be inquired into, as would be requisite on a trial by the court, and must prepare and hand in a proper abstract, with all necessary official searches, and must otherwise satisfy, to the full, the requisitions of the rules in question.

The report, when any of the parties have appeared, should be filed in the office of the clerk, as prescribed by rule 32, and serves as the ground of the application to the court for the requisite decree.

But, when all the defendants are known, and none of them are

infants or absentees, it will be unnecessary to obtain this preliminary reference, before moving for judgment, on the usual proofs of a default suffered. See *Brownson vs. Gifford*, 8 How., 389. Proof of the interests of the parties, and an abstract of the title, must, however, be in readiness, and must be tendered to the court, and it may then be taken, either in open court, or on a reference to the clerk for that purpose. See *Ripple vs. Gilborn*, 8 How., 456; *Porter vs. Lee*, 6 How., 491; and 2 R. S., 321, §§ 22, 23, there referred to. No formal entry of default will be required. *Watson vs. Brigham*, 3 How., 290; 1 C. R., 67.

(d.) DIVORCE.

A similar preliminary reference is obtainable, in cases of this nature, if the defendant fail to answer the complaint, or if the facts charged in the complaint are not denied in the answer. Rule 86. It may be refused, however, when the complaint is defective. See *Heyde vs. Heyde*, 4 Sandf., 692.

In the former case it may be applied for, *ex parte*; in the latter, notice will be proper, and the order should be applied for on motion.

The application must be grounded on the summons and complaint, and proof of service and default, and, if there be an answer, then upon that answer also. Where the complaint does not contain the averments specially prescribed by rule 86, or if, containing those averments, it is not duly verified, the plaintiff's affidavit of such facts should also be in readiness. And, where the suit is to annul a marriage, under the circumstances detailed in rule 87, an affidavit, denying cohabitation in the modes there specified, must be also tendered to the court.

The reference should be to take proof of all the material facts charged in the complaint. And it must not be to a referee nominated by the party. Rule 86. It is imperative to obtain it under the above circumstances, as judgment cannot be entered in these cases by way of ordinary default, and without full proof of the plaintiff's case. See Rule 91. But it will of course be unnecessary in contested cases, and not merely so, but a reference other than of the whole issue will, under these circumstances, be improper, and will be set aside. See *Diddell vs. Diddell*, 3 Abb., 167.

Rule 88 allows the examination of the plaintiff in a case of limited divorce, as to facts not capable of other proof. Probably, under the recent amendment of section 399, the evidence may now be generally admissible.

When made, the report of the referee must be filed with the clerk in the usual manner, as prescribed by rule 32, and forms the ground of the subsequent application for judgment.

(e.) APPLICATION.

The papers necessary to enable the court to make a final adjudication being complete, the application is then made, at chambers if there be no appearance, or at special term, if the defendant is entitled to notice.

It will not of course be necessary to put the cause upon the calendar in the former case. Nor is it requisite in foreclosure, where there is no contest as to the material facts. Rule 71. But, at the time of the application, the plaintiff must be prepared with the affidavits and proofs which that rule calls for.

And, in all cases, he must prepare the form of the judgment he proposes to take, and submit it to the judge, together with the pleadings, proof of default suffered, and the other collateral proofs, necessary to establish his rights to judgment, and the nature of the judgment to be entered.

The papers being submitted, the judge may either grant judgment at the time, if satisfied that the plaintiff is entitled to it, or, if necessary, may order a further investigation, in one or other of the modes prescribed by section 246, *i. e.*, by way of reference, or assessment by a sheriff's jury.

(f.) REFERENCE.

This course will be proper, when the taking of an account or the proof of any fact is necessary to enable the court to give judgment, or to carry the judgment into effect, and likewise for the assessment of specific damages, dependent upon the examination of a long account, in actions for the recovery of money only, or of specific, real, or personal property. But, when the damages claimed do not rest in matter of account, or are of an unliquidated nature, this course will not be proper. See *Horn vs. Doody*, 4 Duer, 670; 2 Abb., 92. And the judge may require to be satisfied upon the subject. See *Brown vs. Miller*, 1 Barb., 24. And this course of procedure will, as a general rule, be applicable to the whole class of equitable, as distinguished from that of legal proceedings, where any preliminary information is necessary to enable the court to enter up the proper decree.

When an accounting is asked by the complaint, a reference will be necessary, and it will be irregular for the plaintiff to take judgment for a supposed minimum balance. *Porter vs. Lent*, 4 Duer, 671; 2 Abb., 115.

Special notice of the application to refer, need not be given to the defendant. See *Conway vs. Hitchins*, 9 Barb., 378 (386).

References for the purpose of taking proof, to enable the court to

give judgment, have already been considered. Those for enabling the court to carry the judgment into effect, will of course depend upon the peculiar features of each case. Under these latter circumstances the order of reference will form part of the judgment to be entered, and should be incorporated in it, and submitted to the judge. A reference for sale of the property in foreclosure, or for the allowance of alimony in divorce, may be mentioned as two instances in which this course will be proper. In neither case will it be made to a referee appointed by the parties; but, in divorce, where proofs have been already taken, it is usual to refer it back to the same referee.

When the necessity of a preliminary reference is anticipated, it will of course be expedient for the applicant to prepare the form of order, and submit it to the judge at the time of application, together with the names of the proposed referee or referees. The proceedings on it will, as a general rule, be *ex parte*; but, if the defendant has appeared, he will be entitled to notice, and will be at liberty to contest the amount, but not the right to a recovery. When complete, the report should be filed, and, where the defendant has appeared, in the manner prescribed by rule 32.

The reference must, under rule 24, be executed in the county of venue, unless otherwise ordered by the court. See this rule strictly enforced, in *Brush vs. Mullany*, 12 Abb., 344.

It is, of course, competent for the party to submit to the judge, the same proof which he would be entitled to make before the referee, and, in simple cases, the court may possibly hear it, and save the expense of a reference.

(g.) ASSESSMENT BY SHERIFF'S JURY.

Where, however, the damages claimed by the plaintiff are of an unliquidated nature, a reference cannot be had, and the recovery must be assessed by a sheriff's jury, in a proceeding analogous to the former writ of inquiry. Section 246 only provides for this proceeding, in cases where the action is for recovery of money only, or of specific real or personal property; but, as in cases not provided for by the Code, the old practice is still retained, it will always be proper, whenever the action sounds, either wholly or partly, in tort, and unliquidated damages are sought to be recovered, either independently, or in connection with other relief. See *Richards vs. Swetzer*, 3 How., 413; 1 C. R., 117; *Boyce vs. Comstock*, 1 C. R. (N. S.), 290; *Lane vs. Gilbert*, 9 How., 150; *Stanley vs. Anderson*, 1 C. R., 52; *Brown vs. Miller*, 1 Barb., 24; *Hewitt vs. Howell*, 8 How., 346. Under rule 24, this assessment, when directed, must be executed in the county of venue, unless the court shall otherwise order: If otherwise executed, it will be irregular.

See *Warner vs. Kenny*, 1 C. R., 96; 3 How., 323. The order, when anticipated, should be prepared beforehand, and, when made by the court, should be lodged with the sheriff, as his authority. A form is given at 1 C. R., 52, and will be found in the appendix.

The sheriff appoints a time and place for its execution. Where the defendant has not appeared, no notice is requisite, but otherwise, notice must be given to him, the same as on an assessment by the clerk. See *Kelsey vs. Covert*, 15 How., 92; 6 Abb., 336.

The defendant, when he has appeared, is entitled to attend at the time and place appointed, and may contest the amount of the plaintiff's recovery, by cross-examination, or counter-evidence in mitigation, the same as on an actual trial. See *Warner vs. Kenny*, 3 How., 323; 1 C. R., 96; *Kelsey vs. Covert*, 15 How., 92; 6 Abb., 336; *Lane vs. Gilbert*, 9 How., 150; *Gilbert vs. Rounds*, 14 How., 46; *Saltus vs. Kipp*, 5 Duer, 646; 12 How., 342; 2 Abb., 382. He cannot, however, draw in question the plaintiff's right to recover, that being admitted by the default. If the defendant does not attend, the plaintiff may proceed in his absence. If the plaintiff himself fails to appear, before the jury separate, he must give a fresh notice, and, if the defendant has attended, he may be compelled to pay costs.

The plaintiff's right to recover, being admitted, requires no proof, but he must prove the measure and amount of his damages, precisely as on an actual trial, and the case is submitted to the jury, and their verdict rendered in the same manner, the sheriff presiding. If the jury cannot agree, they may be discharged, and a new jury drawn. See 2 R. S., 554, § 26.

When complete, the finding of the jury must be put into writing at the time, and signed by the sheriff and the jurors. The former then annexes it to the order, indorses his formal return, and files it with the clerk of the court.

The sheriff's return, when made, may be impeached by the adverse party for irregularity, or the finding of the jury reviewed, on the ground of misconduct, or error in the assessment of damages, by motion, in the same way as on an ordinary trial, but, as a general rule, their verdict will be conclusive. See, as to the indisposition of the court to set such a verdict aside, either generally, or on technical objections, not taken at the time, *Jennings vs. Asten*, 5 Duer, 695; 3 Abb., 373; *Cazneau vs. Bryant*, 6 Duer, 668; 4 Abb., 402; *Harder vs. Harder*, 26 Barb., 409.

An order for an assessment of this description will be irregular, if granted *ex parte*, and without notice to the defendant, in case he has appeared. *Saltus vs. Kipp*, 5 Duer, 646; 12 How., 342; 2 Abb., 382.

In relation to the duty of the jury, on the assessment of damages in an action of waste, and the subjects to be inquired into by them, see

Harder vs. Harder, 26 Barb., 409. And if, in such a case, the necessary inquiries be not fully made, the inquisition will be set aside. See, as to the former writ of inquiry in this action, 2 R. S., 334, § 8.

An assessment of this nature cannot be ordered, on a default taken at the circuit, upon the call of the cause, and, if made, will be set aside. *Giberton vs. Fleischel*, 5 Duer, 652. Nor, where an issue of fact has been joined, can it be tried in this form. *Dolan vs. Petty*, 4 Sandf., 673.

But, in a case of difficulty or importance, the court may refuse to grant an order of this description, and may direct the damages to be assessed at the circuit, or trial term. See *Cazneau vs. Bryant*, 6 Duer, 668 ; 4 Abb., 402 ; *Dillaye vs. Hart*, 8 Abb., 394. See, however, refusal of such an application, in *Hays vs. Berryman*, 6 Bosw., 679.

(h.) FINAL APPLICATION FOR JUDGMENT.

When a reference or assessment by a sheriff's jury has been ordered, the plaintiff, on the coming in of the report, or the filing of the sheriff's return, should apply again to the court, for the judgment to which he is entitled. If the defendant have appeared, notice must be served upon him. If not, the application is *ex parte*.

The form of the order for final judgment proposed to be taken, should be prepared and submitted to the court, together with the antecedent papers, and the report or return. If granted, the order should be entered with the clerk, and judgment perfected upon it in the usual manner.

The court will, of course, exercise its discretion upon this occasion, and, if valid objection be made to the proceeding by the defendant, or if the return or report itself be manifestly imperfect, the motion for judgment will be denied, but with leave to perfect the proceedings, and renew the application. See *Trust vs. Trust*, 11 How., 523.

§ 261. *Entry on Service by Publication.*

The proceedings for this purpose are specially regulated by section 135. See this subject already considered, book III., chapter III., section 56, and cases cited. The form of application is governed by section 246, subdivision 3. The requisitions of rule 25, are also imperative.

The court must itself take the proof prescribed by the section, and cannot, it has been held, order a reference for that purpose. See *Chapman vs. Lemmon*, 11 How., 235 (239). And judgment cannot be entered by the clerk, or otherwise than by direction of the court, on full proof of due service. *Hallett vs. Richters*, 13 How., 43. And, unless such proof be fully given, the judgment will be void. See also *Kendall vs. Washburn*, 14 How., 380 ; *Cook vs. Farren*, 34 Barb, 95 ; 21 How., 286 ; 12 Abb., 359 ; affirmed, 11 Abb., 40.

The possession by a non-resident defendant of property within the state, at the time when the order was made, is a jurisdictional fact, and, if controverted, will be fatal to the judgment. *Fiske vs. Anderson*, 33 Barb., 71; 12 Abb., 8.

The application is, of course, *ex parte*. The plaintiff, on making it, must present to the court, at special term, the summons and order for its publication, and likewise the original complaint, taken from the files of the court, or else a copy, with due proof of filing the original. He must likewise submit full and satisfactory proof of publication, in exact accordance with the order, and for the full period prescribed, and likewise of the mailing of a copy of the summons and complaint, unless dispensed with by the order, or of their personal service out of the state. If the action be one for the recovery of money only, he must further show by affidavit, that an attachment has been issued in the action, and levied upon property belonging to the defendant, and the affidavit must contain a specific description of such property, and a statement of its value, and such affidavit must be attached to and filed with the affidavits of publication. He must also, in such case, produce at the same time, and hand to the judge, an undertaking, with two sureties, to be approved by the court, that he will abide the order of the court, touching the restitution of any estate or effects, which may be directed by the judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant, or his representatives, shall apply and be admitted to defend the action, and shall succeed. Such undertaking must, of course, be acknowledged, and affidavits of justification by the sureties subjoined, in the usual manner.

He must likewise be prepared with, and must tender to the judge, proof of the demand mentioned in the complaint. This proof may be given by affidavit, or orally, and, if the demand be dependent on any security or document, it should be produced and proved, as upon a trial. When the defendant is a non-resident, the judge must also require the plaintiff, or his agent, to be examined on oath, respecting any payments that have been made to the plaintiff, or to any one to his use, on account of his demand. This proof may also be embodied in the affidavits; but, if possible, the applicant should also be prepared to give it orally, should the judge require a fuller examination.

All the above papers, security, and proofs must be ready, and be tendered to the judge at the time of the application, which may either be made separately, or in connection with the trial of the cause against other parties.

If judgment be ordered on the application, it must be perfected in the usual form, according to the nature and circumstances of the case.

The judgment-roll will consist of the whole of the papers and proofs submitted to the judge (with the exception of the undertaking, which, when given, should be filed separately), the order for judgment or decree made, the usual *postea*, where the recovery is for money or costs, being added.

§ 262. *Entry on Confession or Offer.*

The essentials of these proceedings have been already considered, the former in book III., chapter III., section 48, the latter in book VIII., chapter 1, section 167. All that requires notice on the present occasion, will be the formal entry of judgment. Both are simple proceedings, and clearly defined by the provisions of the Code which confer the authority.

(a.) CONFESSION.

All that is requisite on entering judgment by confession, is to file the statement and affidavit with a county clerk, or with the clerk of the Superior Court of the city of New York. Section 384. No other paper need be prepared, beyond a mere calculation of the amount due, and a statement of disbursements. These will usually consist of nothing beyond the commissioner's fee on taking the affidavit, the clerk's fee on entering judgment, and the sheriff's fee on execution, with charges for any transcripts, and filing, if docketed elsewhere.

The clerk then indorses upon the statement, judgment for the amount confessed, with five dollars costs, together with disbursements. He likewise enters the judgment in the judgment-book, with which entry the proceeding is complete. The judgment then possesses precisely the same incidents as all others, save only the power of making it comprise, not merely a present but also a future indebtedness. The mode of enforcement under these latter circumstances, will be considered hereafter, under the head of *Execution*.

Both the entry in the judgment-book, and also the indorsement by the clerk upon the judgment-roll, are matters of substance, and, if either be omitted, the judgment will be irregular, and will create no lien. But, where the omission arises from the mere neglect of the clerk, it is amendable. See *Neele vs. Berryhill*, 4 How., 16; *Blydenburgh vs. Northrop*, 13 How., 289.

Judgment may be confessed for securing future advances, and, when entered and docketed, will stand good, as against subsequent encumbrancers. When, however, such advances have been once made, and afterwards repaid in full, the judgment, as against subsequent encumbrancers, is *functum officio*, and cannot stand, as a continuing security

for future loans, or for the final balance of an account current between the parties. *Truscott vs. King*, 2 Seld., 147.

(b.) OFFER.

All that is requisite on entering judgment, on an offer, under section 385, is to file with the clerk of the county of venue, the summons and complaint, together with the offer, the notice of acceptance of that offer, and an affidavit that such notice of acceptance has been served upon the defendant's attorney, within the ten days prescribed by the section, to which must be added the usual formal *postea*. The judgment-roll must then be made up and filed, and the judgment entered and docketed as in other cases.

No notice of assessment need of course be given. Notice of adjustment may, however, be necessary, unless the amount of the costs be admitted in the offer. The section makes no provision on the subject, but the very fact of the offer clearly implies an appearance, even if a regular notice has not been served. This is more especially the case, when the offer is made after the actual joinder of issue, so that the costs are no longer the ordinary costs of the default.

CHAPTER IV.

JUDGMENT IN CONTESTED CASES.

§ 263. *General Incidents.*

THE formal entry of judgment in contested, presents no essential difference from that in uncontested cases, only the judgment-roll is longer, and comprises a greater number of documents. See, heretofore, under that head, in section 254, and section 281 of the Code, by which its component parts are prescribed.

In some cases it may be necessary, after the hearing of the cause, to assess the amount of the recovery, by means of a reference, before the final entry. If so, the proceedings for that purpose, will be the same as those on a judgment by default. See last chapter, section 260. Where the cause is tried at the circuit, an order cannot properly be made, for assessment of damages by a sheriff's jury. See same section and cases there cited.

Section 274 of the Code lays down certain rules, as to the essentials

of the entry of judgment, in cases where an actual trial has been had, and several subsequent sections refer to that entry in specific cases. It is proposed in the present chapter, to consider the carrying out of these rules, first in their general, and then in their specific application.

Judgment in an action may, under the first sentence of section 274, be given for or against any one or more of several parties, plaintiffs, or defendants.

It may determine the ultimate rights of the parties on each side, as between themselves.

It may grant to the defendant any affirmative relief to which he may be entitled. See likewise similar power conferred in jury cases by section 263.

Section 276 refers rather to the granting of relief by the court, than to its embodiment in the judgment. The closing sentence of section 274 has been already considered, under the head of a dismissal, on motion for want of prosecution.

The power to enter a several judgment, conferred by the same section, will be considered in the next subdivision.

And, under section 275, the court may grant to the plaintiff, any relief, consistent with the case made out by the complainant, and embraced within the issue.

(a.) JUDGMENT AS REGARDS PARTIES CO-DEFENDANTS.

Where defendants have answered, and where the granting of relief, as between them, does not impede the assertion and enforcement of the rights of the plaintiff, or prejudice his case, the court may adjudicate upon, and administer their mutual rights and equities, as between themselves. So also as to any such equities, if any, existent between co-plaintiffs.

See as to relief of this nature, by means of a provision for carrying out the priorities of subsequent encumbrancers as between each other, where such provision does not interfere with the rights of a plaintiff in foreclosure, but not so as to prejudice those rights, *Herriman vs. Skillman*, 33 Barb., 378; *Livingston vs. Meldrum*, 19 N. Y., 440. Likewise, as to costs in such a case, *Barnard vs. Bruce*, 21 How., 360.

But the administration of such subordinate equities, will not be allowed to retard or interfere with the assertion of any separate and independent rights of the plaintiff. See cases above cited.

Thus, it has been held, that relief cannot be so administered, between co-defendants who have not answered, or as between one defendant who has answered, and others who have not. *Norbury vs. Seeley*, 4 How., 73; 2 C. R., 47; *Woodworth vs. Bellows*, 4 How., 24; 1 C. R., 129.

Nor is the existence of any claims for relief, as between such defendants, under the circumstances last mentioned, any bar to the plaintiff's right to enter up judgment against them all, where his title to such relief has not been controverted by the answers put in. *Woodworth vs. Bellows*, last cited.

See also, as to the plaintiff not being under any necessity to tender independent issues, as to the rights of junior encumbrancers in foreclosure, on points, only material to the ultimate division of any eventual surplus, *Drury vs. Clark*, 16 How., 424.

Nor will the court make a decree for sale, in favor of one defendant, against another, when the plaintiff does not move for one in his own favor. *Mechanics' and Traders' Savings Institution vs. Roberts*, 1 Abb., 381.

Nor will a judgment be regular, taken by one set of co-defendants against another, where the latter have not been noticed, and the case brought to trial as against them, by the plaintiff. *Tracy vs. New York Steam Faucet Manufacturing Company*, 1 E. D. Smith, 349.

Nor will such a decree be made, unless the questions affecting co-defendants are regularly before the court, and contested between them, and such as would have formed the subject of a general adjudication of equities, under the former chancery practice. The section must be read in connection with section 174, and the mere fact that all are made parties by the plaintiff will not, *per se*, form the basis for a purely collateral adjudication, on points not formally made the subject of contestation. *Wells vs. Smith*, 7 Abb., 261. And, to enable the court to grant relief to co-defendants, all proper parties must be before it. *Smith vs. Howard*, 20 How., 151.

Where a mere assignment of the interest of a party has been made, *pendente lite*, it will not, *per se*, work an abatement, or prevent judgment from being entered, as between the original parties, where a substitution has not been granted by the court. *Ford vs. David*, 1 Bosw., 569.

(b.) AFFIRMATIVE RELIEF TO DEFENDANT.

The powers of this branch of the section, and of the clause in section 263, before noticed, are confined to the granting of affirmative relief, in favor of the defendant, as against the plaintiff. See *Mechanics' and Traders' Savings Association vs. Roberts*, and *Smith vs. Howard*, cited in last subdivision.

The correction of a self-evident error in an indenture of apprenticeship, was allowed, by way of affirmative defence, in *McNulty vs. Prentice*, 25 Barb., 204.

The affirmative relief, in respect of which a defendant may claim judgment under this section, may be either—

1. Relief of an equitable nature, annulling the plaintiff's demand.
2. Judgment for a set-off or counter-claim, exceeding such demand.
3. Judgment of nonsuit or dismissal of the complaint, and for costs thereon, if awarded.

As to the right to enter up judgment for costs in such case, as against an executor, see *Curtis vs. Dutton*, 4 Sandf., 719. Also, as to judgment for costs, on a dismissal for want of jurisdiction, *McMahon vs. Mutual Benefit Life Insurance Company*, 12 Abb., 28; 3 Bosw., 644.

The granting affirmative relief, by way of mere diminution of the plaintiff's demand or remedies, either by equitable restrictions, allowance of a partial set-off or counter-claim, or an award of costs, as against the plaintiff's recovery, do not properly fall under the head of judgment. Of course, the defendant will see that proper provisions are made upon the subject, in connection with the plaintiff's entry, and will be entitled to correct any errors, either by means of a motion, or on review.

As to the right of a prevailing defendant in tort, to enter up judgment against the plaintiff for his costs, though the latter has obtained a verdict against the others, and a joint defence has been put in, *vide Daniels vs. Lyon*, 5 Seld., 549; *Stone vs. Duffy*, 3 Sandf., 761; 1 C. R. (N. S.), 129. See likewise *Decker vs. Gardiner*, 4 Seld., 29; *Comstock vs. Bayard*, 2 Sandf., 705.

Where one of several plaintiffs dies, pending an action, the cause of which survives, a judgment, entered up by the defendant against all, without a previous revivor, is irregular, and must be set aside. The judgment cannot be amended, and allowed to stand against the survivor, because it is a joint judgment. *Holmes vs. Honie*, 8 How., 383.

In relation to judgment in favor of a defendant in replevin, see next section, under that subdivision.

In *Hannay vs. Pell*, 3 E. D. Smith, 432, the court provided for the equitable rights of the defendant, as surety for the plaintiff, in another matter, by directing that the plaintiff's claim against him, should be applied in exoneration of his liability.

In *Nantucket Pacific Bank vs. Stebbins*, 6 Duer, 341, provision was also made in the judgment for outside equities of the defendant, by directing a deposit of the amount of the plaintiff's claim, until other claimants upon the fund should be brought in, and further adjudication had upon the rights of all parties.

See also, as to the right and duty of the court to provide, on a decree for foreclosure, that the sale be made, in such a manner as not to prejudice the equities of subordinate claimants, *Livingston vs. Meldrum*, 19 N. Y., 440. See likewise generally, *Herriman vs. Skillman*, above cited.

In *Williams vs. Fowler*, 22 How., 4, judgment in favor of a plaintiff

in foreclosure was reversed, and a decree, declaring his securities void for usury, directed, but giving him the option of a new trial.

(c.) MODIFICATION OF PLAINTIFF'S RELIEF.

Of this nature is a direction, that the plaintiff be allowed to enter up or retain judgment, as security, and to abide the event of an application for a new trial, but with a suspension of proceedings in the mean time. See *Jackson vs. Fassett*, 33 Barb., 645; 21 How., 279; 12 Abb., 281. As to whether a second judgment can be entered in such a case, see *Heinemann vs. Waterbury*, 5 Bosw., 686.

(d.) RELIEF TO BE GRANTED TO PLAINTIFF.

Under section 275, the court may grant to the plaintiff, as the result of an actual trial, any relief, consistent with the case made by the complaint, and embraced within the issue, though he cannot take such relief by way of default.

This subject has been, in a great measure, anticipated in book VI., chapter III., sections 131, 132, as to the amendment or disregard of a variance, at or after the trial.

See, as to the application of this principle, by granting specific equitable relief, though judgment was demanded against the defendants personally, *Wood vs. Wood*, 26 Barb., 356.

Also, as to granting judgment for damages, in a suit for specific performance, where performance has become impracticable, *Pitt vs. Davison*, 12 Abb., 385.

But, on a joint creditor's bill, a mere common-law judgment for damages was refused, in *Sage vs. Mosher*, 28 Barb., 287.

Where, however, legal relief was consistent with the case made by the complaint, and embraced within the issue, it was granted, though equitable relief, collaterally asked, was denied, in *See vs. Partridge*, 2 Duer, 463.

An accounting may be directed, and judgment given for the balance, in an action upon an account stated. *Cole vs. Reynolds*, 18 N. Y., 74.

In an action for reformation of a contract, the court may also award judgment, for damages occasioned by its breach, if demanded by the complaint, nor will a new action for such damages be necessary. *Bidwell vs. Astor Mutual Insurance Company*, 16 N. Y., 263.

And, in *Stevenson vs. Buxton*, 8 Abb., 414, judgment was awarded for a specific performance, or for damages for breach of contract, in the alternative, if such specific performance was not made. And, in *Greasom vs. Keteltas*, 17 N. Y., 491, a judgment for damages alone was sustained, on the plaintiff's failure to make out a case for specific performance. See likewise *Pitt vs. Davison*, above cited.

In *Van Rensselaer vs. Layman*, 10 How., 505, the plaintiff was

allowed to take several judgments, on a complaint, alleging ignorance as to whether the interests of the defendants were joint or several.

Where, by the judgment, a defendant is ordered to execute any instrument, provision should be made for its due settlement, under the direction of the court, in case the parties differ. See *Hilliker vs. Hathorne*, 5 Bosw., 710.

In a suit against next of kin, where a portion of them were infants, and their share of the property sought to be charged had been paid over to their general guardian, it was held that, on their liability being established, the judgment should direct the amount due from them to be paid, out of the funds in such guardian's hands. See *Merchants' Insurance Company of New York vs. Hinman*, 34 Barb., 410; 13 Abb., 110.

§ 264. Joint or Several Judgment.

By section 274, the court may, in its discretion, in an action against several defendants, render judgment against one or more of them, whenever a several judgment may be proper.

The test of this propriety is, whether the defendants are or are not strictly joint-debtors. Whenever their interests are either several, or severable in their nature, a several judgment may be rendered; if they are strictly and technically joint, it cannot.

(a.) JOINT-JUDGMENT.

The entry of judgment against joint-debtors, and its incidents, will be fully considered, in chapter VI. of this book. See that chapter, and the statutory provisions and cases there cited.

Section 136 of the Code, may be considered as in effect governing, and furnishing the clue to the interpretation of the portion of section 274, now under consideration.

In all cases where the action is on contract, and against joint-debtors, in the strict acceptation of the word, the plaintiff, when no several defence is interposed, must recover, and must enter up his judgment against all or none. He cannot take a several judgment, though, under the provisions of section 136, he may combine, with a default taken or recovery had against defendants served, judgment of the peculiar nature there provided for, as against others not brought before the court. See *Merrifield vs. Cooley*, 4 How., 272; *Sterne vs. Bentley*, 3 How., 331; 1 C. R., 109; *Fullerton vs. Taylor*, 6 How., 259; 1 C. R. (N. S.), 411; *Stannard vs. Mattice*, 7 How., 4; *Rich vs. Husson*, 4 Sandf., 115; *Bacon vs. Comstock*, 11 How., 197; *People vs. Cram*, 8 How., 151 (155); *Selkirk vs. Waters*, 15 How., 296 (298); 1 C. R.

(N. S.), 35. See also, as to a judgment entered by a defendant against joint-plaintiffs, and that it cannot be severed, *Holmes vs. Home*, 8 How., 383.

Where several defendants were sued for specific performance of a joint-contract, it was held that the cause could not be tried, on the answers of part of them only, when another, jointly interested, had not yet been served, nor appeared in the action. *Powell vs. Finch*, 5 Duer, 666.

But the putting in of a personal defence, such as infancy or the like, by one of the parties sued under a joint contract, renders it severable, and it will then fall within the principle of the next subdivision. See *Butler vs. Morris*, 1 Bosw., 329.

(b.) SEVERAL JUDGMENTS.

The above rule is, however, of comparatively limited scope. Whenever the interests of defendants are several or severable in their nature, it will not be applied, and separate judgment may be entered, either for or against any one or more, or against some and in favor of others of such defendants, according to the proof upon the trial. The provision of the section is, in fact, a corollary to that in section 258, allowing a separate trial between several defendants, whenever, in the opinion of the court, justice will be promoted.

And, even when the plaintiff has in his complaint treated the indebtedness or liability as joint, still if, upon the proofs as given, it appears to be in fact several or severable, a several judgment may be entered. In such a case, the Code has modified the old common-law rules, and such a judgment will be proper, within the meaning of the section. *Mayor of New York vs. Price*, 4 Sandf., 616; 9 L. O., 255; 1 C. R. (N. S.), 85; *The People vs. Cram*, 8 How., 151; *Zink vs. Attenburgh*, 18 How., 108; *Brumskill vs. James*, 1 Kern., 294; *Marquat vs. Marquat*, 2 Kern., 336 (342). See likewise *Van Rensselaer vs. Layman*, 10 How., 505.

In *Cowles vs. Cowles*, 9 How., 361, the same rule was applied to the case of co-plaintiffs, and it was held that the defendant, on showing that one was in fact the sole party in interest, might avail himself of a set-off, as if the action had been brought, in the name of such plaintiff alone.

And the criterion has been stated thus: "Whenever, upon a liability, which upon its face is apparently joint, or joint and several, the circumstances are in fact such, that a several action might be brought against any party, a several judgment will in such case be proper against such party." So held, as to a contract or liability made or assumed in the name of a partnership, but without authority. *Harrington vs. Higham*, 15 Barb., 524; *Parker vs. Jackson*, 16 Barb., 33.

So also where, upon a contract, joint upon its face, the plaintiff establishes a liability against one only of the joint contractors, he may take a several judgment against him, though there be not proof sufficient to charge his co-defendant. *McKensie vs. Farrell*, 4 Bosw., 192; *Claf-
lin vs. Butterly*, 5 Duer, 327; 2 Abb., 466; *Pruyn vs. Black*, 21 N. Y., 300.

Where, in an action on a joint and several liability, one defendant only has been served, the plaintiff may, if he choose, proceed against him as if he were the sole defendant. See *Stannard vs. Mattice*, 7 How., 4.

Where, on a joint liability, a portion only of the defendants answer, a joint-debtor's judgment may be taken upon the trial, against defaulters on proof of the case against those who contest. *Downing vs. Mann*, 3 E. D. Smith, 86; 9 How., 204. And, even when the plaintiff fails to prove his case, against those who appear and contest, he may, on proof of the joint contract, take judgment on that occasion, against those who do not. *Sluyter vs. Smith*, 2 Bosw., 673.

Where, on appeal, a judgment against joint-contractors is reversed, on a failure to make a case against some of the defendants, the action, though dismissed as to them, will nevertheless be retained, that the plaintiff may have such relief against the others, as he may show himself entitled to. *Williams vs. Christie*, 4 Duer, 29. And, where reversed as to one, the judgment may be suffered to stand against another, where the case is of a severable nature. The Code has changed the former rule upon the subject. *Giraud vs. Stagg*, 10 How., 369; 4 E. D. Smith, 27. See also *Walker vs. Swayzee*, 3 Abb., 136; *Montgomery County Bank vs. Albany City Bank*, 3 Seld., 459. The stricter doctrine held in *Farrell vs. Calkins*, 10 Barb., 384, seems overruled.

And, generally, where the case is proved as to some, but fails as to other defendants, judgment may be rendered, according to the proofs in favor of the plaintiff, against the former, and against him, as regards the latter. *Woodburn vs. Chamberlin*, 17 Barb., 446; *Bowdoin vs. Coleman*, 3 Abb., 431 (445); 6 Duer, 182; *Blodgett vs. Morris*, 4 Kern., 482 (490).

In an action sounding in tort, separate judgment may in like manner be rendered, in favor of the plaintiff, against some of the defendants, as to whom a case is proved, and in favor of any others, who may prevail upon the trial. *Decker vs. Gardiner*, 4 Seld., 29; *Munson vs. Hege-
man*, Seld. Notes of the 12th of April, 1853, p. 26; *Daniels vs. Lyon*, 5 Seld., 549; *Stone vs. Duffy*, 3 Sandf., 761; 1 C. R. (N. S.), 129; *Comstock vs. Bayard*, 2 Sandf., 705; *Montfort vs. Hughes*, 3 E. D. Smith, 591; *Forsyth vs. Edmiston*, 11 How., 408; *Wagner vs. Bill*, 19 Barb., 321; *Dominick vs. Eacker*, 3 Barb., 17.

And the rule is the same, where the plaintiff has omitted to serve, or has discontinued the proceeding against some, going to trial against others. He may take judgment against the latter only, on proving his case. *Robinson vs. Frost*, 14 Barb., 536; *McKenzie vs. Hackstaff*, 1 E. D. Smith, 75.

And, when irregularly taken against a portion of the defendants, judgment may be allowed to stand, as to others, against whom liability was proved, the necessary amendments being made. *Sherman vs. Fream*, 8 Abb., 33.

Where, in a case of this description, the jury have rendered a verdict, or a referee has made his report, against several defendants, attempting to sever or apportion the liability, by assessing different rates of damages against each, the proceeding is irregular, but the plaintiff has the right to elect *de melioribus damnis*, and to take judgment against all the defendants, for the highest amount of damages found against any. *Beals vs. Finch*, 1 Kern., 128; 9 How., 385. In such case, the filing of a *remittitur* of the damages found, as against the other defendants, will be the regular practice. (See 2 Duer, 267.) But the judgment should not be reversed, merely because there is no such formal entry. The very entry for the larger amount is, in itself, an election to remit. *O'Shea vs. Kirker*, 4 Bosw., 120; 8 Abb., 69. See also *Bulkeley vs. Smith*, 1 Duer, 643. By the two former cases, the doubts as to this rule, as expressed in *Bulkeley vs. Smith*, 2 Duer, 261; 11 L. O., 300, are clearly overruled.

§ 265. *Entry in Specific Cases.*

(a.) REPLEVIN.

The form of judgment in these cases, is specifically prescribed by section 277, above cited.

Where in favor of the plaintiff, it may be as follows:

If he has obtained possession by means of the provisional remedy, the judgment then is for the possession of the property, and for damages against the defendant for its detention.

If he has not so obtained possession, the judgment is for the recovery by him of possession, with damages as above, or for recovery of the value, and damages, if possession cannot be had.

If the defendant prevails, he merely recovers his costs, where his possession has not been interfered with. If it has, he may then recover, in addition, damages for such interference.

If the property has been delivered to the plaintiff, and the defendant claims a return, he then takes judgment for such return, or for its value, in case a return cannot be had, with damages, in either case, for the taking and withholding.

Where the judgment is in favor of the plaintiff, and he has not previously obtained possession, he must take judgment, in the alternative form prescribed by the section, for a return, or for the value, in case a return cannot be had. He cannot abandon the property, and take judgment for its value, at his election. *Fitzhugh vs. Wiman*, 5 Seld., 559; *Gallarati vs. Orser*, 4 Bosw., 92; *Rockwell vs. Saunders*, 19 Barb., 473 (479); *Van Neste vs. Conover*, 20 Barb., 547; *Dows vs. Rush*, 28 Barb., 157; *Ingersoll vs. Bostwick*, 22 N. Y., 425. These cases clearly overrule *Commercial Bank vs. White*, 3 How., 292; 1 C. R., 68, and *Aldrich vs. Thiel*, 3 C. R., 91.

The same rule holds, with reference to judgment in favor of a defendant, when the plaintiff has obtained possession. He must take his judgment in the alternative, and no longer possesses the power, formerly given him by the Revised Statutes, of electing to take judgment for the value only. *Dwight vs. Enos*, 5 Seld., 470; *Seaman vs. Luce*, 23 Barb., 240; *Wilson vs. Wheeler*, 6 How., 49; 1 C. R. (N. S.), 402. The plaintiff has, in such cases, the right to return the property, instead of paying its value. *Glann vs. Younglove*, 27 Barb., 480. The dicta in *Russell vs. Allen*, 3 Kern., 173, seem, at first sight, to conflict with *Dwight vs. Enos*, as to the defendant's right to elect. On reference to the report it will be seen, however, that the action was commenced, before the Code went into operation, and the point does not seem to have been raised on the argument.

The defect is, however, one which does not render the judgment void, but only voidable, and an amendment may be allowed. *Fitzhugh vs. Wiman*, 5 Seld., 559; *Gallarati vs. Orser*, 4 Bosw., 92. And the appellate court will disregard the defect, if not raised by exception in the court below. *Johnson vs. Carnley*, 6 Seld., 570.

On judgment being taken, the prevailing party should pay special attention to the findings of the value of the property, and the assessment of damages being properly included. See *Glann vs. Younglove*, 27 Barb., 480. See also, as to the right to costs, Code, section 304, subdivision 4.

Where a portion only of the defendants prevail upon the trial, judgment may be entered up in their favor, though refused as to others. *Woodburn vs. Chamberlin*, 17 Barb., 446.

If, from a defect of proof in the action, the complaint is dismissed, the defendant is entitled to judgment for a return of the goods, without any necessity of proving his own title. *McCurdy vs. Brown*, 1 Duer, 101.

(b.) EJECTMENT.

Judgment in ejectment must be entered up, in the form prescribed by the Revised Statutes, above noticed in chapter I. of the present book,

section 250. It must comprise an exact description of the premises, and provide for the recovery of their possession, with costs, and it may also provide for damages in respect of *mesne* profits. It cannot go beyond the statutory provisions, as, for instance, by appointment of a receiver. See *Thompson vs. Sherrard*, 35 Barb., 593 ; 22 How., 155 ; 12 Abb., 427.

But, if the rights of the plaintiff have expired during the action, he can then only take judgment for his costs and damages, and not for the possession of the land. *Lang vs. Wilbraham*, 2 Duer, 171.

(c.) OTHER REAL ACTIONS.—JUDGMENT UNDER A STATUTE.

The entry of judgment, in actions for trespass on lands, for waste, for nuisance, and on a proceeding for determination of claims on real estate, should also be in accordance with the statutory provisions in each case, as already noted in section 250, above alluded to.

Judgment of forfeiture and eviction cannot, however, be rendered, in connection with equitable relief in the same action. See *Linden vs. Hepburn*, 3 Sandf., 668 ; 3 C. R., 165 ; 5 How., 188 ; 9 L. O., 80.

And the same remark, as to the necessity of a strict compliance with any statutory provisions or rules of the court, may be generally made, with reference to all judgments entered under any special regulation of this description. See sundry of these provisions, as above cited, or referred to in section 250.

Of this nature is a judgment for usurpation of office. It can only be entered in the manner prescribed by section 441, for ouster and costs, and cannot comprise damages, the recovery for which must be had in a separate proceeding. *People vs. Snediker*, 3 Abb., 233.

(d.) DIVORCE.

In the framing of a decree of this description, the provisions of the Revised Statutes must be followed. On granting a limited divorce, on application of either party, or an absolute divorce at the suit of the wife, the court may make further provisions, for the support and maintenance of the wife and children, by the husband, or out of his property.

Vide 2 R. S., 145, section 45 ; 2 R. S., 147, section 54. Or even when a divorce is not granted. *Ibid.*, 55. On a separation, the court may also make such further decree, as the nature and circumstances of the case may require. And, where the suit is brought by the wife, the court may make such order, as to the custody of the children, as may be proper. 2 R. S., 148, section 59. See also, as to provision for costs, *ibid.*, section 58.

When made at the time, these provisions should be incorporated in the decree, or they may be regulated by subsequent order from time to

time. And it has been held erroneous to submit the question of alimony to the jury, or generally to decide the question at the time, without giving opportunities to the parties to produce their proofs on that specific question. *Forrest vs. Forrest*, 6 Duer, 102; 3 Abb., 144.

And, on such a decree, affirmative relief, by way of counter-divorce, may be included, if the plaintiff fails, and the defendant establishes a case, and the demand and countermand are for the same form of relief. See *McNamara vs. McNamara*, 2 Hilt., 547; 9 Abb., 18.

(e.) EQUITABLE RELIEF.

The framing of a decree for this purpose, where the relief granted is purely equitable, and does not depend upon the provisions of any special statute, on any peculiar section of the Code, or on any regulation imposed by the rules, will, of course, depend entirely upon the circumstances of each peculiar case, and no general instructions need be laid down, beyond a caution to see that, in each case, the formal decree is in strict accordance with the prayer of the complaint, with such modifications as may be directed by the court, either with reference to any counter-rights substantiated by the defendant, or in view of the general circumstances. Great care should be taken to make the decree full, explicit, clear, and comprehensive, both in essentials and in arrangement, in order that it may be at once easy to be carried out, if sustained or not impeached, and free from objection on formal grounds, if a review be sought.

(f.) PARTITION.

The form of decree in this case is, in a great measure, a matter of special regulation, both by the Revised Statutes, by the subsequent amendatory measure of 1847 (chapter 430, of that year), and also by the rules. If a sale be originally directed, the decree is final in its nature; if an actual partition, then it is, to a certain extent, interlocutory, the case coming up again for final action, upon the report of the commissioners, which latter stage, and the proceedings leading to it, will be considered in the next chapter.

The exact form of decree, whether interlocutory or final, will be, in a great measure, of a special nature, dependent upon the peculiar circumstances of each case, and the interests to be provided for. It will therefore be sufficient, on the present occasion, to state only its general features.

In either case, whether an actual partition or a sale be directed, the decree will be founded on the pleadings and proofs, and the report of the referee on the preliminary investigation, noticed in the previous chapter, section 258, where such investigation has been had.

If such decree be for actual partition, it must, in the first instance,

declare the rights, titles, and interest of the parties, so far as they have appeared; it must determine such rights, and must give judgment that partition be made between such of them as have any right in the premises, according to such rights, describing the premises in full. See title III., chapter V., part III., of the Revised Statutes, 2 R. S., 321, section 23. See also section 84.

If the interests of any of the parties be unknown, the judgment, after directing a partition, as regards the parties who are known, may direct that the residue of the premises shall remain for the parties whose interests have not been ascertained, subject to division between them at any future time. Section 24.

The decree may also direct that portions of the estate may be assigned in severalty, and others to any set or sets of parties, as tenants in common, when any such portions shall be subject to conflicting claims, or the parties shall so desire it; and, in the former event, may reserve any questions of right between such claimants, provide for the intermediate custody of that portion of the property, and for such further proceedings as may be necessary, to ascertain and finally declare the rights in such contested portion. And it may also provide as to costs, and for the discharge of any parties whose interests have ceased. See chapter 430 of 1847, above referred to.

And lastly, the decree should appoint three respectable freeholders, as commissioners to make partition, and should direct them as to their duties. See sections 25 to 33 of the same title. N. B.—The commissioners, when appointed, may also take into consideration and report, whether a sale of the whole or part of the property will or will not be proper, and may assess any compensation, proper to be made for equality of partition. See sections 29 and 37 as to the former, and 83 as to the latter question.

The decree should likewise provide, that all deeds, &c., be produced to and left with the commissioners, and should conclude, by directing the issue of a commission to them accordingly. The reservation of further directions until the coming in of their report may be added, as under the old practice, though this does not appear to be absolutely necessary.

When a sale is directed, in consequence of a report of the commissioners, the decree for that purpose is in the nature of an ulterior proceeding. It may, however, be made in the first instance, on the report of a referee, under rule 79.

In that case, the decree commences, and declares and determines the rights of the parties, in the same manner as in the preceding, confirming the report.

It then proceeds to direct a sale, and to prescribe the manner in which it should be made, and as to the credit which may be given to the pur-

chasers. See title above referred to, sections 37 to 40, inclusive. Such sale may either be made by the commissioners (§ 37) or by a referee (§ 81), and, where it is necessary to ascertain the rights of specific lienholders, a preliminary reference must be had. See sections 42 to 44. It directs a report to be made of such sales, and that, upon its confirmation, conveyances be made to the purchasers, and declares their effect.

It then provides for the application of the moneys, according to the circumstances; first, in payment of costs and expenses; second, of any taxes or assessments; third, in payment or provision for any general or specific liens by encumbrancers, or life or dower interests, according to the circumstances, with due regard to priorities, if any; and, fourth, directs the division of the residue among the parties, making provision for bringing into court the shares of any who may be infants.

The delivery or custody of the title deeds should also be provided for, and a direction made, that the purchasers be let into possession, and also that a final report of the sale be made.

The order on a final decree to sell, consequent on a report from commissioners, will be substantially to the same effect.

And, where a partition of part, and a sale of the other part, is directed, the essentials of both of the above may be combined in the same judgment. From the above synopsis it will be self-evident that the preparation of a decree in partition, whether interlocutory or final, is a matter which will require especial attention, with a view both to its general regularity, and the special circumstances of each case; the more so as, from its very nature, it forms the groundwork of the future title of the property partitioned, and, as such, is liable to be the subject of continual future investigation.

The following decisions may be cited, with reference to such a decree:

In an ordinary partition, it seems that a decree by default cannot properly be taken in the first instance, without a reference to take proof. See *Porter vs. Lee*, 6 How., 491; *Ripple vs. Gilborn*, 8 How., 456 (462).

And, where some of the parties interested require to have their shares set off in common, under the statute of 1847, a preliminary reference will be proper. *Northrop vs. Anderson*, 8 How., 351.

Where, however, the parties appeared, and the partition sought was to be made by an executor, under a special power, and not in the ordinary form, it was held that a decree, declaring the rights of the parties, and ordering a partition accordingly, in pursuance of the power, might be entered in the first instance. *Brownson vs. Gifford*, 8 How., 389.

In *Vanorman vs. Phelps*, 9 Barb., 500, the nature and effect of a decree for actual partition, and the period at which it becomes operative will be found fully considered.

With reference to partition, both of the real, and also of the personal

property of an intestate, when devolving upon the same parties, by means of different proceedings, and the power of regarding the distribution already made in one, in the subsequent adjudication of the other, see *Hicks vs. Gildersleeve*, 4 Abb., 1.

As to the necessity of the rights and interests of the parties being fully stated by the referee, with a view to adjudication by the court, and the mode of such statement, see *Hyatt vs. Pugsley*, 23 Barb., 285.

As to the effect of such a decree, as conclusive upon the rights of persons not *in esse* at the time, see *Mead vs. Mitchell*, 17 N. Y., 210; also *same case* at special term, 5 Abb., 92.

As to the disposition of funds, set apart to answer the claims of a tenant for life or dowress, the nature and effect of the securities for such fund, when taken, and its ultimate division, see *Robinson vs. McGregor*, 16 Barb., 531.

Formal irregularity in the proceedings, though a defect until corrected, may be disregarded, or held amendable, in exercise of the discretion of the court, in order to sustain the title. See *Croghan vs. Livingston*, 17 N. Y., 218; 6 Abb., 350; affirming *same case*, 25 Barb., 336; *Althause vs. Radde*, 3 Bosw., 410; *Lefevre vs. Laraway*, 22 Barb., 167; *Varian vs. Stevens*, 2 Duer, 635; *Waring vs. Waring*, 7 Abb., 472; *Van Wyck vs. Hardy*, 20 How., 222; 11 Abb., 473; *Blakeley vs. Calder*, 15 N. Y., 617; affirming *same case*, 13 How., 476; *Rogers vs. McLean*, 11 Abb., 440; reversing *same case*, 31 Barb., 304; 10 Abb., 306; *Noble vs. Cromwell*, 26 Barb., 475; 6 Abb., 59. See likewise, as to waiver, *Requa vs. Holmes*, 19 How., 430. *Jennings vs. Jennings*, 2 Abb., 6, seems to be overruled by the first of the above cited decisions. See special power to the same effect, by making the provisions of section 173 of the Code generally applicable to proceedings of this nature, chapter 679 of 1857, vol. 2, p. 504.

But, where the irregularity involves the acquisition of jurisdiction, as in the case of defective service, the proceeding will not be amendable, or the defect capable of waiver by the subsequent interposition of the parties. *Requa vs. Holmes*, 16 N. Y., 193.

Unless the court is satisfied that partition cannot be made without great prejudice to the rights of the owners, a sale should not be directed, but actual partition should be decreed. *Fleet vs. Dorland*, 11 How., 489.

(g.) FORECLOSURE.

The form of judgment in foreclosure is so distinctly, and fully prescribed by rule 72, that any further specification, beyond a reference to that rule, will be unnecessary. Its directions must be strictly followed

in all respects, and all that it requires inserted. The decree should also direct, that the sheriff or referee should make his report of the sale, and specify therein the amount of any deficiency, if any, and that such deficiency should be paid by the parties liable, or that the plaintiff have execution therefor. And, if part only of the debt is due, provision should be made accordingly, either by allowing the defendant to pay the amount before sale, or for the sale of the property in parcels.

A decree cannot be regularly taken or supported, after an actual abatement of the suit, even though such abatement be unknown, or uncertain at the time. *Gerry vs. Post*, 13 How., 118.

Nor can one be taken to provide for the rights, and on the motion of a junior encumbrancer, the plaintiff himself not moving at the time. *Mechanics' and Traders' Savings Institution vs. Roberts*, 1 Abb., 381.

When the existence of a prior encumbrance is substantiated in the course of the proceedings, and notice brought home to the plaintiff, provision will be made for it, though unrecorded. *Haywood vs. Shaw*, 16 How., 119.

A decree of foreclosure, regularly entered, will bind and be conclusive against all persons acquiring subsequent interests, *pendente lite*, though not made parties. *Cleveland vs. Boerum*, 3 Abb., 294. See, however, as to the rights of a necessary party, not joined, *Walsh vs. Rutgers Fire Insurance Company*, 13 Abb., 33.

A decree, for reformation of the mortgage as executed, may be made in connection with one for foreclosure, where the right to such relief is substantiated. *De Peyster vs. Hasbrouck*, 1 Kern., 582.

And, in a proper case, subordinate equities may be provided for. *Livingston vs. Meldrum*, 19 N. Y., 440; *Herrimon vs. Skellman*, 33 Barb., 378.

To authorize the direction for judgment against a grantee of the mortgagor, for a deficiency, the language of his deed must clearly import that the obligation has been positively assumed by him. *Stebbins vs. Hall*, 29 Barb., 524. See also *Belmont vs. Coleman*, 22 N. Y., 438. And effect will be given to any collateral engagements, between him and his vendor, tending to diminish or defeat his liability.. *Flagg vs. Munger*, 5 Seld., 483.

Nor can a plaintiff take a contingent personal judgment for such deficiency, in the first instance, and as part of the original decree. He must take his judgment for a sale in the usual manner, and then, make a further application, after that sale, if necessary. *Cobb vs. Thornton*, 8 How., 66.

As to the mode and form of entering a decree of strict foreclosure, for the purpose of curing antecedent defects, or otherwise, see *Kendall vs. Treadwell*, 14 How., 165; 5 Abb., 16.

(h.) MECHANICS' LIEN.

The judgment on a foreclosure of this description, is specially provided for, as under, as regards New York cases, by chapter 404 of 1855, p. 760, passed, in affirmance of the construction put upon the statute as it stood before, by the New York Common Pleas. See *Cox vs. Broderick*, 4 E. D. Smith, 721 (722), and *Cronkright vs. Thompson*, 1 E. D. Smith, 661, there referred to under section 1.

Such judgment must direct the sale of the interest of the owner in the land and premises upon which the lien exists, to the extent of the rights of such owner, at the time of filing the notice of lien, and that the proceeds of such sale shall be applied to the payment of the costs of the proceeding, and of the amount to be found due to such claimant, and that the residue of such proceeds be paid to the clerk of the city and county of New York, to abide the further order of the court.

By the next two sections, the mode of distribution of such surplus is provided for.

Under section 4, the interest is to be sold subject to any prior liens, unless the claimants under them are parties. In that case, the court is to settle the rights of the parties, and the payment of any lien or judgment by the owner, is to inure for his benefit, as a payment to the contractor.

And, if the contractor be made defendant, judgment may be rendered against him for any excess above the amount, provided for as against the owner. The court may also award costs, as may be just.

Analogous provisions are now made, as to the entry of judgment on proceedings of this nature, in the counties of Kings and Queens, by chapter 478 of 1862, p. 947.

In the other counties, except Erie, the recovery is in the nature of an ordinary judgment, enforceable by the usual process of execution, and not by way of special foreclosure, except that the execution shall direct the officer to sell the right, title, and interest, which the owner had in the premises, at the time of filing the notice. See chapter 402 of 1854, p. 1086, sections 11 and 12, extended by chapter 204 of 1858, p. 324. In Erie county the remedy would seem to be by ordinary judgment and execution.

The right of foreclosure and sale in New York is absolute, as in cases of foreclosure of a mortgage, nor has the owner any right of ulterior redemption. And the sheriff is bound to give a deed of the premises, and not a mere certificate of sale, as upon execution. *Randolph vs. Leary*, 3 E. D. Smith, 637; 4 Abb., 205; *Smith vs. Corey*, 3 E. D. Smith, 642; 4 Abb., 208, note.

The above, and the other New York decisions below noticed, may

probably be held applicable to sales in the counties of Kings and Queens under the recent statute, though, as yet, there is no reported decision upon the subject.

But such sale, when directed, must not be of the property itself, but only of the owner's interest in it, in the form prescribed by the statute. *Smith vs. Corey, supra.*

Nor, in such a proceeding, can the plaintiff take an ordinary personal judgment, as against the owner. The decree must be special, in the form prescribed by the statute, as regards him, providing further, if necessary, that the plaintiff may have execution against the contractor, for any deficiency, as in the case of an ordinary foreclosure. *Eagleson vs. Clark*, 2 E. D. Smith, 644; 2 Abb., 364; *Althause vs. Ludlum*, 2 E. D. Smith, 657; *Sinclair vs. Fitch*, 3 E. D. Smith, 677 (690); *Cox vs. Broderick*, 4 E. D. Smith, 721; *Dennistoun vs. McAllister*, 4 E. D. Smith, 729.

If the contractor applies, of his own motion, to be brought in, against the wish of the other parties, terms may be imposed upon him. *Eagleson vs. Clark, supra.*

When brought in, the contractor may avail himself of a counter-claim against the plaintiff, as in an ordinary action, and may have judgment for any excess. *Grogan vs. McMahon*, 4 E. D. Smith, 754; 6 Abb., 306.

And he can only be held liable when the proceeding is brought by the claimant within the terms of the statute, and not on a mere ordinary claim, not constituting a lien. *Dennistoun vs. McAllister*, 4 E. D. Smith, 729.

In a proper case, with all necessary parties before the court, the mutual equities of claimants may be adjusted, and a decree framed in accordance with them. See *Paine vs. Bonney*, 4 E. D. Smith, 734. But this form of relief will not be administered, except in extreme cases, and, as a general rule, the court will not interfere with the rights of the plaintiff, by limiting the operation of his judgment.

(i.) EQUITABLE LIENS.

In *Tallmage vs. Sill*, 21 Barb., 34, judgment was rendered, for the enforcement of an equitable lien on real estate, and directing a sale for its satisfaction, in the same manner as a sale on execution.

Of the above nature, is the lien of a party who has done work, or advanced money to a married woman, on the credit of her separate estate. The form of such a judgment is given in full in *Yale vs. Dederer*, 21 Barb., 286 (292). The case itself has been subsequently reversed, but only on the merits, on the general question of liability, and not in respect of any defects in the form there given. After declaring the debt of the plaintiff to be an equitable lien on the separate estate

of the defendant, it provides for its payment, first out of her personal, and then out of her real property, and for the appointment of a receiver for that purpose, directing her to transfer to such receiver sufficient of her personal estate to satisfy the plaintiff's debt, and, in case of any deficiency, then sufficient of her real property to satisfy the residue, to be sold by him for that purpose, with the usual collateral directions. See also *Cobine vs. St. John*, 12 How., 333.

It has been also held that if the judgment rendered, merely declares the debt to be a lien, and omits to provide for the mode of its payment, it will, though valid, be, *pro tanto*, ineffectual for the purposes of enforcement, and that a further application to the court will be necessary. See *Chapman vs. Lemmon*, 11 How., 235.

The recent amendments in sections 274 and 287 (1862), providing that, in a suit against a *feme covert*, an ordinary money-judgment may now be taken, enforceable against her separate estate, have removed the difficulty arising from the conflict of the previous decisions; some holding that a judgment of this nature could be taken, since the act of 1860: see *Barton vs. Beer*, 35 Barb., 78; 21 How., 309; *Berley vs. Rampacher*, 5 Duer, 183: others, that the only judgment that could be taken in such a suit, was a judgment *in rem*, and not *in personam*. See *Dickerman vs. Abrahams*, 21 Barb., 551; *Cheeseborough vs. House*, 5 Duer, 125.

The questions as to the liability in these cases have been already considered, under the head of *Parties*.

(j.) Costs.

On the dismissal of a complaint for want of jurisdiction, where the parties have actually appeared, it seems that judgment for costs can be awarded against the plaintiffs. *McMahon vs. Mutual Benefit Life Insurance Company*, 3 Bosw., 644; *The Same vs. The Same*, 12 Abb., 28.

Where costs have been awarded to the defendant, on an insufficient recovery by the plaintiff, it is irregular for him to enter a separate judgment for them. They should be set off, and judgment rendered only for the excess, to whichever party it belongs. *Johnson vs. Farrell*, 10 Abb., 384.

(k.) JUDGMENT ON APPEAL.

A judgment of this nature is entered in the same manner as one on an original hearing, the judgment-roll consisting of the appeal papers and *postea*. The entry will be, that the judgment be affirmed or reversed, as the case may be, or, if modified, then that it be modified

in the manner prescribed by the court, to which the usual award of costs should be added.

On the render of judgment on appeal, it is the duty of the successful party, where his adversary desires to appeal further, to make the formal entry of that judgment at his own expense. *Purdy vs. Peters*, 23 How., 328.

When a judgment has been affirmed, on appeal to the general term of the same court, the judgment should be, for affirmance and costs only, and it will not be regular or proper to enter up a second judgment for the original demand. *Eno vs. Crooke*, 6 How., 462; *De Agreda vs. Mantel*, 1 Abb., 130. But otherwise, when the appeal has been taken from the judgment of an inferior court. *Eno vs. Crooke*, *supra*.

And a judgment for the whole amount will be proper, when the case does not come up upon appeal at all, but merely upon a new trial, on opening a former judgment which has been allowed to stand as security. *Miller vs. Eagle Life and Health Insurance Company*, 3 E. D. Smith, 184.

When the judgment of the appellate court is given for the appellant, absolutely and finally, no new trial being ordered, it is imperative upon the court to order restitution of all that the appellant has lost. *Estus vs. Baldwin*, 9 How., 80.

(l.) JUDGMENT ON REMITTITUR.

It will not be sufficient merely to file the *remittitur* with the clerk of the court below, and to adjust the costs; the formal order of that court should be obtained, either *ex parte*, or on notice, if the court so prescribe, and a judgment entered thereon, for costs and allowance, if made, and of affirmance or reversal, as the case may be. The roll will consist of the *remittitur* itself, with the *postea* superadded. See *Seacord vs. Morgan*, 17 How., 394; *Union India Rubber Company vs. Babcock*, 4 Duer, 620; 1 Abb., 262. In the latter of these cases a form of judgment is given at the close.

(m.) STIPULATION FOR JUDGMENT.

Where a judgment has been entered up, in consequence of a verbal stipulation between the attorneys on both sides, the court will compel both parties to perform its terms. The rule, requiring such agreement to be in writing, does not apply in a case of this description, where an advantage has been obtained by the one party, in consequence of the other's reliance on the arrangement, and where, in fact, the verbal agreement has been executed, by passing into a judgment. *Montgomery vs. Ellis*, 6 How., 326.

(n.) POWER TO COMPEL ENTRY OF JUDGMENT.

Where the prevailing party delays entering up his judgment, his opponent, by means of a motion, may compel him to take the necessary proceedings for that purpose. *Bank of Geneva vs. Hotchkiss*, 5 How., 478; 1 C. R. (N. S.), 153. See, however, this subject more fully considered in a subsequent chapter, under the head of *Appeal*.

CHAPTER V.

PROCEEDINGS TO CARRY OUT JUDGMENT IN CERTAIN CASES.

AN ordinary money-judgment is enforceable by execution, and a large portion of those equitable in their nature, by process of contempt or its incidents. These measures will form the subject of chapter I. of book XII.

To some cases, however, neither proceeding is applicable, but the judgment is carried into effect, either wholly or partially, by subsequent proceedings in the suit itself, independent of process of enforcement; to the consideration of which class of proceedings the present chapter will be devoted.

§ 266. *Proceedings to Carry out Partition.*

(a.) ACTUAL PARTITION.

On a decree for actual partition being pronounced, as stated in the last chapter, the first proceeding is to see that the commission to the commissioners is duly issued, under the seal of the court. That commission specifies the nature of the decree made, and gives directions to the commissioners as to the mode of fulfilment of their duties, as prescribed by sections 25 to 30 of title III., chapter V., part III. of the Revised Statutes, before referred to, and likewise as to the compensation, if any, which should be made for equality of partition.

When obtained, the commission should be delivered to the commissioners, who must take the oath prescribed by section 27. All must meet together in the performance of any of their duties, but the acts of a majority are valid. Section 31. If any die, resign, or neglect to serve, the court may appoint others. Section 26.

The commissioners must then proceed to make partition, unless it appear to them, or any two of them, that such partition cannot be made, without great prejudice to the owners. In this case they are to make a return to the court of that fact, in writing, under their hands. Section 28.

With that return their duty ceases, for the present, at all events; and, on that return, application is made to the court, for judgment for sale, instead of actual partition. If granted, such sale may be effected either by the commissioners or by a referee, as the court may direct. The latter course is, however, the more convenient, and it will generally be better to attain the same object, by means of a preliminary reference, without going through the form of a commission at all.

But, if no such report be made, the commissioners then proceed to make actual partition, according to the shares, and in the manner prescribed by the decree.

In making it, they are to divide the real estate, and allot the shares of the parties, quantity and quality being relatively considered by them, according to the rights and interests adjudged by the court; designating the several shares and portions by posts, stones, or other permanent monuments. And they may employ a surveyor, with the necessary assistants, to aid them. Section 29. They ought, as a general rule, to cause a map to be made, showing clearly and distinctly their division of the property, though the statute does not in terms so prescribe.

Having completed the proceedings, they should make their report to the court, under the hands of any two of them, specifying their proceedings, giving a full description of the division made, and adding the items of their charges. Section 30. The report should be acknowledged as a deed of real estate, and is to be filed in the office of the clerk of the court. Section 33. When a map has been made, it should be annexed to it by way of schedule.

Their own expenses, and those of a surveyor and his assistants, when employed, are to be ascertained and allowed by the court, and the amount, together with the fees allowed them by law, are to be paid by the plaintiff, and allowed in his costs. Section 32. Their fees are, for every day's actual and necessary service, two dollars to each commissioner. *Vide* 2 R. S., 643, § 35.

On the report being filed, notice should be given to such parties as have appeared, that the cause will be brought on for hearing on the report, at which time a final decree should be applied for, and entered in accordance with that document, or with such modifications as the court may direct. The decree should recite and confirm the report, adjudge that partition be made accordingly, should provide for pay-

ment of costs (see section 72) and compensation for equality, if awarded, and also for the execution of deeds to each other by the parties. On these conditions being fulfilled, the proceeding is complete.

But, on good cause shown, the court may set aside the report, and appoint new commissioners. Section 33. In this case, the proceedings will have to commence before them *de novo*.

When awarded, judgment is conclusive upon all parties to the suit and their privies, and all persons claiming under them, and also upon any unknown owners duly noticed. Section 35. See likewise section 34. But it will not affect the claim of any tenants, or any persons having paramount life interests over the whole of the property, or any parties not duly brought before the court. Section 36.

(b.) SALE ON PARTITION.

The form of a decree to be entered, when a sale is directed, has been already considered in the last chapter, section 263, under that head. There is no essential distinction between its provisions, when entered on the report of commissioners, or on that of a referee.

The decree differs from that on an ordinary judicial sale, in empowering the giving of credits to purchasers, and taking securities from them. See sections 38 to 42.

Where there are any specific liens on undivided shares, in favor of persons not parties, the proceedings must be amended. A preliminary reference must be had, to ascertain and report as to the existence of such liens—advertisements inserted, proof given, and a report of such liens made and filed. Sections 42 to 44.

If any encumbrances of this nature appear on the report, or on the general proceedings, the share of the party, whose estate is thus encumbered, must be directed to be brought into court, after deducting the proportion of the costs for which it is liable. Section 44.

The holders of liens upon such share must then apply, by motion on affidavit, on fourteen days' notice to the owner, or longer if he be a non-resident, for payment of the amount of their claims. On such application a hearing is had, any questions of fact determined, and a distribution made, according to the priorities of the claimants, it being made the duty of the clerk, on paying such encumbrance, to see that it is duly cancelled of record. Sections 45 to 48.

But, as to any shares on which there are no such encumbrances, the distribution or investment is to proceed at once. Section 49.

Whenever any paramount life interests exist, the sale may be made, either subject to or discharged from them. If the latter, provision will have to be made, either by the payment of a sum in gross, as the value of such interest, if agreed to be accepted, or by investment of a suffi-

cient amount, to be brought into court, to answer the future payments; similar provision being made in respect of inchoate rights of dower. Sections 50 to 55. See likewise chapter 177 of 1840, sections 1 and 2.

The mode of sale is then provided for. The same notice is to be given, as on the sale of real estate by sheriffs on execution (section 56), *i. e.*, by posting notices, and publication for six weeks successively.

Vide 2 R. S., 368, 369, sections 34 and 35. See, however, rule 73, as to three weeks' notice being sufficient, on sale of lands in the city of New York. Under rule 80, such sale cannot be stayed by *ex parte* order, or except upon two days' notice.

The terms of the sale are to be made known at the time, and, if the premises consist of distinct farms, buildings, or lots, they are to be sold separately. Section 57. And neither the commissioners or referee, nor any guardian of any infant, are to be permitted to purchase for their own benefit. Section 58.

On completing the sale, a report is to be filed by the commissioners or referee (on oath if by the former), specifying fully the proceedings on the sale, with a description of the different parcels of land sold to each purchaser, the name of the purchaser, and the price paid by him: which report must be filed in the court. Section 59.

Application must then be made for an order, directing and authorizing the execution of conveyances to the purchasers. Section 60. Conveyances are thereupon executed accordingly by the commissioners or referee, which, when so executed, are conclusive on all parties and their privies. Section 61, amended by chapter 320 of 1830.

The costs of the plaintiff, and any other parties, if awarded, are to be paid—the expenses and fees of the referee or commissioners retained, any taxes or assessments, or payments in gross, in lieu of life interests made (releases being taken), and the balance divided, and any securities taken, distributed amongst the parties, according to their respective rights, or their shares brought into court for their use; all necessary details being provided for. See sections 62 to 71.

When these proceedings are complete, a final report is made by the referee, or the commissioners—the receipts and releases taken annexed to it, and the whole filed with the clerk. This done, the proceeding is complete.

In relation to the mode by which the value of a life interest is assessed, when redeemed by payment of a sum in gross, and the proceedings in relation to the payment of money into court, and its investment and application, see rule 84 cited, and rules 81, 82, and 83, referred to in the first chapter of the present book, section 248.

The death of a plaintiff after decree, does not abate the proceedings, or render invalid those previously taken. On his heirs being brought

in by substitution, advertisements published under the original title, will be available for the purposes of a sale, and it will not be necessary to advertise anew. *Thwing vs. Thwing*, 18 How., 458 ; 9 Abb., 323. See also, as to an abatement, effecting no prejudice to the proceedings, after revivor duly had, or waiver of the formal defect, by appearance or other equivalent proceedings. *Requa vs. Holmes*, 19 How., 430.

Since the acts of 1848 and 1849, it is no longer necessary to pay into court and invest the share of sale-moneys awarded to a *feme covert*, but it may be paid to her, the same as to any other party. *Benedict vs. Seymour*, 11 How., 176.

As to the proceedings which may be taken, for the protection of a purchaser objecting to complete, see *Disbrow vs. Folger*, 5 Abb., 53.

The same provisions which exist for the protection of purchasers under execution, against mere technical irregularities in notice, &c., are equally available in partition. *Lefevre vs. Laraway*, 22 Barb., 167.

A resale will not be ordered, on a mere suggestion of advance of price by way of opening of the biddings. Where, however, there has been any fraud, negligence, or misconduct, or surprise, or misapprehension, in connection with the sale, such an order will be made. And, where infants are interested, it may be so on the court's own motion. *Same case*.

In the event of any misconduct or neglect on the part of the officer making the sale, he may be held personally liable to any party injured by it. *Van Tassel vs. Van Tassel*, 31 Barb., 439.

When all proper parties have been brought before the court, objections, which might have been available, if raised in due time, but, if raised, could have been cured by an amendment, cannot be taken by a purchaser; he will, on the contrary, be held to complete his purchase. *Blakeley vs. Calder*, 15 N. Y., 617; affirming *same case*, 13 How., 476; *Rogers vs. McLean*, 11 Abb., 440; reversing *same case*, 31 Barb., 304; 10 Abb., 306; *Noble vs. Cromwell*, 26 Barb., 475; 6 Abb., 59.

But a defect, involving a failure to acquire jurisdiction, will be fatal, and the purchaser will be discharged. *Cook vs. Farren*, 34 Barb., 95; 21 How., 286; 12 Abb., 359; *Clark vs. Clark*, 21 How., 479. See also, in *re Cavanagh*, 23 How., 358; 14 Abb., 258.

§ 267. *Proceedings to Carry Out Foreclosure.*

(a.) PRELIMINARIES TO SALE.

If, after a decree of foreclosure has been taken by him, the mortgagee enters into fresh arrangements with the mortgagor, by which the existing contract is varied, or another substituted, his original remedy will be gone, and further proceedings restrained. *Van Wagenen vs. La*

Farge, 13 How., 16. As to allowing a claimant to come in and substantiate a claim on the estate, after judgment in a proceeding under the mechanics' lien law, see *Levy vs. Joyce*, 1 Bosw., 622.

On the decree being made and entered, a certified copy should be delivered by the plaintiff's attorney, to the sheriff or referee appointed to make the sale.

The advertisements, prescribed by rule 73, should then be published, for three weeks in the city of New York, and for six weeks in any other county. The sale must be by public auction, and, in New York, must be made at the place, and within the hours prescribed by the rule, as recently amended. As to what will be a sufficient publication of notice under the rule in question, see *Chamberlain vs. Dempsey*, 22 How., 356; 13 Abb., 421.

On motion properly made, the sale may be stayed, on the application of any of the parties; but, since the revision of 1858, this can no longer be done by *ex parte* order, or on a less notice than one or two days, served upon the plaintiff's attorney. See rule 80, then inserted.

Where the decree is made on default, under the usual interest clause, a stay will not be granted, on a mere offer to pay the interest and costs. *Hunt vs. Keech*, 3 Abb., 204. Nor will a subsequent purchase of a sheriff's certificate of sale under a prior judgment, by the owner of the equity of redemption, be ground for staying the mortgagee's proceedings, at any time before the title under the certificate has become absolute. *New York Shot and Lead Company vs. Cary*, 20 How., 444; 10 Abb., 44.

(b.) PROCEEDINGS ON SALE.

On the sale being made, any party to the suit may become a purchaser, under the provision directed to be inserted by rule 72. But this provision does not extend to authorize a purchase, by any party standing in the position of agent or trustee. It only removes the technical, and not the absolute and independent, prohibition. See *Jewett vs. Miller*, 6 Seld., 402; *Conger vs. Ring*, 11 Barb., 356. Nor can an agent for collecting a mortgage make such a purchase. *Moore vs. Moore*, 1 Seld., 256.

When the mortgage is originally made of an entire tract of land, and the full amount is due, the right of the mortgagee to sell the whole, will not be interfered with, to provide for equities arising out of a subsequent subdivision. *Griswold vs. Fowler*, 24 Barb., 135; 4 Abb., 238; *Lamberson vs. Marvin*, 8 Barb., 9.

But otherwise, when the estate consists of several lots or parcels, which can be sold separately, without diminishing the value; it is then the duty of the sheriff or referee, unless otherwise directed, to sell it

accordingly, unless satisfied that it will bring a greater price, if sold together. See rules 72 and 74.

In making a sale by parcels, of property, a portion of which has been sold by the mortgagor, the equities of the parties must be provided for, and, if necessary, they should be sold in inverse order of alienation. *Breese vs. Busby*, 13 How., 485; *Ellison vs. Pecare*, 29 Barb., 333.

An omission to sell in parcels, in a case where that course is clearly proper, will form ground for an order for resale. *Merchants' Insurance Company of New York vs. Hinman*, 3 Abb., 455.

But, where it will clearly be advantageous to both parties, to sell a large tract in one lot, a sale in that manner will be directed. *Gregory vs. Campbell*, 16 How., 417.

And although, as a general rule, the designation made by a defendant will be attended to, yet, if such designation includes other premises, or is in any manner disadvantageous to the plaintiff, the latter will himself be at liberty to prescribe the mode of sale. *Woodruff vs. Bush*, 8 How., 117.

The sale of the property, when made, includes fixtures then attached to it. *Gardner vs. Finley*, 19 Barb., 317; *Laflin vs. Griffiths*, 35 Barb., 58.

If the sale be not made at the time prescribed by the advertisement, a regular adjournment should be announced at the time, as well as subsequently advertised. But, if an irregularity in this respect, be induced by the acts of a party, it cannot be taken advantage of by him. *La Farge vs. Van Wagenen*, 14 How., 54.

As a general rule, any irregularity in the time or mode of sale, will vitiate the whole proceeding. So held, with reference to a resale, ordered by the plaintiff, of lots bid in by him, after the defendant and some of the intended bidders had left. *Woodruff vs. Bush*, 8 How., 117.

A sale of this nature should be made for cash, unless the property be bid in by the plaintiff, in which case, the amount of his bid goes in extinguishment or diminution of his debt, as the case may be. Should his purchase-money exceed the amount of that debt, he must, of course, pay the surplus, in the same manner as any other purchaser.

See, however, as to the effect of a memorandum of sale, made at the time, where cash has not been paid, and as to how far it may, or may not, be enforceable, as a contract, *Hegeman vs. Johnson*, 35 Barb., 200.

A purchaser, who is also a creditor, is bound to pay in the whole of his purchase-money, even although he may have a valid claim on the surplus, and may be entitled to have part of it subsequently returned to him; and the court will not order a deed to be given to him, until such payment. *Battershall vs. Davis*, 23 How., 383.

On the receipt of the money, the sheriff or referee executes and

delivers a deed to the purchaser. Prior to the execution of that deed, it is the duty of the plaintiff to file the mortgage, under which the proceedings are taken, if existent, and not lost or destroyed, in the office of the clerk, unless it has already been or can be duly recorded, and, if the latter, to cause it to be so recorded, in every county in which lands are sold. Rule 75.

Having received the purchase-money, the sheriff or referee must pay the debt, interest, and costs of the plaintiff, or so much of them as the purchase-money will extend to pay, taking his receipt, or that of his attorney. Rule 72. Any surplus must be paid by him, within five days, to the county treasurer, or, in the city of New York, to the chamberlain of that city, whose receipt must be taken, unless the decree directs otherwise. Same rule.

Having taken these steps, the sheriff or referee must then make his report of sale, stating his proceedings in detail, and annexing the receipt of the plaintiff, and also that for the surplus, if any. If, on the other hand, there be a deficiency, the report must show the existence of that deficiency, and its amount. If there be any taxes or assessments due on the premises, antecedent to the plaintiff's lien, they should also be paid, and proper receipts taken and annexed, the nature and amount of such payments being shown upon the report. The same should likewise be done, with respect to any other payments, if any, directed to be made by the decree, for prior encumbrances, or otherwise. He should likewise retain his own commission and expenses, annexing a particular account of them, and his receipt.

The report, when made and signed, should be at once filed in the office of the clerk, on which the proceeding is complete.

The sheriff's or referee's deed is conclusive upon all parties to the suit, and their privies, deriving title under them, after the commencement of the proceedings. But the interest of prior encumbrancers, or of others, not parties to the suit, will not be affected. See, as to the interests acquired by the purchaser, *Packer vs. Rochester and Syracuse Railroad Company*, 17 N. Y., 283; *Hoyt vs. Martense*, 8 How., 196. No right of redemption whatever is retained by the mortgagor, or his privies in estate. *North River Insurance Company vs. Snediker*, 10 How., 310; *Cleveland vs. Boerum*, 27 Barb., 252; 3 Abb., 294; affirming *same case*, 23 Barb., 201. See, however, as to the special right of a railway company to redeem a portion of mortgaged premises, on payment of a ratable proportion of the debt, *Dows vs. Congdon*, 16 How., 571. As to extent to which, and the parties against whom, a sale on foreclosure by advertisement will, respectively, be held conclusive, see *Root vs. Wheeler*, 12 Abb., 294.

A deed, inadvertently including property not comprised in the decree,

will be reformed, and no interest will be derived under it, in the property erroneously included. *Laverty vs. Moore*, 32 Barb., 347.

A purchaser may, of course, object to complete, on the ground of a defect, involving want of jurisdiction, or a deficiency of parties. *Darvin vs. Hatfield*, 4 Sandf., 468; affirmed, Seld. Notes of the 30th of December, 1852, p. 36; *Alword vs. Beach*, 5 Abb., 451.

He cannot, however, do so, on the ground of an erroneous adjudication, or for any formal defect or irregularity in practice, which is capable of amendment. *Same cases*. *Holden vs. Sackett*, 12 Abb., 473. See also generally, *Kissock vs. Grant*, 34 Barb., 144. As to a resale being ordered, at the hazard of a purchaser refusing to complete, *vide Holden vs. Sackett, supra*.

As to the superior rights of a purchaser, as against a grantee of the mortgagor, who has omitted to record his deed, until after the filing of the notice of *lis pendens*, see *Ostrom vs. McCann*, 21 How., 431.

Where judgment-creditors of a former owner had not been made parties, it was held that the purchaser could not maintain a proceeding by way of direct foreclosure, against them. His only relief was, by a suit that they redeem or else be foreclosed, or that their judgments be declared not to be liens, but only a cloud on the title. *Blanco vs. Foote*, 32 Barb., 535. As to the effect of omitting to join a junior mortgagee, see *Walsh vs. Rutgers Fire Insurance Company*, 13 Abb., 33.

(c.) JUDGMENT FOR DEFICIENCY.

On the report of sale being filed, if a deficiency be found to exist, the plaintiff's attorney is entitled to enter up judgment for the amount. This entry is made in the judgment-book, by the clerk, as the consequence of the previous judgment, without any special application to the court, or notice to the adverse party. It is sometimes done at once, on the coming in of the report, and, where the judgment is purely by default, there can be no objection. Where, however, the defendant has appeared, and the case has been contested, the more regular practice would seem to be, to wait the eight days allowed by rule 32, for the filing of exceptions.

The question as to whether a judgment for deficiency can be claimed as against a married woman, is raised, but not decided, in *Cramer vs. Comstock*, 11 How., 486. The amendment of 1862 has now removed all doubt upon the subject.

(d.) SURPLUS.

The course, in the event of a surplus, is pointed out by rule 76.

Any party claiming an interest, either as a party to the suit, or as having any lien on the mortgaged premises at the time of the sale, is

entitled to file with the clerk with whom the report of sale is filed, a notice, stating that he is entitled to such surplus, or some part thereof, and the nature and extent of his claim. Where such notice is not filed by an attorney, the applicant's place of residence must be stated.

On this notice, an order of reference should be applied for, to ascertain and report the amount due to the claimant, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon. Notice of the application must be given to every party who appeared in the cause, and to every claimant who shall have filed such a notice with the clerk, previous to the entry of the order. The same parties are also entitled to notice of all subsequent proceedings, and, where a claimant has not appeared, or made his claim, by an attorney, notice may be served on him by mail, at his place of residence, as stated in the notice of his claim.

The proceedings before the referee appointed for that purpose, take place in the usual form, and his report must be filed, and due time allowed for the taking of exceptions, as provided in rule 32.

At the expiration of that time, an application grounded thereon should be made to the court, on notice to the parties entitled, as above, for the final distribution or disposition of such surplus. A certified copy of the order of the court, in relation to this application, will form the authority of the treasurer or chamberlain, for paying or applying the surplus, in accordance with the directions given, on which payment or application the matter will be finally wound up.

As to the intermediate investment and disposition by the treasurer or chamberlain of moneys paid into his hands, and the mode in which moneys directed to be paid by order are to be drawn out, see Rules 81 and 83. Under the latter, a certified copy of the order, countersigned by the justice by whom it was made, is to accompany each draft so drawn, and must be procured accordingly. It will, of course, be the most convenient mode to procure these copies, at the time the order is originally made and entered.

A similar practice is prescribed, with reference to the moneys arising from the sale of property, on foreclosure of a mechanic's lien in the city and county of New York, by chapter 404 of 1855, p. 760.

The plaintiff in the suit stands upon the same footing as any other person, in establishing an independent claim to such surplus, and labors under no disqualification. *Field vs. Hawxhurst*, 9 How., 75; *Beekman Fire Insurance Company vs. First Methodist Episcopal Church*, 18 How., 431 (434); 29 Barb., 658.

In relation to priorities of payment, between different judgment-creditors, see *Bodine vs. Moore*, 18 N. Y., 347; *Stevens vs. Bank of Central New York*, 31 Barb., 290; *New York Life Insurance and Trust*

Company vs. Vanderbilt, 12 Abb., 458. See also, as to a judgment vacated for a time, but restored, prior to distribution, *King vs. Harris*, 30 Barb., 471.

The wife or widow of a mortgagor, is entitled to an interest in a proportionate part of the surplus, for the purpose of providing for her dower, whether actual or inchoate. *Denton vs. Nanny*, 8 Barb., 618. And this, even when the mortgage was a mortgage for purchase-money, so that, as against the mortgagee, her rights could not be asserted. *Blydenburgh vs. Northrop*, 13 How., 289.

A judgment-creditor of the husband, cannot claim an interest in the surplus sale-money of property, acquired by the wife since the statute of 1849, even where the marriage was of an earlier date. *Sleight vs. Read*, 18 Barb., 159; affirming *same case*, 9 How., 278. As to the wife's right in the surplus of her own property, mortgaged by her for the payment of the husband's debt, and likewise in that of the sale of other lands belonging to him, also forming part of the same security, see *Vartee vs. Underwood*, 18 Barb., 561.

Where, on a building-association mortgage, the plaintiffs had an interest in the surplus, to secure the payment of further dues, the court directed it to be invested accordingly. *Franklin Building Association vs. Mather*, 4 Abb., 274.

In *Beekman Fire Insurance Company vs. First Methodist Episcopal Church in New York*, 29 Barb., 658; 18 How., 434, it was held that, where there were no contesting creditors, the plaintiff might claim that the surplus be applied, as against the defendant, in payment of an independent debt due to him.

As regards the rights of creditors, demands, to be available as against the surplus, must be such as are at the time enforceable against the property. A mere equitable claim, not matured into an actual lien, cannot be taken into consideration. *King vs. West*, 10 How., 333.

Claimants on the surplus, assert those claims, to a certain degree, at their peril. If unsuccessful, they will be charged with the extra costs, where the surplus is small, the claims of the successful party just and equitable, and the effect of the contest has been, to incur a large amount of unnecessary costs. See *Lawton vs. Sager*, 11 Barb., 349.

Where the surplus belongs to a minor, who subsequently dies under age, his interest will not be converted, but will retain the character of real estate, and be subject to the same powers of disposition on his part, and to the same line of succession on the part of his heirs, as the estate which produced it. *Swezey vs. Thayer*, 1 Duer, 286; 11 L. O., 47.

It is not competent for a party entitled to a share in the surplus, to assert his right thereto by proceedings supplementary to execution.

under section 294. His regular course is to apply by motion or petition, in the suit. *Anonymous*, 1 C. R. (N. S.), 211.

(e.) RESALE, WHEN ORDERED.

On sale made on foreclosure, or otherwise under judicial proceedings, an order, setting aside the proceedings, and directing a resale, may be applied for, when those proceedings have been irregular, or the sale has been unfairly or improperly conducted. The application should be made by way of motion, in the ordinary form, grounded on affidavits, showing the facts on which that application is predicated, and that, by granting the relief, justice will be promoted. See *Chamberlain vs. Dempsey*, 22 How., 356 (360); 13 Abb., 421. Those facts must be stated in detail, and, when the motion is on the latter ground, a strong case must be made, to remove the ordinary presumption of regularity. In this case, the application rests clearly in the discretion of the court. Where substantial irregularity is charged, the relief will be more in the nature of a right. A collateral stay should be applied for, to prevent an intermediate completion.

But a sale, otherwise duly made, will not, as a general rule, be interfered with, on a mere suggestion, or for mere formal defects, or irregularities of a technical and amendable nature. See *Wake vs. Hart*, 12 How., 444; *La Farge vs. Van Wagenen*, 14 How., 54; *Grady vs. Ward*, 20 Barb., 543.

In the following cases, sales have been set aside for irregularity: When made after an actual abatement of the suit. *Gerry vs. Post*, 13 How., 118. See, however, *Lynde vs. O'Donnell*, 21 How., 34; 12 Abb., 286. For a sale in parcels, disregarding the equities of parties. *Breese vs. Busby*, 13 How., 485. For not making the sale in separate parcels, when proper. *Merchants' Insurance Company of New York vs. Hinman*, 3 Abb., 455. See also, as to a failure on the part of a surrogate to acquire complete jurisdiction, forming ground for setting aside a sale made by him, *Sibley vs. Waffle*, 16 N. Y., 180.

An order may be made, discharging a purchaser from his purchase, where the title is imperfect. *Farmers' Loan and Trust Company vs. Dickson*, 9 Abb., 61; 17 How., 477. And, when he is discharged, either on his own motion, or that of other parties, he will be entitled to be repaid his deposit and interest, and likewise his disbursements, and a counsel fee for examining the title, if incurred, and he may also be allowed costs of the motion. *Same case*; *Gerry vs. Post*, *supra*; *Murdoch vs. Empie*, 9 Abb., 283; 19 How., 79; *King vs. Morris*, 2 Abb., 296; *Stahl vs. Charles*, 5 Abb., 348; *Rogers vs. McLean*, 31 Barb., 304; 10 Abb., 306. N. B.—The reversal at 11 Abb., 440, is on the merits, and does not affect this point. Nor will the repayment of the deposit be

stayed, by reason of an appeal, where the purchaser is not shown to be irresponsible. *Rogers vs. McLean*, 10 Abb., 458.

On a resale being granted, on grounds resting in the discretion of the court, the purchaser will be entitled to a similar order, and, if he has acted in good faith, a compensation may be given to him for the benefit he has lost. See *Lentz vs. Craig*, 13 How., 72; 2 Abb., 294; *Marsh vs. Lowry*, 16 How., 41; 26 Barb., 197.

The sale may also be set aside, for fraud on the part of the purchaser, in procuring it, in which case, all intermediate dealings with the estate by him will be void, except as regards purchasers in good faith and without notice. *Colby vs. Rowley*, 4 Abb., 361.

As a general rule, a sale will not be set aside, as a mere opening of the biddings, on proof that a party is prepared to give more, or on a mere suggestion of undervalue, except only in case of sales made by a surrogate. *Murdoch vs. Empie*, 19 How., 79; 9 Abb., 283; *Lefevre vs. Laraway*, 22 Barb., 167 (173), and case cited. See, as to opening biddings on a surrogate's sale, *Kain vs. Masterton*, 16 N. Y., 174.

But in an application for a resale, the applicant should be prepared to show, both that the price obtained was inadequate, and also that a higher bid will be made, and he may be required to give security for the making of such a bid, as a condition of granting the order. See *Murdoch vs. Empie*, 19 How., 79; 9 Abb., 283 (a form being given at p. 285). *Lentz vs. Craig*, 13 How., 72; 2 Abb., 294.

If the parties, or intended bidders, have been in any manner misled, so as to be prevented from attending the sale, or from bidding, the sale will be set aside. *Banta vs. Maxwell*, 12 How., 479; *Murdock vs. Empie*, 19 How., 79; 9 Abb., 283; *Stahl vs. Charles*, 5 Abb., 348.

And, where there has been any surprise or mistake, especially if the price obtained has been grossly inadequate, a resale may be granted on proper terms. *King vs. Morris*, 2 Abb., 296; *Marsh vs. Lowry*, 26 Barb., 197; 16 How., 41. See also generally, *Lentz vs. Craig*, 13 How., 72; 2 Abb., 294; *Smith vs. Hermance*, 18 How., 261.

If the applicant for such relief, is himself chargeable with *laches*, costs may be imposed upon him. *Banta vs. Maxwell*, *supra*. And, if the purchaser be himself willing to make a sufficient advance on the price given, the motion may be denied, on condition that he do so. *Stahl vs. Charles*, *supra*.

(f.) COURSE OF PURCHASER ON COMPLETION.

Should any difficulty be made by the tenant or occupant, the deed executed by the sheriff or referee must be produced to him, and possession demanded. On proof of such production and demand, and of refusal to deliver possession, the purchaser, on application to a judge, in

or out of court, is entitled, *ex parte*, and without notice, to a writ of assistance; and his grantee, on further exhibiting the subsequent deed to him, will also be entitled to the same remedy. Nor can an equitable claim, by judgment-creditors, against the tenant in possession, be urged, on any motion affecting such writ. *New York Life Insurance and Trust Company vs. Rand*, 8 How., 35; affirmed, 8 How., 352; and, on the affirmance, it was even held that it might issue without an order. See also *New York Life Insurance Company vs. Cutler*, 9 How., 407; *North River Fire Insurance Company vs. Snediker*, 10 How., 310; *Lynde vs. O'Donnell*, 21 How., 34; 12 Abb., 286.

A tenant for a term of years is bound to attorn to the purchaser. If he refuse, then the writ will issue against him. *Lovett vs. German Reformed Church*, 9 How., 220.

Where, by reason of the filing of the notice of *lis pendens*, before the commencement of the action, the proceedings were wholly irregular, the writ of assistance was set aside, on the motion of a purchaser of the property, not a party. *Burroughs vs. Reiger*, 12 How., 171; 3 Abb., 393, note.

Nor, though such writ issues against all persons deriving title under the parties, can it be sustained, as against a tenant, coming into possession after the decree, under a person, not a party, but lawfully in possession, under a hostile title, even though such tenant was himself a party, and relief, as to other premises, had been granted against and submitted to by him. *New York Life Insurance and Trust Company vs. Cutler*, 9 How., 406.

And the purchaser should apply at once. An application cannot be made at a subsequent period, after he has received his deed, and conveyed over the premises to another. *Bell vs. Birdsall*, 19 How., 491; 11 Abb., 222.

The owner of the equity of redemption is entitled to all rents, down to the period of completion, and his right is not affected, by the tenant himself becoming the purchaser. When the deed is not ready at the time fixed for its delivery, the purchaser's remedy is, by motion for leave to pay the money into court, or to compel the completion. *Clason vs. Corley*, 5 Sandf., 454; 10 L. O., 237.

§ 268. *Ulterior Proceedings in Other Cases.—Sale for Assessments.*

Of a somewhat similar nature to the above, is a sale for the object of paying or redeeming taxes and assessments, charged on property in which several persons own different interests, under the special powers for that purpose, conferred by chapter 327 of 1855, p. 537, in a proceeding instituted under that statute. The sale is made by a referee

appointed for that purpose, and is conducted in the same manner as a sale in foreclosure or partition, the money being applied in payment or redemption of the amount due, as the case may require, and in payment of the costs of the proceeding.

The constitutionality of the statute, and that a title under it binds all parties and privies to the proceeding, precisely as in a sale in partition, is established by *Jackson vs. Babcock*, 16 N. Y., 246.

Any portion of the property assessed may be sold to pay taxes on another. But, when a tax or assessment has been actually paid, or as soon as it has been satisfied by sale, the power is gone. The referee cannot proceed to sell the remainder of the property, however advantageous it may appear to be to do so. *Powers vs. Barr*, 24 Barb., 142.

Such a sale cannot be made for the purposes of reimbursement, nor can property be sold, not actually comprised within the assessment. *Norsworthy vs. Bergh*, 16 How., 315. See also *same case*, for form of order, directing a reference, for the purpose of conducting such sale, in a manner calculated to provide for the equities of the parties interested.

(a.) DIVORCE.

On the granting of a decree for separation, or a divorce, by reason of adultery of the husband, a reference, for the purpose of ascertaining the amount of alimony to be paid to the wife, may be necessary, and, unless the amount be fixed by the court, may be provided for by the decree. It may also be moved for, and obtained, on special application. This is of course a distinct proceeding from the application for alimony *pendente lite*, which belongs to a different period of the litigation, and will be assessed upon different principles.

If a reference be granted, it may also provide that the referee, after assessing the amount to be paid by way of alimony, may report also as to the security that should be given by the husband. See *Forrest vs. Forrest*, 6 Duer, 102 ; 3 Abb., 144.

An award of alimony, when made, remains conclusive as against the husband, nor, when he is the guilty party, can he impeach it, on the ground of subsequent misconduct on the part of the wife. If she delays the application, it is his duty to bring it on himself, nor can he make her delay in the first instance, the ground of a motion for a commission to take testimony, for the mere purpose of impeaching her character. *Forrest vs. Forrest*, 3 Bosw., 661 ; 9 Abb., 289.

On an allegation of altered circumstances on the part of the husband, an application may be made by the wife, for an increased allowance. She cannot, however, make the fact that she is maintaining a person whom she is not bound to support, the ground for such an application. *Halsted vs. Halsted*, 5 Duer, 659.

On the referee's report being made, it should be filed with the clerk, as prescribed by rule 32, and, after the expiration of the eight days allowed for exceptions, application should be made for an order making the allowance reported. The order, if granted, must be entered in due form, and a copy served upon the defendant personally, the mode of its enforcement being by process of contempt.

(b.) INSOLVENT CORPORATION.

As to the ulterior proceedings, for collection and distribution among its creditors; of the property of a corporation, against which judgment of forfeiture has been rendered, in a suit by the attorney-general, see Code, section 444.

CHAPTER VI.

JUDGMENT AGAINST JOINT-DEBTORS.

§ 269. *Statutory Provisions.*

THE original proceedings for enforcement of a liability of this description, are thus prescribed by section 136, already cited under the head of *Summons*, but a repetition of which will be convenient on the present occasion :

§ 136. (115.) Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows :

1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct; and, if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served, and, if they are subject to arrest, against the persons of the defendants served; or,

2. If the action be against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants ;

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them or any of them alone.

These provisions form a corollary to those of the Revised Statutes on the same subject. Article I., title VI., chapter VI., part III., 2 R. S., 377, 378. By the latter, similar powers are given to proceed against the defendants who have been served, and it is provided that, if judgment be recovered, it "shall be against all the defendants, in the same manner as if all had been served with process." By section 2, it is enacted, that such judgment shall be conclusive evidence of the liability of the defendant who was personally served with process in the suit, or who appeared therein; but, against every other defendant, it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence; and, by sections 3 and 4, provisions are made with respect to the issuing of execution under a judgment so entered, which will be hereafter noticed under that head. These provisions are likewise made applicable to proceedings in justices' courts. See 2 R. S., 247, 251.

The ulterior enforcement of a judgment entered up in this manner, as against parties not originally served, for the purpose of enforcing their separate liability, is provided for by chapter II., title XII., part II. of the Code, running as follows:

§ 375. (328.) When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract, by proceeding as provided in section 136, those who were not originally summoned to answer the complaint, may be summoned to show cause why they should not be bound by the same judgment, in the same manner as if they had been originally summoned.

Dates from 1849. In 1848, the difference was merely verbal.

§ 376. (329.) In case of the death of a judgment-debtor after judgment, the heirs, devisees, or legatees of the judgment-debtor, or tenants of real property owned by him and affected by the judgment, may, after the expiration of three years from the time of granting letters testamentary, or of administration, upon the estate of the testator or intestate, be summoned to show cause why the judgment should not be enforced against the estate of the judgment-debtor in their hands respectively, and the personal representatives of a deceased judgment-debtor may be so summoned, at any time within one year after their appointment.

Dates from 1849. In 1848, the section was shorter and less specific, prescribing no time from which the liability might be enforced.

§ 377. (330.) The summons provided in the last two sections shall be subscribed by the judgment-creditor, his representatives, or attorney; shall describe the judgment, and require the person summoned to show cause within twenty days after the service of the summons; and shall be served in like manner as the original summons.

§ 378. (331.) The summons shall be accompanied by an affidavit of the

person subscribing it, that the judgment has not been satisfied, to his knowledge, or information and belief, and shall specify the amount due thereon.

§ 379. (332.) Upon such summons, the party summoned may answer within the time specified therein, denying the judgment, or setting up any defence which may have arisen subsequently; and, in addition thereto, if he be proceeded against according to section 375, he may make the same defence, which he might have originally made to the action, except the Statute of Limitations.

Dates from 1849. Same in 1848, save only that the exception at the close was omitted.

§ 380. (333.) The party issuing the summons, may demur or reply to the answer, and the party summoned may demur to the reply, and the issues may be tried, and judgment may be given, in the same manner as in an action, and enforced by execution; or the application of the property charged to the payment of the judgment, may be compelled by attachment, if necessary.

From 1849. Less full in 1848.

§ 381. (334.) The answer and reply shall be verified, in the like cases and manner, and be subject to the same rules, as the answer and reply in an action.

From 1849. Substantially the same in 1848.

§ 270. *Original Entry of Judgment.*

The enactments of the Revised Statutes, above referred to, are not repealed by the Code, but are still subsisting. *Vide Sterne vs. Bentley*, 3 How., 331; 1 C. R., 109.

The judgment ought, therefore, in all such cases, to be entered against all the defendants, whether served or not. *Ibid.*; *Merrifield vs. Cooley*, 4 How., 272; *Mechanics' and Farmers' Bank vs. Rider*, 5 How., 401; 1 C. R. (N. S.), 61. The last case goes to the extent of holding that it cannot be entered otherwise, and this seems to be the correct conclusion, notwithstanding the permissive wording of section 136, as last amended; and this view is supported by *Stannard vs. Mattice*, 7 How., 4; *Crandall vs. Beach*, 7 How., 271; and *Bridge vs. Payson*, 5 Sandf., 210.

This principle does not apply, however, to the heirs of a person dying intestate, and sued for his debts. Although the statute of 1837, Laws of 1837, p. 537, section 73, requires them to be sued jointly, and not separately, their interests, "*inter se*," are, nevertheless, several; and they are not joint-debtors, or jointly liable, but only each, severally, for his due proportion. *Kellogg vs. Olmsted*, 6 How., 487.

The entry of judgment against a party not served, binds all property in which he has a joint interest, which may be levied upon accordingly.

As regards his separate estate, and also as respects his person, it has no effect whatever, unless by means of the ulterior proceedings about to be noticed. It is not even *prima facie* evidence of his liability, which must be rebutted.

Nor can an action be brought, or a collateral proceeding sustained, upon the mere record of the judgment against such a person, without collateral proof of his liability. *Oakley vs. Aspinwall*, 4 Comst., 513. See *same case*, 1 Duer, 1; 10 L. O., 79; affirmed, 3 Kern., 500.

A judgment of this nature, when taken, is entered against all the defendants, in the usual form. The distinction lies in the subsequent proceedings for its enforcement.

On suggestion of fraud or connivance, a judgment of this description will be opened, as against a defendant not served, to let in his defence. *Cleveland vs. Porter*, 10 Abb., 407.

§ 271. *Proceedings under the Code.*

The provisions of chapter II., title XII., as above cited, clearly point out the course to be pursued, for the purposes of ulterior enforcement of a judgment originally taken as above. The proceeding is of a peculiar and special nature, as regards the initiatory measures.

The summons performs in fact the office of a complaint, as well as that of process strictly considered. It must describe the judgment, and thus, in connection with the collateral affidavit, furnishes in fact all necessary information to the defendant, to enable him to prepare his defence. The notice of relief demanded is peculiar, assuming the form and answering the purposes of an order to show cause. Sections 375 to 377 inclusive.

It is also peculiar, inasmuch as it must be accompanied by an affidavit, to the effect that the judgment has not been satisfied, and specifying the amount due thereon. Section 378. This paper completes the necessary statement for the information of the defendant.

Both must be served upon the defendant in the usual form. Section 377. The section is silent as to the mode of service of the affidavit. There can be no doubt, however, but that it must accompany the summons in its service, as well as in its preparation, and that, as in the case of a complaint, a copy may be held sufficient for that purpose. Till the point is decided, it might, however, be not undesirable to serve a duplicate original, where the case is important and likely to be contested.

Where, at the expiration of the time prescribed, no cause is shown, the plaintiff, on the usual proof of service, and that no answer has been received, should make an application for judgment, to the officer, and at the time and place mentioned in the summons; and the order for judg-

ment may be taken by default, and as of course, on the above proof. The application will necessarily be *ex parte*, and the entry of judgment follow, in the usual manner. There does not seem to be any authority in section 246, for the clerk to enter up judgment in these cases, without the special direction of the judge.

It seems that proceedings under section 376, against the heirs, devisees, or legatees of a deceased judgment-debtor, must be taken against them all, though their interests are several; also that such proceedings cannot be grounded on a joint-debtor's judgment under section 136, which, as against any not served, will be irregular. *Kellogg vs. Olmsted*, 6 How., 487.

The proceeding being statutory, the form of summons prescribed by the section must be strictly and literally followed, and should not be varied from in any respect, nor will notice of an application for further relief be sustainable. See *Mills vs. Thursby* (No. 10), 12 How., 385; 2 Abb., 432. In the *same case* (No. 8), 11 How., 129, the latter clause of section 376 seems to have been overlooked.

See generally, as to the power to issue the summons in the form prescribed by section 375, as against joint-debtors, *Harper vs. Bangs*, 18 How., 457.

When the defendant is not content to allow judgment to go by default, he may appear and answer.

When summoned under section 376, he will be at liberty to deny the judgment, or to set up any defence which may have arisen subsequently.

When under section 375, his range of defence is wider, and he may also make any defence which he might have made in the original action, save only the statute of limitations. Under the Code of 1848, that plea might also be taken: see *Vandenburg vs. Biggs*, 3 How., 316; but that liberty was taken away, on the amendment of 1849.

It is, of course, incompetent for the defendant to demur, and the answer is, in form, an answer to the summons and affidavit. In all its essential parts, however, it is identically the same as an answer to a complaint, and it should be verified. Section 381.

The answer being served, issue should be joined by the plaintiff, by service of a demurrer or reply to the answer. One or the other should be put in in all cases, especially where the answer contains any allegation of new matter. See *Mills vs. Thursby* (No. 10), 12 How., 385 (388); 2 Abb., 432. The proceeding, though having the effect, is not in its nature a regular action. *Same case*. See also *Fairchild vs. Durand*, below cited. And the provisions in section 153, in relation to an ordinary reply, and dispensing with it, unless a counter-claim is put in, are clearly inapplicable. The reply should be verified. Section 381.

When the reply contains any thing beyond a mere denial, the party summoned may demur to it (section 380); but, as a demurrer necessarily admits the allegations to which it is directed, it will, perhaps, be imprudent to do so, unless the matter can be brought to a clear issue of law.

The issue, when joined as above, should be brought on for trial in the ordinary form.

The judgment to be entered, will be the ordinary money judgment, where a party is summoned under section 375, or such other adjudication as may be proper. Under section 376, the judgment will, of course, be special. It must be taken strictly *in rem*, as against the estate sought to be charged, in the hands of heirs, beneficiaries, or representatives, as the case may be. A personal judgment, against parties standing in a representative capacity, will be clearly improper. *Mills vs. Thursby* (No. 10), 12 How., 385; 2 Abb., 432. See likewise, *same case* (No. 8), 11 How., 129. Costs may be awarded, as the judgment may, under, section 380, be given, in the same manner as in an action. *Same case*, 12 How., 385; 2 Abb., 432, *supra*. This last point has since been specially provided for, by the amendment of section 307, in 1857. See last clause of that section, contrary to the original views of the commissioners. See their report, p. 234, 235.

The form of the proper judgment in a proceeding against executors, is given in *Mills vs. Thursby*, No. 10, above cited, at 12 How., 385 (394); also at 2 Abb., 432 (440).

When rendered under section 375, the judgment will be enforceable by execution in the usual manner: under section 376, by special execution, against the estate of a deceased testator; on leave of the surrogate, when against representatives; or by attachment, when the claim is sought to be enforced against specific property. Section 380.

The judgment, when taken, is, doubtless, reviewable by appeal in the usual manner. See *Mills vs. Thursby*, above cited, both citations.

It seems that proceedings of this description, not being in the nature of a regular action, are not removable into the federal courts. *Fairchild vs. Durand*, 8 Abb., 305.

CHAPTER VII.

OF THE AMENDMENT OR DISCHARGE OF JUDGMENTS.

§ 272. *Amendment of Judgment.*

CLEAR powers for this purpose are conferred by sections 173 and 174, and they have been frequently exercised, where the application has arisen out of a mere technical defect, and has been “in furtherance of justice.” And such a power existed under the former practice. See *Clason vs. Corley*, 4 Seld., 426; affirming *same case*, 5 Sandf., 454; 10 L. O., 237.

But, in order to sustain an application of this description, there must have existed some mistake or omission in the original proceeding. Alterations cannot be made in the actual adjudication, even though directions may have been omitted, which would have been inserted, if they had been originally asked for. *New York Ice Company vs. North Western Insurance Company*, 32 Barb., 534; 20 How., 255; 11 Abb., 419. *Barnard vs. Bruce*, 21 How., 360.

The view taken in the *New York Ice Company vs. North Western Insurance Company* as to the powers of the court is, however, disapproved, and its general authority to grant an amendment in all cases, when in furtherance of justice, asserted by the Court of Appeals, in *The Same vs. The Same*, 23 N. Y., 357; 21 How., 296; 12 Abb., 414. The appeal in that case was, however, dismissed, on the ground that the court above had no jurisdiction to entertain it, as an appeal from the order. See, generally, as to a refusal to correct a voluntary error, *Montgomery vs. Ellis*, 6 How., 326. Nor will a motion be entertained, to correct a final decree regularly entered and enrolled, unless by the consent of all parties, or in respect of matters which are quite of course. In no other case, will any alteration be made in a decree on motion; the only mode by which it can be effected will be by bill of review. *Picabia vs. Everard*, 4 How., 113.

And an amendment, if asked for, should be for the purpose of sustaining, and not for that of impeaching the judgment. See *Gasper vs. Adams*, 24 Barb., 287. If asked for the latter purpose, strict terms will be imposed.

However wide the powers of section 173, they do not include judicial

errors in rendering the judgment itself; these cannot be so corrected. *Hotaling vs. Marsh*, 14 Abb., 161.

Amendments of the proceedings prior to judgment have, however, been frequently allowed at a subsequent period, to be made *nunc pro tunc*, for the purpose of curing mere irregularities in point of form, and sustaining the proceeding. See, as to the filing of a guardian's bond in partition, as of the proper date, *Croghan vs. Livingston*, 17 N. Y., 218; 6 Abb., 350; affirming *same case*, 25 Barb., 236. See also, generally, *Wight vs. Alden*, 3 How., 313; *Van Wyck vs. Hardy*, 20 How., 222; 11 Abb., 473; *Lewis vs. Jones*, 13 Abb., 427.

And proceedings consequent on a decree, for the purpose of carrying it out, are also similarly amendable. *Romaine vs. McMillen*, 5 How., 318.

It is also a frequent practice, to allow a judgment to be entered *nunc pro tunc*, as of the date of the original adjudication, for the purpose of sustaining it, as where a party has died after verdict or decision, but before actual entry. *Ehle vs. Moyer*, 8 How., 244. And such amendment is a question solely between the parties, with which outside creditors have no right to interfere. See *Mann vs. Brooks*, 7 How., 449.

But, in a case of ejectment, where there had been great *laches* in the application, and one of the defendants was still alive, the court refused to interfere. *Diefendorf vs. House*, 9 How., 243.

In *Sherman vs. Fream*, however, 8 Abb., 33, where one co-defendant in tort had died, and the suit had been discontinued as to another, an amendment was allowed, for the purpose of sustaining the judgment as against a third.

A mere technical defect in the summons was allowed to be amended, in *Sluyter vs. Smith*, 2 Bosw., 673. See also, as to similar defects in proof of service, signature, &c., or a similar error in the complaint, *Farmers' Loan and Trust Company vs. Dickson*, 17 How., 477; 9 Abb., 61.

But a jurisdictional defect, such as an imperfect service by publication, is unamendable. *Kendall vs. Washburn*, 14 How., 380; *Cook vs. Farren*, 34 Barb., 95; 21 How., 286; 12 Abb., 359; *Fiske vs. Anderson*, 33 Barb., 71; 12 Abb., 8. See, however, as to mere slight technicalities, *Van Wyck vs. Hardy*, 20 How., 222; 11 Abb., 473.

A technical defect in the proceedings at or consequent upon trial, as an omission to enter a formal rule, carrying into effect the decision of the court, is amendable, or should be disregarded. *Whitehead vs. Pe-care*, 9 How., 35. See also *Dart vs. McAdam*, 27 Barb., 187 (192).

And the docket of a judgment is amendable. *Sears vs. Burnham*, 17 N. Y., 445.

So likewise, as to a judgment of affirmance, in matter not affecting the merits. *Bagley vs. Brown*, 3 E. D. Smith, 66.

Where the defendant was guilty of *laches*, in his application to vacate a judgment by default on the ground of irregularity, the plaintiff was allowed to amend technical defects, that would otherwise have been fatal. *Jones vs. United States Slate Company*, 16 How., 129.

The power to allow a pleading to be amended after judgment, though existent, should be cautiously exercised. An application for that purpose was denied in *Field vs. Hawxhurst*, 9 How., 75.

When granted, the amendment should be carried into effect, by means of the order, which should contain special provisions on the subject, and that order should be appended to the judgment-record. It is not proper to make an actual obliteration or erasure in the record. The passages stricken out may, however, be marked by brackets or lines of distinction, and an entry made in the margin referring to the order; or the judgment itself, if amended, may be entered at length, if the party so desire. *Sluyter vs. Smith*, 2 Bosw., 673.

Where the defendant has been sued by a wrong name, an *ex parte* order for amendment of the record, even if admissible, will have no effect in sustaining an intermediate execution, or a sale under it. They will, on the contrary, be wholly void. *Farnham vs. Hildreth*, 32 Barb., 277.

As to the correction of the record, in a case where one of the defendants had not actually appeared, but judgment had been taken by mistake in his favor, see *Keyes vs. Moultrie*, 1 Bosw., 629.

§ 273. *Setting Aside for Irregularity.*

Where any irregularity has taken place, either in the entry of judgment, or in the proceedings leading to that entry, a motion of this nature will always be sustainable.

If irregularity be shown, in matter of substance, it will, as a general rule, be granted; but, if the defect complained of be purely technical, and there are no real merits in the case, it may be refused.

The application must be made by motion, on the ordinary notice.

The relief asked for, should be to the effect that the judgment and all proceedings thereunder may be set aside and vacated, and that all proper directions may be given consequent thereon, subjoining a demand for further relief, and the costs of the motion, which will, as a general rule, be granted, where substantial irregularity is shown. Where execution has been issued, and a levy made, or any other actual proceedings consequent upon the judgment have been had, it will be better specially to refer to them, and to ask the necessary further relief; and the judgment should be sufficiently described.

The moving affidavits must clearly substantiate the irregularities

complained of, and such irregularities must also be specified upon the face of the notice. Rule 39. *Selover vs. Forbes*, 22 How., 477. See, as to what will be a sufficient statement, *Hicks vs. Brennan*, 10 Abb., 304.

Nor can a motion to set aside a judgment be repeated, on grounds known at the time it was first brought forward. The moving party is bound to bring forward all his objections in the first instance. *Pattison vs. Bacon*, 21 How., 478; 12 Abb., 142.

It is competent to show on the face of the moving affidavits, any collateral facts, tending to show irregularity, or a failure to acquire jurisdiction. See, as to service by publication, *Fiske vs. Anderson*, 33 Barb., 71; 12 Abb., 8.

When a stay of proceedings is desirable, as will ordinarily be the case, a collateral order may be obtained, or the question may be brought up by order to show cause, including the stay required, if such an order can be procured.

The stay must, however, be obtained in good faith, and the moving party cannot take advantage of it for his own purposes. An assignment made under such circumstances, was declared to be void, in *Jaques vs. Greenwood*, 12 Abb., 232.

Where the application is to set aside a judgment obtained by default, the usual affidavit of merits should be made, or its substance incorporated in the moving papers. See *Hunter vs. Lester*, 18 How., 347; 10 Abb., 260.

As a general rule, the application must be made at special term, and this, even when the judgment was entered at general term, where the point in which the irregularity was involved, was not before that branch of the court. *Ayres vs. Covill*, 9 How., 573; *De Agreda vs. Mantel*, 1 Abb., 130. But not so, in respect of matter connected with the actual adjudication above. In that case, the motion must be made at general term. *Corning vs. Powers*, 9 How., 54.

A motion of this nature can only be made by a party to the judgment, not by a stranger to the record. *Murray vs. Judson*, 5 Seld., 73. But, where the judgment has been entered up as an invalid confession, or upon impeachment of fraud, it has been held that it may be set aside, on the motion of any party interested in impeaching it. See *Bridenbecker vs. Mason*, 16 How., 203. See, however, as to the power to let sureties in to defend an action against their principal, *Jewett vs. Crane*, 35 Barb., 208; 13 Abb., 97.

It must be made, under any circumstances, within one year from the entry of judgment (section 174). See *Van Benthuyzen vs. Lyle*, 8 How., 312; *Cook vs. Dickerson*, 1 Duer, 679; *Whitehead vs. Pecare*, 9 How., 35; *Whitney vs. Kenyon*, 7 How., 458; *Park vs. Church*, 5 How., 381; 1 C. R. (N. S.), 47. See also *Potter vs. Rowland*, 4 Seld., 448.

And not only so, but it must also be made with due diligence, immediately on the irregularity being discovered. If the party complaining of the irregularity delays his application, it may probably be refused, and an amendment allowed to be made by his adversary, for the purpose of supplying the defect, which otherwise might not have been admitted. *Jones vs. United States Slate Company*, 16 How., 129; *Patterson vs. Graves*, 11 How., 91; *Martin vs. Lott*, 4 Abb., 365; *Bogardus vs. Livingston*, 2 Hilt., 236. See also *Whitney vs. Kimball*, 6 Bosw., 690.

And, if the irregularity be in the preliminary proceedings, the defendant must move to set it aside at once, or the defect will be waived. If he delays his application until after judgment, it will be too late, and that judgment, though irregular, will be permitted to stand. *Myers vs. Overton*, 4 E. D. Smith, 428; 2 Abb., 344; *Collins vs. Ryan*, 32 Barb., 647; *Hilton vs. Thurston*, 1 Abb., 318. Nor can a judgment be collaterally impeached, in respect of errors of this description. *Burkhardt vs. Sanford*, 7 How., 329.

The above rules, however, do not apply to those cases, where a judgment is impeached for want of jurisdiction. Where this is the fact, the motion may be made at any time. *Hallett vs. Richters*, 13 How., 43; *Bonnell vs. Henry*, 13 How., 142.

If the motion be successful, the order should be drawn up, entered, and served in the usual manner. Special instructions should be inserted in it to the clerk of the court, and to the clerks of any counties in which the judgment has been docketed, directing them to make the necessary entries in the judgment-books, for the purpose of discharging the lien as regards real property, and also to the sheriff or sheriffs, if execution has been issued, prescribing the discharge of any levy, if made, and the suspension of further proceedings on such executions.

The prevailing party should see that such entries are made by the clerk. He should also obtain, and forward to the clerk of every county in which the judgment has been docketed, a transcript, showing the *vacatur*, in order to the making of similar entries, so as to discharge the lien, wherever existent. If execution have been issued, a certified copy of the order must be served upon the sheriff or sheriffs, as the case may be.

On a motion of this description, a feigned issue cannot be granted, under the common demand for further relief; if an appropriate remedy, it must be specially asked for. *Mann vs. Brooks*, 7 How., 449.

In *Whitehead vs. Pecare*, 9 How., 35, the general principle is laid down that, under section 176, the court is bound to disregard, or order amended, any defect in the entry of judgment, which does not affect the substantial rights of the adverse party.

(a.) WHEN GRANTED.

Any substantial irregularity will, as above noticed, form ground for an order to vacate, and, where the defect is in any manner of a jurisdictional nature, or where it involves surprise, or any thing in the nature of unfairness, towards the party against whom the judgment has been taken, the granting of the motion, if made in due time, will be nearly as of course.

The following may be mentioned as a few, amongst many instances, in which this description of relief has been extended :

When the summons has been defective, as being issued under the wrong subdivision of section 129, and judgment has been entered by default; or, when, the summons being issued under subdivision 2, the judgment has been entered under subdivision 1, without the proper proceedings, on application to the court. *McNeff vs. Short*, 14 How., 463; *Cobb vs. Dunkin*, 19 How., 164; reversing *same case*, 17 How., 97.

Or, when a summons, duly issued, has been improperly or insufficiently served. *Williams vs. Van Valkenburg*, 16 How., 144; *Bulkeley vs. Bulkeley*, 6 Abb., 307. Or, where it has not been served at all, but the defendant attempted to be brought in in another manner. *Akin vs. Albany and Northern Railroad Company*, 14 How., 337.

Service on an elector, on election day, is an irregularity of this description, rendering the judgment void. *Bierce vs. Smith*, 2 Abb., 411; *Weeks vs. Noxon*, 1 Abb., 280; 11 How., 189. But not so, it seems, with regard to service on the Sabbath. *Marks vs. Wilson*, 11 Abb., 87.

And even a mere technical, as distinguished from a substantial irregularity in service, will not be corrected, after judgment by default, where merits are not sworn to. *Hunter vs. Lester*, 18 How., 347; 10 Abb., 260; *Myers vs. Overton*, 4 E. D. Smith, 428; 2 Abb., 344.

Any irregularity or defect in proceedings for service by publication, or substituted service, under the statute of 1853, will render the judgment void. *Jones vs. Derby*, 1 Abb., 458; *Collins vs. Campfield*, 9 How., 519; *Back vs. Crussell*, 2 Abb., 386; *Foot vs. Harris*, 2 Abb., 454; *Kendall vs. Washburn*, 14 How., 380; *Cook vs. Farren*, 34 Barb., 95; 21 How., 286; 12 Abb., 359; *Niles vs. Vanderzee*, 14 How., 547; *Haight vs. Husted*, 4 Abb., 348; affirmed, 5 Abb., 170; *Warren vs. Tiffany*, 17 How., 106; 9 Abb., 66; *Titus vs. Relyea*, 16 How., 371; 8 Abb., 177; *Hallett vs. Righters*, 13 How., 43; *Fiske vs. Anderson*, 33 Barb., 71; 12 Abb., 8. See also generally, as to publication, *Rathbone vs. Clarke*, 9 Abb., 66, note. See likewise, as to a failure to acquire jurisdiction on other grounds, *Dresser vs. French*, 7 How., 350. See, in addition, as to disregarding an ultra-technical objection, *Jacquir-*

son vs. *Van Erben*, 2 Abb., 315; *Van Wyck* vs. *Hardy*, 20 How., 222. 11 Abb., 473.

Judgment, predicated upon irregular service of an amended complaint, was set aside in *Mercier* vs. *Pearlstone*, 7 Abb., 325. So also, it has been held, where the complaint is in itself irregular, the judgment will be void. *Field* vs. *Morse*, 7 How., 12.

Judgment taken, without service of a copy of the complaint, after actual demand, was set aside in *Walsh* vs. *Kiershad*, 8 Abb., 418.

The entry will also be irregular, if made, pending a binding stay of proceedings. *Clumpha* vs. *Whiting*, 10 Abb., 448; *Fitch* vs. *Hall*, 18 How., 314; *Colt* vs. *Wheeler*, 12 Abb., 388. Or, with actual knowledge of a stay being granted, though before service of the order granting it. *Warren* vs. *Wendell*, 13 Abb., 187. Or, during an actual extension of the time to answer. *Braisted* vs. *Johnson*, 5 Sandf., 671. See likewise *Schuchardt* vs. *Roth*, 10 Abb., 203.

A judgment entered for supposed want of answer, disregarding one which has been actually and regularly served, and is correct in point of form, though returned for some alleged defect, will be invalid. *Strout* vs. *Curran*, 7 How., 36; *Waggoner* vs. *Brown*, 8 How., 212; *Williams* vs. *Riel*, 11 How., 374; 5 Duer, 601; *Bergman* vs. *Howell*, 3 Abb., 329; *Spencer* vs. *Tooker*, 21 How., 333; 12 Abb., 353. So likewise, where the answer was attempted to be served in due time and with due diligence, the actual omission being attributable to the act of the plaintiff's attorney. *Lord* vs. *Vandemburgh*, 6 Duer, 703; 15 How., 363.

When an answer has once been returned for undue service, an omission to send it back again, if served and left a second time, will not render the judgment irregular. *Jacobs* vs. *Marshall*, 6 Duer, 689.

Judgment entered up in a suit, actually abated at the time of entry, and not duly revived, has been held void. *Holmes* vs. *Honie*, 8 How., 383; *Gerry* vs. *Post*, 13 How., 118; *Warren* vs. *Eddy*, 13 Abb., 28.

Judgment by default at the call of the cause, taken against a defendant not served with notice of trial, will be void. *Tracy* vs. *New York Steam Faucet Manufacturing Company*, 1 E. D. Smith, 349. So also, as to an inquest. *Potter* vs. *Davison*, 8 Abb., 43. So also, where taken against partners, on an offer made by one only, without the consent of the other. *Binney* vs. *Le Gal*, 19 Barb., 592; 1 Abb., 283; *Blodget* vs. *Conklin*, 9 How., 442; *Bridenbecker* vs. *Mason*, 16 How., 203. See, however, *Lahey* vs. *Kington*, 22 How., 209; 13 Abb., 192.

The numerous cases in which judgment on an irregular confession has been vacated, have been already fully cited and commented upon, in book III., chapter III., section 48.

Where an order of reference has been improperly granted, a judg-

ment, entered up on the report taken under it, will not stand. *Sharp vs. Mayor of New York*, 18 How., 213; 9 Abb., 426; affirmed, 31 Barb., 578; 19 How., 193. See likewise, where the referee has proceeded in an unauthorized manner, *Brush vs. Mullany*, 12 Abb., 344.

If, when called on in its order, the cause is irregularly disposed of, by being sent to a sheriff's jury, the proceedings will be set aside. *Giberton vs. Fleischel*, 5 Duer, 652.

Where, on inquest taken by the court, its decision in writing was not filed, the judgment was held irregular. *Burger vs. Baker*, 4 Abb., 11.

So also, where, on a default suffered, proper *prima facie* proof was not given of the plaintiff's case, denied by the answer. *Patten vs. Hazewell*, 34 Barb., 421.

Judgment taken by default, for relief not demanded, or in excess of that demanded by the complaint, will be void. *Simonson vs. Blake*, 20 How., 484; 12 Abb., 331; *Hurd vs. Leavenworth*, 1 C. R. (N. S.), 278.

A judgment entered by a defendant, for costs resting in the discretion of the court, where no actual award had been made, was set aside in *Bank of Attica vs. Wolf*, 18 How., 102.

So also, as to a judgment entered in favor of a defendant, for costs to which he was not, in fact, entitled. *Van Schoning vs. Buchanan*, 23 How., 164; 14 Abb., 85; affirming *same case*, 23 How., 44.

Where the defendant is entitled to notice of assessment, judgment entered up without it, will be irregular. *Quin vs. Tilton*, 2 Duer, 648. Not so, however, where judgment is taken for an admitted balance, allowing a counter-claim in full. *Robbins vs. Watson*, 22 How., 293. And, an order for assessment by a sheriff's jury, taken *ex parte*, after appearance, will be set aside. *Saltus vs. Kip*, 5 Duer, 646; 12 How., 342; 2 Abb., 382. So likewise, a reference to ascertain damages, instead of assessing them by a sheriff's jury, will be vacated. *Hewitt vs. Howell*, 8 How., 346.

A judgment, actually extinguished, cannot be acted upon, and any proceedings taken under it will be set aside. *Craft vs. Merrill*, 4 Kern., 456. See also *Truscott vs. King*, 2 Seld., 147.

When an attorney has appeared for a party without authority, the court will, as a general rule, decline to set aside a judgment founded on such appearance, and leave the party to his remedy against the attorney, unless he be shown to be insolvent. See *Bogardus vs. Livingston*, 2 Hilt., 236. In such last-mentioned case, the party will be let in to defend, on terms. See *Blodgett vs. Conklin*, 9 How., 442. In *Ellsworth vs. Campbell*, however, 31 Barb., 134, it is held that, where an attorney has so acted, to the prejudice of a party who has not employed him, it is a wrongful act, and one which the courts are bound to redress,

without compelling the party to seek his remedy against the attorney. And, where a person, not an attorney, has acted without full authority, judgment entered by him will be set aside. *Roy vs. Harley*, 1 Duer, 637 ; 10 L. O., 29.

A partially irregular judgment was corrected, on motion, by striking out the irregular portion, in *Shearman vs. Justice*, 22 How., 241. See also, as to modifying a judgment, erroneous in part, *Walsh vs. Rutgers Fire Insurance Company*, 13 Abb., 33.

(b.) WHEN REFUSED.

An alleged parol agreement for the cancelling of a judgment, will not be recognized, in opposition to the oath of the adverse party. Nor will a motion to vacate a judgment be entertained, after it has been paid. *Mulligan vs. Brophy*, 8 How., 135.

A judgment, taken pending an appeal from an order, where no stay of proceedings has been granted, is regular, and will not be set aside. *Bacon vs. Reading*, 1 Duer, 622 ; 11 L. O., 122.

Where judgment had been entered against a married woman, for goods obtained by her by means of fraudulent representations of her being single, the court refused to set aside the judgment on motion, and left her to such remedy as she might have, by way of appeal. *Genet vs. Dusenbury*, 2 Duer, 679 ; 11 L. O., 355.

Where the irregularity sought to be impeached, was purely technical, and no real merits had been shown, or where an original defect had been in fact corrected, the courts have refused to interfere. See *Gordon vs. Sterling*, 13 How., 405 ; *New York Central Insurance vs. Kelsey*, 13 How., 535 ; *Jacquirson vs. Van Erben*, 2 Abb., 315 ; *Henry vs. Bow*, 20 How., 215 ; *Lewis vs. Jones*, 13 Abb., 427.

So also, where its alleged existence was not clearly made out, *Donadi vs. New York State Mutual Insurance Company*, 2 E. D. Smith, 519.

Where the right of the party to judgment was clear, though he had entered it up in an irregular manner, a *vacatur* was refused. *Runnell vs. Griffin*, 8 Abb., 39.

Judgment entered, on return of an answer, served before the complaint was drawn, was held regular, in *Phillips vs. Prescott*, 9 How., 430. So also, where an amended answer, which was in fact a nullity, that previously served not being amendable, was omitted to be returned. *Farrand vs. Herbeson*, 3 Duer, 655. See also, as to the inutility of an attempt to re-serve an irregular answer, already returned, *Jacobs vs. Marshall*, 6 Duer, 689.

A judgment entered, on returning an answer omitted to be verified, was sustained, no proof being adduced to show that the omission was warranted, in *Lynch vs. Todd*, 13 How., 546.

Where a settlement was obtained by fraud of the adverse party, before judgment was perfected, an entry subsequently made, in disregard of such settlement, was refused to be vacated. *Marquat vs. Mulvy*, 9 How., 460.

A second judgment for the same sum, though irregularly entered, was allowed to stand, where the debtor had contrived, by fraud, to procure satisfaction of one previously taken. *Weed vs. Pendleton*, 1 Abb., 51.

Where the conduct of a defendant, seeking to vacate a judgment for want of due service on him, had been evasive, the judgment was directed to stand as security, though he was allowed to come in and defend on terms. *Southwell vs. Marryatt*, 1 Abb., 218.

And a motion of this nature was denied altogether, where the defendant, originally cognizant of the irregular service, had delayed his application until after judgment and execution. *Hilton vs. Thurston*, 1 Abb., 318.

A question, as to irregularity, must be raised by motion, in the court in which the judgment has been entered. It cannot be raised, upon appeal to a higher tribunal. *Ingersoll vs. Bostwick*, 22 N. Y., 425.

§ 274. *Opening, as Matter of Favor.*

Applications of this nature fall more peculiarly under the powers conferred by section 174, especially that part of it providing that the court "may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him, through his mistake, inadvertence, surprise, or excusable neglect."

This subject has been already touched upon incidentally, under many of the heads above entered upon, especially under those of judgment upon inquest, or by default, and it will be here considered only in its more general aspect.

The proceedings for the purpose are substantially the same as those on a motion on the ground of irregularity, as treated of in the last section. The application must be noticed, grounded on affidavits, brought on, and disposed of in the same manner, and, on the relief being granted, the same measures must be taken by the moving party, to procure a due entry of the *vacatur* of the judgment, if granted, in order to discharge its lien. If, on the contrary, the judgment be directed to stand as security, the entry and service of the order, is all that will be admissible, until further action by the court. The motion must be noticed for a special term, but, in the first district, may be made to a justice out of court. See *Lowber vs. Mayor of New York*, 5 Abb., 325.

The moving affidavit should, in all cases of motion, on the part of the

defendant, comprise the substance of an affidavit of merits, unless one has been already filed and served. Where the application is to open a judgment taken by default, the nature of the proposed defence should be disclosed, either by substantive statements in the affidavit, or by preparing, and serving with the moving papers, a copy of the proposed answer. The date of the entry, or service of notice of the judgment, should in every instance appear. The case must also be clearly brought within some one or more of the four grounds of motion prescribed by section 174, and circumstances must be stated in detail, to substantiate this, by sufficient allegations of fact ; and, if the motion is not made immediately after the entry of judgment, the delay must be fully explained, so as to rebut the imputation of want of due diligence in the application. If the judgment is in course of actual or anticipated enforcement, a stay of proceedings should be applied for, either separately by *ex parte* proceeding, or by bringing up the question by means of an order to show cause.

In *Wetmore vs. Law*, 34 Barb., 515 ; 22 How., 130, it was held that a motion of this nature might be sustained, on proof of facts arising since the judgment was entered, of such a nature as to render it clear that such judgment ought not to be executed, provided those facts were undisputed.

The successful party has been held to be equally entitled to relief in this respect, as he would have been, in case the judgment had been rendered against him. He comes within the spirit, though not within the letter of the section. *Montgomery vs. Ellis*, 6 How., 326.

By 2 R. S., 246, sections 116, 117, special power was given to the Courts of Common Pleas to stay proceedings upon, and to set aside justices' judgments, on allegation that they were entered up with intent to defraud creditors, on application of any outside creditor, and the same power is doubtless possessed by the present county courts.

But, in the courts of higher jurisdiction, a judgment cannot be impeached on motion of a person not a party to the record, save only in the case of those entered on confession, to which, in fact, the provision of the Revised Statutes, above alluded to, primarily refers. See *Jackson vs. Sheldon*, 9 Abb., 127.

The Marine Court has special power to open upon motion, a judgment entered by default ; but, when the application is made in relation to a case which has been tried, on the ground of fraud or irregularity, it can only be reached through its general term, by means of an appeal. *Martin vs. The Mayor of New York*, 20 How., 86 ; 11 Abb., 295 ; affirmed, 12 Abb., 243.

By chapter 489 of 1859, section 5, p. 1127, special authority is given to the comptroller of the city of New York to take means, in the name

of the corporation, to open and reverse any judgments obtained, or to be obtained against the latter body, by collusion, or founded on fraud.

The Marine Court cannot entertain an application of this description by way of motion, but only through the medium of appeal. *Martin vs. The Mayor of New York, supra.*

But, in the higher tribunals, relief of this nature has been extensively administered, and similar jurisdiction had been previously exercised, under the general powers of the court, on the application of the officer in question, in his character of an individual tax-payer, in *Lomber vs. The Mayor of New York*, 26 Barb., 262; 15 How., 123; 5 Abb., 484; affirming, with modifications, *same case*, 5 Abb., 325.

Relief, as above noticed, has been recently granted under this statute, in the following cases: *Sharp vs. The Mayor of New York*, 31 Barb., 572; 18 How., 97; 9 Abb., 243, holding the constitutionality of the statute, that it should be liberally construed, and that it is not necessary that the grounds on which the judgment is impeached, should be shown by affidavits of the comptroller. *Same case*, 18 How., 213; 9 Abb., 426; 31 Barb., 578 (581); affirmed, 31 Barb., 578; 19 How., 193. The bare affidavit of the comptroller, of his belief, will not, standing alone, be sufficient; fraud or collusion must be shown, and, if shown, the judgment will be vacated. *Outwater vs. The Mayor of New York*, 18 How., 572; *Joyce vs. The Same*, 20 How., 439; 12 Abb., 309. See, as to the costs on such an order, *former case*, 20 How., 213. On such a motion, the merits will not be inquired into, if collusion, fraud, or irregularity be established. *The People vs. The Mayor of New York*, 11 Abb., 66. See also *same case*, 19 How., 289.

And even when the application is not brought strictly within the statute, the same relief may be granted on general grounds. *Millmann vs. The Mayor of New York*, 18 How., 542. See also *Pettigrew vs. The Same*, 17 How., 492.

Where the case presents any feature, tending to cast a suspicion of fraud, which may be established on a retrial, a judgment may be opened, on motion, instead of turning over the party aggrieved to a new suit to set it aside. *Griswold vs. Griswold*, 14 How., 446. In relation to the circumstances, under which such a suit will or will not be maintainable, see *Munn vs. Worrall*, 16 Barb., 221.

Where, after the recovery of judgment against her for costs, the plaintiff was found, on inquisition of lunacy, to have been insane, prior to an alleged settlement of the controversy, on which that judgment was predicated, it was set aside. *Demelt vs. Leonard*, 19 How., 140; 11 Abb., 252.

Where a judgment was founded upon a contract, containing an

evident mistake, it was set aside, and the defendant allowed to come in. *Pettigrew vs. The Mayor of New York*, 17 How., 492.

A judgment, suffered by surprise, and excusable neglect in serving an answer actually prepared, was opened in *Mann vs. Provost*, 3 Abb., 446. The same case is authority, that a judgment, in a proceeding for determination of claims to real estate, stands on the same footing as ordinary judgments, in this and in all other respects.

In *Hayden vs. McDermott*, 9 Abb., 14, relief was granted in a case of cross-judgments, by directing payment of the excess, and that both should then be satisfied.

Where judgment has been taken by default, and merits are sworn to, and an actual defence disclosed, the rule will be to open the default upon terms. *Quinn vs. Case*, 2 Hilt., 467; 9 Abb., 160; *Commissioners of Excise vs. Hollister*, 2 Hilt., 588; *Clark vs. Lyon*, 2 Hilt., 91. See, as to a case of technical irregularity in service, but where the proceedings of the defendant had been evasive, *Southwell vs. Marryatt*, 1 Abb., 218.

When the defendant showed himself to be aggrieved, by having the case forced on at the circuit, an order opening the judgment upon terms, was sustained on appeal. *Miller vs. Porter*, 17 How., 526.

A joint-debtor, not served with process, was allowed to come in and defend the original action, the judgment standing as security, in *Ford vs. Whitridge*, 9 Abb., 416; *Cleveland vs. Porter*, 10 Abb., 407.

When a regular judgment is set aside, it will usually be so, on condition that the costs incurred on entering it up are to be paid. See *Kane vs. Demarest*, 13 How., 465; *Quinn vs. Case*, 2 Hilt., 467; 9 Abb., 160. And also frequently, the costs of the motion. See *Mann vs. Provost*, 3 Abb., 446 (450); *Bennett vs. Le Roy*, 6 Duer, 683; 14 How., 178; 5 Abb., 55.

Conditions may also be imposed upon the defendant, in respect of the form of answer to be put in. *Mann vs. Provost*, *supra*. Or restrictions, in respect to steps taken by him in a collateral proceeding. *Bennett vs. Le Roy*, *supra*. See likewise *same case*, 5 Abb., 156.

Or the applicant may be required to give security, for any amount ultimately found due. *Jones vs. United States Slate Company*, 16 How., 129.

If there exist any doubt, as to the solvency of the applicant, the judgment actually entered, and any execution, or proceedings under that judgment, may be ordered to stand as security, although the party be admitted to defend. *Blodget vs. Conklin*, 9 How., 442; *Clark vs. Lyon*, 2 Hilt., 91; *Southwell vs. Marryatt*, 1 Abb., 218; *Cleveland vs. Porter*, 10 Abb., 407. See also stringent terms imposed in *Selover vs. Forbes*, 22 How., 477.

But, when the judgment has been ordered so to stand, the creditors

cannot take any further proceedings upon it, pending the controversy. *Ford vs. Whitridge*, 9 Abb., 416. And, where an amendment is allowed, the judgment cannot be directed to stand as security, for any thing beyond the amount recoverable under the original complaint, on which it was founded. See *Union Bank vs. Mott*, 19 How., 114; 10 Abb., 376.

A judgment, ordered to stand as security, is no longer final and absolute in its nature, nor does it prevent the taking of any proceedings in the suit, not founded upon it, but independent in their effect. An order of arrest is, therefore, obtainable, whilst the action stands in this position. *Union Bank vs. Mott*, 16 How., 525; 8 Abb., 150; affirmed, 17 How., 353; 9 Abb., 106.

Terms imposed by the order, must in all cases be strictly complied with. Thus, where a plaintiff's default was opened, by giving him leave to stipulate, it was held that he was bound to give the stipulation, even though its performance was practically impossible. His proper course was to give it, and then present his matters of excuse, in answer to the motion founded on his neglect. *Gale vs. Vernon*, 4 Sandf., 709.

If the applicant fail to comply with the terms imposed upon him, the order will, of course, become null, and it will be important for the opposing party to see that the imposition of them is clearly expressed, and made a positive condition, on the face of the order. And, wherever the applicant's solvency is in any manner doubtful, his opponent should be prepared with affidavits to that effect, to be used on opposing the motion, so as to form ground for a demand that the judgment stand as security, or for any other similar relief that the exigencies of the case may require; the application may also be opposed generally, on proof of matter tending either to controvert, or to avoid the case made by the moving affidavits.

But, where the terms imposed have been substantially performed, and a *bond fide* attempt made to effect a complete compliance, the failure of which is not owing to any *laches* on the part of the applicant, the order will stand. *The People vs. Louber*, 7 Abb., 158.

In *Jewett vs. Crane*, 35 Barb., 208; 13 Abb., 97, it was held that an application of this nature might be made by sureties, seeking to defend in place of their principal.

A proceeding analogous to the above, is provided for by the Revised Statutes, in the case of a limited divorce, on application of the parties, and satisfactory evidence of a reconciliation being adduced. *Vide* 2 R. S., 147, § 56.

A judgment may, of course, be vacated by stipulation between the attorneys, and where it is clear that an unconditional order would be

granted by the court, the practice is usual and convenient. If, however, the case is one, in which the imposition of conditions might be justifiably asked for, this step will not be prudent, and an attorney who takes it, without the instructions of his client, does so at his own peril, in the event of its being shown that the latter has sustained any loss or disadvantage in consequence. See *Clusman vs. Merkel*, 3 Bosw., 402.

In *Church vs. Rhodes*, 6 How., 281, relief of a peculiar and special nature was administered. The defendant had there moved for a rehearing of a referee's report, on which judgment had been entered, as provided for by section 272 of the Code of 1849. Pending that proceeding, the amendments of 1851 were passed, which took away his remedy in this respect, and, in the mean time, the period for appealing had run out. The court, under these circumstances, allowed a motion to be made, to take the judgment off the roll *pro formâ*, in order to its immediate re-entry, with a view to restore the defendant's right to a review, by appeal, under this unusual state of things.

(a.) WHEN REFUSED.

But, as a general rule, a judgment will not be vacated, in order to its re-entry, for the purpose of extending the right of a party to appeal. See *Marsten vs. Johnson*, 13 How., 93; *Humphrey vs. Chamberlain*, 1 Kern., 274.

Nor, where there are no real merits in the defence proposed to be put in, or such defence is clearly untenable or unconscionable. See *Dwight vs. Webster*, 32 Barb., 47; 19 How., 349; 10 Abb., 128; *Hawes vs. Hoyt*, 11 How., 454; *King vs. Merchants' Exchange Company*, 2 Sandf., 693; *Plumb vs. Whipples*, 7 How., 411; *Mulligan vs. Brophy*, 8 How., 155; *Morris vs. Slatery*, 6 Abb., 74.

Nor, when the applicant is chargeable with *laches* in making the application. See *White vs. Featherstonhaugh*, 7 How., 357; *Toole vs. Cook*, 16 How., 142; *Fake vs. Edgerton*, 6 Duer, 653; *Bogardus vs. Livingston*, 7 Abb., 428. See also *Lee vs. Watkins*, 13 How., 178; 3 Abb., 243; *Whitney vs. Kimball*, 6 Bosw., 690.

§ 275. *Opening, where Service by Publication.*

This relief is a matter of special provision, under the concluding clause of section 135, with the exception of cases of divorce, and it may be obtained, either by the actual defendant, or by his representatives. Sufficient cause must be shown, and the existence of an actual defence upon the merits made manifest. This done, the opening is a matter of *quasi* right, though it rests in the discretion of the court. Terms may be imposed, and the application must be made, within one year after

notice of the judgment, and within seven years after its rendition. If delayed beyond either period, it will no longer be admissible, and the judgment will stand absolute.

This motion must be distinguished from a motion to open a judgment of this description, on the ground of irregularity, which rests on different grounds, and demands the application of different principles.

The application for this purpose must be made on motion, on the usual notice, grounded on affidavit. That affidavit should show upon its face the following requisites:

1. The date of entry of judgment, and the nature of the action.
2. Unless apparent on the previous statement, that such must be the case, it must be shown affirmatively, that notice of the judgment has not been received by the applicant, until within one year previous to the application, and the actual date and mode of receipt of such notice may be stated.
3. Good cause must be shown, on the face of the affidavit, why the applicant should be allowed to defend. The usual affidavit of merits should, in all cases, be incorporated or annexed; and, in addition, the existence and nature of the defence proposed to be put in, should be shown by distinct and definite allegation. It may be also convenient, and will be the better practice, to prepare and submit with the moving papers, the form of the proposed answer.

The affidavit, so prepared, should be sworn to by the actual applicant, whenever practicable, or, if not, then by his attorney or agent, stating fully, the reasons why it cannot be made by the former.

The consideration of the essentials of this application has been already in part touched upon, in book III., chapter III., section 56, under the head of service of this nature.

It is clear, though not provided for by the section, that it is competent for the plaintiff to oppose the application, and to rebut the case made out by the defendant, either as regards the showing of good cause to defend, or otherwise. In *Dykers vs. Woodward*, 7 How., 313, leave to defend was refused, the answer served, clearly presenting no valid opposition to the plaintiff's case.

The court is expressly authorized to impose, on the granting of the application, such terms as may be just, and the allowing the judgment, and any consequent proceedings, to stand as security, is a condition that may be reasonably asked for. See *Carswell vs. Neville*, 12 How., 445. And, where the defendant is a non-resident, security for costs may of course be required.

If a defence be allowed, the cause proceeds to a trial in the usual course, as on an original joinder of issue.

Restitution is expressly provided for by the section, in the event of

that defence proving successful. And, by rule 25, additional security is now provided, by the undertaking required to be taken, before judgment is originally awarded, and which, in default of such restitution, is enforceable by the defendant in the usual manner.

§ 276. *Satisfaction of Judgment.*

The last matter to be considered, with reference to the subject of judgments, is the proceedings for their satisfaction of record, when paid or otherwise discharged.

The Code does not contain any provisions on this subject, which is still regulated by those of the Revised Statutes. The latter have been already referred to, and cited, so far as it is necessary, in chapter I. of the present book, section 248.

A satisfaction-piece must be prepared, and signed by the judgment-debtor or his representatives, and acknowledged before a commissioner, or other party competent to take the acknowledgment of deeds, and then lodged with the clerk of the court in which the judgment is entered.

Within two years from the entry of judgment, the attorney of record is also competent to acknowledge satisfaction. At the expiration of that period, his authority ceases altogether. It is also capable of revocation by the party, in the mean time.

When lodged with the clerk, satisfaction is entered by him at once in the judgment-book. If the judgment be docketed in any other county, or in the same, when the court is of limited jurisdiction, and its judgments are not docketed in the county clerk's office, a transcript or transcripts of the satisfaction, should be applied for, and docketed in each county in which the judgment is subsistent as a lien. The entry of a reversal or *vacatur* of the judgment, when made by the clerk, on lodgment of the order for that purpose, may be docketed in other counties, by means of a transcript obtained in the same manner.

And, when the judgment has been satisfied, and execution issued to the sheriff of any other county than that in which the judgment is entered, the party paying the amount is entitled to demand from such sheriff, a certified copy of the execution, and of his satisfaction indorsed thereon. When obtained, this must be lodged with the clerk of the county of original entry; and, when so lodged, it has the same effect as the entry of an ordinary satisfaction. See chapter 6 of 1860, p. 13.

When the judgment is satisfied, by execution issued to the sheriff of the same county, the clerk makes the entry, on the filing of his return, of which transcripts can then be obtained, and filed in other counties, or otherwise, in the manner above stated.

The sheriff's fee for such a transcript is twenty-five cents. The commissioner's fee for taking an acknowledgment, the same amount. The clerk's fee for entering satisfaction is twelve and a half cents, and for each transcript delivered by him, twelve and a half cents.

If, after payment of a judgment, the party subsequently refuse to sign the necessary papers for entering satisfaction, so as to discharge all liens thereunder, he may be compelled to do so, by an application to the court, on affidavit of the facts. The affidavit must, however, show an offer to pay all reasonable expenses, at the time that such papers are tendered for his signature, to which he is of course entitled. It is, however, highly inexpedient to delay the entry of satisfaction, on the payment of a judgment of whatever nature. By far the wiser practice is to do so at once, and that, in every county in which the judgment has been docketed. An usual course in these cases, is for the satisfaction-piece to be prepared on the part of the defendant, and the signature of the plaintiff's attorney obtained, and his acknowledgment taken, at the time of settlement, which saves any further trouble, and also any expense, except the usual commissioner's fees on that acknowledgment.

Where there is any doubt or conflict of evidence, a judgment should not be set aside, on motion of a subsequent lien holder, on allegation that it is satisfied. He should be left to his action for that purpose. See *Frink vs. Morrison*, 13 Abb., 80.

The execution and acknowledgment of a satisfaction-piece, if unexplained, is conclusive evidence that the judgment has been paid, in money, or some equivalent. *Wright vs. Smith*, 13 Barb., 414.

An attorney has no authority to sign a satisfaction-piece, for any other consideration than an actual payment of money in full. If he attempts it in any other form, his client may repudiate the arrangement, however *bonâ fide* in its making, and the satisfaction may be vacated. *Lewis vs. Woodruff*, 15 How., 539.

Payment of a justice's judgment to the justice, entitles the defendant and all other parties, to treat the debt as satisfied, and the plaintiff cannot repudiate the transaction. *Dexter vs. Broat*, 16 Barb., 337. So also as regards a tender to the plaintiff. *Same case*.

Imprisonment of the defendant in execution is, *pro tanto*, a satisfaction of the debt, whilst it continues, and a consent to let him go at large will work an absolute discharge of the judgment. *Bank of Beloit vs. Beale*, 20 How., 331; 11 Abb., 375 (379).

An executory agreement to accept payment for a judgment in a specific manner, when performed, will of course be a discharge, and may operate as a stay in the interim; but, if there be a partial failure of performance, the party will, on such failure, be remitted to his original

rights of enforcement. *Haggerty vs. Simpson*, 1 E. D. Smith, 67. See likewise *Crosby vs. Wood*, 2 Seld., 369.

So long as a judgment remains satisfied of record, and until the satisfaction is actually vacated, no proceeding can be grounded upon it, under any circumstances. *Ackerman vs. Ackerman*, 14 Abb., 229.

(a.) VACATING SATISFACTION.

Where, after formal satisfaction of a decree in chancery, it subsequently appeared that the lands, by sale of which the amount had been raised, were not salable, and that no title was obtained by the purchaser, the previous entry of satisfaction was vacated, and a new execution ordered to be issued. *Suydam vs. Holden*, Seld. Notes, 7th of October, 1853, p. 16. See also *Field vs. Paulding*, 3 Abb., 139; 1 Hilt., 187.

And, where the consideration on which satisfaction had been entered had wholly failed, by reason of the invalidity of a substituted judgment, it was held that such failure might entitle the creditors to have such satisfaction vacated, or removed from the record. *Hammond vs. Bush*, 8 Abb., 152 (169).

And a satisfaction of judgment, entered by the client on a private arrangement, in fraud of his attorney's lien for his costs and compensation, will be vacated. *Rooney vs. Second Avenue Railroad Company*, 18 N. Y., 368.

Where, however, the application on the part of the attorney was unreasonably delayed, the court refused to interfere. *Winans vs. Mason*, 33 Barb., 522; 21 How., 153.

If entered by the attorney without authority, the satisfaction may be vacated. *Vide Lewis vs. Woodruff, supra*.

(b.) OTHER POINTS.

The mere payment of a judgment does not preclude an appeal, unless such payment has been made, by compromise and agreement to settle the controversy. See *Wells vs. Danforth*, 1 C. R. (N. S.), 415. An entry of satisfaction procured by the defendant himself, might, however, have a different effect.

As to the power to keep a judgment alive, by means of an assignment, for the benefit of a person not a party to the record, by whom it has been paid, see *Harbeck vs. Vanderbilt*, 20 N. Y., 395.

BOOK XII.

EXECUTION AND ITS INCIDENTS.

CHAPTER I.

OF EXECUTION AND ANALOGOUS REMEDIES.

§ 277. *Statutory Provisions.*

THE Code contains the following provisions on the subject, constituting chapter I., title IX., part II. :

§ 283. (238.) Writs of execution for the enforcement of judgments, as now used, are modified in conformity to this title, and the party in whose favor judgment has been heretofore or shall hereafter be given, may, at any time within five years after the entry of judgment, proceed to enforce the same as prescribed by this title.

Dates from 1849. Substantially the same in 1848.

§ 284. (239.) After the lapse of five years from the entry of judgment, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or non-resident, or cannot be found to make such service, in which case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given, unless it be established by the oath of the party, or other satisfactory proof, that the judgment or some part thereof remains unsatisfied and due. But the leave shall not be necessary, when execution has been issued on the judgment within the five years, and returned unsatisfied in whole or in part.

When judgment shall have been rendered in a court of a justice of the peace, or in a justices' or other inferior court in a city, and docketed in the office of the clerk of the county, the application for leave to issue execution must be to the county court of the county where the judgment was rendered, or, in the city and county of New York, to the Court of Common Pleas of that city and county.

Last sentence of first clause added in 1858. Rest dates from 1851. No provision for substituted service in 1849. Last clause omitted in 1848.

§ 285. (240.) Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for a contempt.

Dates from 1849. Substantially the same in 1848.

§ 286. (241.) There shall be three kinds of execution; one against the property of the judgment-debtor; another against his person; and the third for the delivery of the possession of real or personal property, or such delivery, with damages for withholding the same. They shall be deemed the process of the court, but they need not be sealed nor subscribed, except as prescribed in section 289.

§ 287. (242.) When the execution is against the property of the judgment-debtor, it may be issued to the sheriff of any county where judgment is docketed. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties.

Real property adjudged to be sold, must be sold in the county where it lies, by the sheriff of the county, or by a referee appointed by the court for that purpose, and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold.

An execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her, from her separate property, and not otherwise.

The last sentence added on the amendment of 1862. The remainder of the section dates from 1852. In 1851, it was substantially the same, with some verbal differences. Prior to that year the second clause was omitted.

§ 288. (243.) If the action be one in which the defendant might have been arrested, as provided in section 179 and section 181, an execution against the person of the judgment-debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part.

But no execution shall issue against the person of a judgment-debtor, unless an order of arrest has been served, as in this act provided, or unless the complaint contains a statement of facts, showing one or more of the causes of arrest required by section 179.

Concluding sentence added on amendment of 1862. Rest of section dates from 1849. Substantially the same in 1848.

§ 289. (244.) The execution must be directed to the sheriff, or coroner, when the sheriff is a party, or interested, subscribed by the party issuing it,

or his attorney, and must intelligibly refer to the judgment, stating the court, the county where the judgment-roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

1. If it be against the property of the judgment-debtor, it shall require the officer to satisfy the judgment out of the personal property of such debtor, and, if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter.

2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the officer to satisfy the judgment out of such property.

3. If it be against the person of the judgment-debtor, it shall require the officer to arrest such debtor and commit him to the jail of the county, until he shall pay the judgment, or be discharged according to law.

4. If it be for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents and profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall in that respect be deemed an execution against property.

Dates from 1849. Less explicit and extensive in 1848.

§ 290. (245.) The execution shall be returnable within sixty days after its receipt by the officer, to the clerk with whom the record of judgment is filed.

Dates from 1849. The difference in 1848 was merely verbal.

§ 291. (246.) Until otherwise provided by the legislature, the existing provisions of law, not in conflict with this chapter, relating to executions, and their incidents, the property liable to sale on execution, the sale and redemption thereof, the powers and rights of officers, their duties thereon, and the proceedings to enforce those duties, and the liability of their sureties, shall apply to the executions prescribed by this chapter.

Dates, as it stands, from 1851. The phraseology was changed in that year, and also in 1849, but the substance of the provision was nearly the same throughout.

The provisions referred to in the last section are numerous, and are chiefly to be found in the Revised Statutes. It may be convenient shortly to notice, or to refer to such of them as are not in conflict with the Code, and which, therefore, retain their vitality; but, inasmuch as

those of this class are special, and not general, in their nature, and refer to particular proceedings, or particular steps in the general procedure, the author has thought it the simpler course, to refer to each of them, in connection with the proceedings to which it peculiarly relates, instead of citing them generally at the commencement of the chapter.

§ 278. *General Characteristics.—Preliminary Proceedings, when Requisite.*

The Code, though remodelling the original statutory provisions as to the form, and somewhat enlarging the scope of an execution, has left the former proceeding substantially unaltered, under the general saving effected by section 291. See per Hubbard, J., in *Gridley vs. McCumber*, 5 How., 414; 3 C. R., 211, thus: "The Code, in my judgment, does not materially change the law, as it previously existed, on the subject of executions; except that it prescribes a formula for the writ; the different kinds, and primary objects, remain as heretofore."

The period within which that process is issuable is, however, materially enlarged by section 283, and the former restrictions, by which the successful party was obliged to wait thirty days from the entry of judgment, are removed. It is now issuable, immediately on such entry, except under the circumstances below referred to. See *Swift vs. De Witt*, 3 How., 280; 1 C. R., 25; 6 L. O., 314; *Catskill Bank vs. Sanford*, 4 How., 101; 2 C. R., 53.

Whenever the sheriff is a party, process against him issues to the coroner of the county, who acts in the same manner and with the same powers. *Vide* 2 R. S., 441, sections 84 to 95, part III., chapter VII., title VI., article VIII.

(a.) ALIAS EXECUTION.

If, on its original issuing, the execution be inefficient for the purpose of obtaining payment of the demand sought to be recovered, it may be reissued, as often as may be necessary, until effectual. See *Peck vs. Tiffany*, 2 Comst., 451.

Since the amendment of section 284, effected in 1858, it would seem that such an execution may be issued at any time, without regard as to whether five years have or have not elapsed since the entry of judgment, provided an original execution has been issued within the five years, and returned unsatisfied, in whole or in part.

And such an execution may be issued, in the event of the escape of an imprisoned debtor. 2 R. S., 364, section 8. Or in that of his decease in custody. 2 R. S., 368, sections 28, 29, 30.

Also, in the event of a sale of real estate being set aside for irregu-

larity, and the purchaser evicted, and of the purchase-money being recovered back by him. 2 R. S., 375, section 69.

Nor does the mere issuing of such an execution have the effect of staying supplementary proceedings, if pending at the time, unless it is clear that the levy will satisfy the judgment. *Lilliendahl vs. Fellerman*, 11 How., 528; 2 Abb., 155; *Sale vs. Lawson*, 4 Sandf., 718. See, however, as to an alias execution issued after five years, *Belknap vs. Hasbrouck*, 13 Abb., 418, note.

As to the right to issue an alias execution against further assets, come to the hands of an executor or administrator, on leave obtained from the surrogate for that purpose, see 2 R. S., 117, section 22.

(b.) SUSPENSION OF EXECUTION.

The death of a party after judgment, but before execution issued against him, suspends that issue, for one year from the date of his decease, but not otherwise. *Vide* 2 R. S., 368, section 27.

As to the temporary suspension of a levy, under execution on judgment against the corporation of New York, see chapter 379 of 1860, p. 645, section 5, below referred to.

The death of the plaintiff wholly suspends the issuing of execution, nor will the doctrine of relation protect an actual executor, who has taken that step, without having duly qualified. *Bellinger vs. Ford*, 21 Barb., 311; *Same case*, 14 Barb., 250.

Under these circumstances, no proceeding can be taken, until the suit has been revived by a party duly qualified. Or the more available remedy may seem to be by a new action, in substitution for the former writ of *scire facias*, the writ itself being abolished. Section 428. *Thurston vs. King*, 1 Abb., 126; *Jay vs. Martine*, 2 Duer, 654; *Cameron vs. Young*, 6 How., 372; *Wheeler vs. Dakin*, 12 How., 537; *Ireland vs. Litchfield*, 22 How., 178; *Frink vs. Morrison*, 13 Abb., 80.

When a default has been opened, allowing the judgment to stand as security, proceedings on it are stayed until the ulterior decision of the court, and, in the mean time, no execution can be issued. *Ford vs. Whitridge*, 9 Abb., 416.

(c.) LEAVE TO ISSUE, WHEN NECESSARY, IRRESPECTIVE OF CODE.

Not merely is the right to issue execution against the estate of a deceased defendant suspended for one year, as above noticed, but it is also necessary to obtain previous permission, from the surrogate of the county who has jurisdiction of the debtor's property. See chapter 295 of 1850, p. 639.

And execution cannot issue against an executor or administrator as such, until his account shall have been rendered and settled, or unless

on an order of the surrogate who appointed him. *Vide* 2 R. S., 88, section 32. See, as to the form and manner of such an application to the surrogate, by a creditor, who shall have obtained judgment against an executor or administrator, after a trial at law upon the merits, 2 R. S., 116, sections 19, 21. See likewise, as to a similar application, for leave to issue an alias execution, under these circumstances, for further assets, *quando acciderint*, 2 R. S., 117, section 22.

In *Alden vs. Clark*, 11 How., 209, it was considered that not merely was the surrogate's permission necessary under the act of 1850, in order to the issuing of execution against the estate of a deceased defendant, but that the leave of the court must also be applied for in all cases, whether five years have or have not elapsed. It is also held that notice of such application, must be given to all parties interested in the estate of the deceased.

This proceeding seems more peculiarly applicable, to cases where there is no representative of the estate of the deceased judgment-debtor. Where his will has been proved, or administration taken out, the proper course will be to summon the representatives or parties interested, to show cause why the judgment should not be enforced against the estate of the deceased debtor in their hands, under the special power given for that purpose in section 376. See, as to this proceeding and its incidents, *Mills vs. Thursby* (No. 10), 12 How., 385; 2 Abb., 432. On the judgment obtained on this proceeding, execution issues by leave of the surrogate, in the ordinary course.

When an account has been rendered and settled by an executor or administrator, it is no longer necessary to obtain the surrogate's permission previous to issuing execution; but such execution can only issue for a just proportion of the assets appearing to be applicable. If for more, it will be irregular. *Olmstead vs. Vredenburg*, 10 How., 215.

See, as to refusal on the part of a surrogate to decree payment of a judgment-debt out of the assets of a deceased party, in anticipation of the usual period of settlement, *Claim of Mills vs. Estate of Thursby*, 11 How., 126.

(d.) LEAVE TO ISSUE UNDER CODE.

An application for this purpose will be necessary, where execution is sought to be issued, after the lapse of five years from the entry of judgment. Section 284.

The only exception to the general rule is that, when execution has been issued on the judgment within five years, and returned unsatisfied in whole or in part, leave is unnecessary. This provision was first inserted on the amendment of 1858, and seems clearly to embrace all

cases of execution against the person, to which such a previous execution and return is a prerequisite.

That amendment carries out the views previously enounced in *Mc-Smith vs. Van Dusen*, 9 How., 245; *Pierce vs. Crane*, 4 How., 257; 3 C. R., 21; and *Kress vs. Ellis*, 14 How., 392. The contrary was held before the amendment, in *Currie vs. Noyes*, 1 C. R. (N. S.), 198; *Redmond vs. Wheeler*, 2 Abb., 117; *Swift vs. Flanagan*, 12 How., 438; *Sacia vs. Nestle*, 13 How., 572.

The last class of cases decides, that the former writ of *scire facias* under these circumstances is wholly abolished, and a fresh action under the Code substituted in its place. See also *Catskill Bank vs. Sanford*, 4 How., 101; 2 C. R., 58; *Same case*, 4 How., 101; *Jones vs. Lawlin*, 1 Sandf., 722; 1 C. R., 94. See likewise, as to execution after the decease of the plaintiff, *Thurston vs. King*, 1 Abb., 126; *Jay vs. Martine*, 2 Duer, 654; *Cameron vs. Young*, 6 How., 372; *Wheeler vs. Dakin*, 12 How., 537; *Ireland vs. Litchfield*, 22 How., 178; and *Frink vs. Morrison*, 13 Abb., 80, above noticed.

The same class of cases decides that the abolition of the former writ of *scire facias* was retrospective, as regarded actions commenced before the passage of the Code; and overrules the following, maintaining the contrary, and that, in that class of actions, the former writ was still available. *Anon.*, 1 C. R., 118; *Clark vs. Hutchinson*, 1 C. R., 127; 7 L. O., 91; *Merritt vs. Wing*, 4 How., 14; 2 C. R., 20; *Pierce vs. Crane*, 4 How., 257; 3 C. R., 21.

The application must be made to the court by which the judgment has been rendered, if a court of record; if not, to the county court of the county, and, in New York, to the Court of Common Pleas.

Personal notice must be given to the adverse party, unless he be absent, or non-resident, or cannot be found. Under these latter circumstances, service may be made by publication, or in such manner as the court may direct.

It is clear that, when this is the case, a preliminary application should be made to the court, or to a judge, asking directions as to the mode and duration of publication, or other form of service. The ordinary service by publication, under section 135, is clearly confined to cases of summons. The statute of 1853 is only partially applicable, and that statute requires an application to be made.

The motion must be brought on, on the usual notice, unless otherwise prescribed, or on order to show cause, which may embody every direction as to substituted service. And an affidavit should, in all cases, be made, that the judgment, or some part thereof, remains unsatisfied and due, specifying particulars, if there has been any partial satisfaction.

If the defendant appears, the motion will come on with the usual in-

cidents of a hearing. If he makes default, the order may be taken on the usual proof of service. But the official certificate of the sheriff of another state will not be sufficient. His affidavit must be procured. See *Thurston vs. King*, 1 Abb., 126.

An order of this description cannot be obtained, after abatement of the suit by the death of the plaintiff. See *Bellinger vs. Ford*, and *Thurston vs. King*, *supra*.

It cannot be obtained until the five years have elapsed. If moved for previously for another purpose, as where a previous execution was set aside as being void, it will have no prospective effect, in justifying an issuing after the period has elapsed. *Field vs. Paulding*, 1 Hilt., 187; 3 Abb., 139.

And, if issued after the five years without leave, the execution will be bad. See *Currie vs. Noyes*, 1 C. R. (N. S.), 198; *Redmond vs. Wheeler*, 2 Abb., 117; *Swift vs. Flanagan*, 12 How., 438; *Sacia vs. Nestle*, 13 How., 572. These four cases are partially overruled, in relation to the effect of a previous execution, by the amendment of the section in 1858, but, on the general principle, their authority is not shaken. See also *Alden vs. Clark*, 11 How., 209.

But the omission to obtain such leave, does not render the execution absolutely void, but only voidable. *Bellinger vs. Ford*, 21 Barb., 311; *Bank of Genesee vs. Spencer*, 18 N. Y., 150. See also, *Bacon vs. Cropsy*, 3 Seld., 195. See, however, as to a justice's judgment, *Bates vs. James*, 3 Duer, 45. Consent to the execution being issued, will also waive this irregularity. *Hulbert vs. Fuller*, 3 C. R., 55. See also *Merritt vs. Wing*, 4 How., 14; 2 C. R., 20.

If too long delayed, the application may be refused, as after a delay of more than twenty years, creating the presumption of payment. See *Kennedy vs. Mills*, 4 Abb., 132. See likewise, generally, *Sacia vs. Nestle*, 13 How., 572.

On the motion being brought on, the defendant may show any matter, tending to defeat or diminish the demand of the plaintiff; and, if he contests the existence or amount of the debt, a reference may be directed. *Catskill Bank vs. Sanford*, 4 How., 101; *Kennedy vs. Mills*, 4 Abb., 132.

He cannot, however, go behind the record, and question the regularity of the judgment. If he seeks to do so, he must make an independent application. The only inquiry is, whether that judgment, or any part of it, has been satisfied. *Lee vs. Watkins*, 13 How., 178; 3 Abb., 243. Nor can the operation of the execution, as against intermediate grantees of the debtor, be inquired into. See *Small vs. Wheaton*, 4 E. D. Smith, 427; 2 Abb., 316.

Where a valid set-off was alleged by the defendant, to an amount suffi-

cient to extinguish the plaintiff's claim, the motion was denied, and the latter left to his remedy by action. *Betts vs. Garr*, 1 Hilt., 411.

Where the defendant's discharge as an insolvent debtor had been set aside, liberty was granted to issue execution. *Small vs. Wheaton*, *supra*. See also *Browne vs. Bradley*, 5 Abb., 141. But such a discharge cannot be collaterally impeached by affidavit, to sustain an execution already issued in disregard of it. The court will leave the parties to their direct remedy. See *Dresser vs. Shufeld*, 7 How., 85. Leave to issue a fresh execution will be proper, where a prior satisfaction of the judgment has been vacated. *Suydam vs. Holden*, Seld. Notes, 7th of October, 1853, p. 16. See also, *Field vs. Paulding*, 1 Hilt., 187; 3 Abb., 139.

(e.) GENERAL OBSERVATIONS.

It is, on many accounts, essential that, in all cases, execution should be issued at once, and as speedily as possible; and this, even when it is clearly improbable that any thing can be immediately realized.

In the first place, until the issuing and return of such an execution, supplementary proceedings, with a view to the discovery of the debtor's property, cannot be maintained; and it is most expedient, that a basis should, at once, be laid for the adoption of those remedies, without technical delays, at any future period, when they may appear to be practically available.

In the second place, it is equally essential, with a view to form the basis for proceedings in the nature of a creditor's bill, should property be thereafter discovered.

And, in the third place, if issued and returned within five years, it relieves the party from the necessity of an application to the court, before issuing an alias execution, against subsequently acquired or discovered property.

Where execution against the person is admissible, it is equally important, as that description of process cannot be issued, until after the previous issuing and return of one against property. Besides which, any undue delay may form ground for a *supersedeas*. See below, under that head.

An unreasonable delay in issuing execution on a judgment, the collectibility of which had been guaranteed, was held to discharge the guarantor, in *Mains vs. Haight*, 14 Barb., 76.

On the other hand, an execution cannot be issued prematurely, as for an expected deficiency on the sale of mortgaged premises, before that deficiency has been duly ascertained. *Cobb vs. Thornton*, 8 How., 66. Where execution is an admissible remedy, and the debt is collectable under it, a surrogate's court cannot enforce payment of the same debt,

by the extraordinary process of attachment. *In re Latson*, 1 Duer, 696. See also *Doran vs. Dempsey*, 1 Bradf., 490, there cited.

§ 279. *Form and General Incidents.*

Whatever may be its nature, every execution possesses certain incidents in common, which it will be as well to notice preliminarily, as likewise the mode of direction applicable to each.

(a.) DOCKETING OF JUDGMENT.

That this is a necessary preliminary in all cases, is clear, from section 287; and the *dicta* in *Stephens vs. Browning*, 1 C. R., 123; 7 L. O., 61, and *Stoutenburgh vs. Vandenburg*, 7 How., 229, to the effect that an execution, though confessedly void as to real, may be enforceable as against personal property, in a county where the judgment has not been docketed, cannot safely be relied on; see likewise *De Agreda vs. Mantel*, 1 Abb., 130 (135); and the actual decision in *Stoutenburgh vs. Vandenburg*, is in fact authority to the same effect.

Execution cannot be issued upon a judgment which, at the time, stands satisfied of record. If the satisfaction be voidable for any cause, it must be first vacated. *Ackerman vs. Ackerman*, 14 Abb., 229.

(b.) FORM OF WRIT.

Execution, of whatever nature, is process of the court, and must be issued in the name of the people, and tested, *pro formâ*, in the name of a justice of the tribunal out of which it is issued. It must be issued by the same court by which the judgment was rendered. If erroneously issued out of another, the defect will be fatal. It will not merely be voidable, but void. *Clarke vs. Miller*, 18 Barb., 269.

It need not be under the seal of the court, but must be subscribed by the party issuing it, or by his attorney.

When execution is issued on the judgment of a court of record, no other subscription than the above is necessary. When, however, it issues upon a judgment originally rendered in a justice's court, or other similar tribunal, which has become a judgment of the county court, by being docketed under the power conferred by section 63, it must, in that case, be issued and subscribed by the clerk of the county. It should be prepared accordingly and presented to him for that purpose, and his signature obtained.

The execution must, in all cases, be directed to the sheriff of the county, into which it is issued, or to the sheriff of each such county, where more than one execution is issued at the same time. This course is expressly sanctioned by section 287. Each execution in such cases is

equally original process, and the docketing of judgment in each such county, is an equally necessary prerequisite.

When the execution is against specific property, it may be directed to the sheriff of any county, where such property or some part thereof is situated. If such property be in different counties, it cannot of course be fully reached, except by means of issuing an execution into each.

As to the expediency of issuing execution into every county in which there is known to be property of the judgment-debtor, without regard to that of his residence, see *The People vs. Norton*, 4 Sandf., 640. But, with a view to the institution of supplementary proceedings, the issuing into the county where the defendant resides, or has a place of business, should never be omitted. See section 292.

If the sheriff of any such county be a party, or interested, the execution must in that case be issued to the coroner, or, where there are more than one coroner in the same county, to one of such coroners, that one in whose immediate district the property to be taken is situate, being selected. In the event of both the sheriff and the coroners being disqualified, the writ may, it would seem, be directed to any disinterested person, designated by the court, or by a judge, by means of a special order. See 2 R. S., 364, sections 11, 12, according to the ancient practice of appointing elisors in such cases.

Where an attachment has been issued, and a levy made under it by a former sheriff, it seems that the execution on the judgment, when rendered, should be addressed to such former sheriff, and not to the sheriff then in office, and should be special in form, reciting the attachment, and directing a levy of the property taken under it. *McKay vs. Harrower*, 27 Barb., 463.

The execution, when issued, must intelligibly refer to the judgment, stating the court, the county where the judgment-roll or transcript is filed, the names of the parties, the amount of the judgment, if it be for money, the amount actually due thereon, and the time of docketing in the county into which the execution is issued. Care should be taken in all cases, to make a correct insertion of the amount of the judgment, and of the sum actually due thereon. An error of this nature would seem, however, to be amendable. See *Peck vs. Tiffany*, 2 Comst., 451; *Peet vs. Cowenhoven*, 14 Abb., 56.

To the above must be added the requisition to the sheriff, by which his duty is pointed out. In framing this requisition, the exact form prescribed by section 289, must be followed *verbatim*, according to the nature of each case.

Where the execution falls under the first of the three classes mentioned in section 286, and is issuable against the property of a living judgment-debtor, the requisition is, that the sheriff satisfy the judg-

ment, out of the personal property of such debtor, and, if sufficient personal property cannot be found, out of the real property belonging to him, on the day when the judgment was docketed in the county, or at any time thereafter. Section 289, subdivision 1.

When the execution is of the same class, but the judgment-debtor is deceased, and the judgment is sought to be enforced against real or personal property, in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, the direction must be, in that case, that the sheriff or other officer satisfy the judgment out of such property.

This special direction is essential, and, if omitted, will render the execution bad. And, where the accounts of representatives have been rendered and settled, execution can only be issued for the *pro rata* proportion of the assets applicable to the judgment. If such assets be insufficient, and execution direct a levy for the whole debt, it will be bad. See *Olmstead vs. Vredenburg*, 10 How., 215. See, as to the proper form of judgment in such cases, on a proceeding under section 376, *Mills vs. Thursby* (No. 10), 12 How., 385; 2 Abb., 432, before referred to.

And execution issued against a receiver, personally, for the costs of an unsuccessful action, will be bad altogether, unless they be specially directed to be paid by him. See *Marsh vs. Hussey*, 4 Bosw., 614.

When execution is issued on judgment entered up against a *feme covert*, under the power conferred by the recent amendments (1862), it must direct the levy and collection of the amount of the judgment against her, from her separate property, and not otherwise.

When the execution falls under class 2, in section 286, and is issuable against the person of the debtor, the requisition is that the officer "arrest such debtor, and commit him to the jail of the county, until he shall pay the judgment, or be discharged according to law." Section 289, subdivision 3.

And, when the execution falls under the third of those classes, and is for the delivery of specific property, the requisition then is that the officer "deliver the possession of the same, particularly describing it, to the party entitled thereto." Care must of course be taken, that the description so to be inserted, be particular and specific, and sufficient for the guidance of the officer, as a mistake on his part, may involve a serious responsibility.

The direction may also, at the same time, require the officer to satisfy any costs, damages, or rents and profits recovered by the same judgment, and also the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had, out of the personal property of the party against whom it was rendered; and, if

sufficient personal property cannot be found, then out of the real property belonging to him, on the day when the judgment was docketed, or at any time thereafter.

This is the clear purport of the direction prescribed by subdivision 4 of section 289. The verbal arrangement is not, however, the same in that subdivision, the order of the clauses being confused. Of course, it will be equally competent to follow that verbal arrangement, however wanting it may be in perspicuity.

This latter direction is expressly in the nature, and is in fact to be deemed as, *pro tanto*, an ordinary execution against property, under subdivision 1, and is subject so far to the same rules.

The directions in subdivision 4 of section 289, are in close analogy with the writ of possession, under the former practice, which may be substantially followed. See form given at 2 R. S., 308, section 34. And such writ may issue in favor of a defendant, recovering back possession, on a second trial on ejectment. 2 R. S., 310, section 41. As to the former power to include execution for costs or damages in the same writ, see 2 R. S., 342, section 22. As to the writ of possession, on the assignment of dower, see 2 R. S., 312, section 55, subdivision 3.

And, in an action for determination of claims to real property, a writ of possession may be issued, in favor of a defendant, brought into court by those proceedings, and who, upon the trial, shall recover, and be declared entitled to the immediate possession of the property. See chapter 511 of 1855, section 8, amending 2 R. S., 314, section 15.

In all cases, the execution usually concludes with a direction to the sheriff to return the execution to the clerk, within sixty days after its receipt. The clerk with whom the record of judgment is filed, is the proper clerk to be designated in such direction. Section 290.

But it has been held that this statement is not essential in its nature, not being prescribed by section 289, and that its omission will not be a fatal objection to the proceeding. *Fake vs. Edgerton*, 5 Duer, 681; 3 Abb., 229.

There can be no question, however, but that its insertion is both advisable and proper in all cases, and there may be a question whether the words, "shall be returnable," are not susceptible of a stricter construction.

When an attachment has been already issued, and a levy made under it, either by the sheriff in office at the time of the render of judgment, or by his predecessor, it seems that the execution should be special, and should recite the former attachment and the levy thereunder, and should require the judgment to be satisfied, by sale of the property already taken, in the first instance, and afterwards out of the property of the defendant generally. And it should be addressed to

the former sheriff, and not his successor, if there has been an intermediate change in the office. See *McKay vs. Harrower*, 27 Barb., 463.

(c.) INDORSEMENT ON EXECUTION.

When the execution has been prepared as above, it should be folded, indorsed at the back with the title of the cause, and the name and address of the attorney, or party in person, and directed to the sheriff.

And a special direction should be indorsed thereupon, addressed to such sheriff.

In the case of an ordinary money execution, the direction may be as follows: "Levy, as within directed, the sum of (stating the amount due), with interest thereon, besides your fees and expenses."

This direction must be signed by the attorney or party in person. The sum stated in it must be the precise amount due, giving credit for any payments or deductions, if any. And, where the execution is against executors, after account rendered and settled, the sum named must be the *pro rata* proportion of admitted assets, and not the total amount of debt.

The power to direct the levy of interest is contained in 2 R. S., 364, section 9, amended by chapter 324 of 1844, section 2. Where the execution is issued immediately upon the recovery of judgment, the above form will be sufficient. When otherwise, the direction should be modified thus: "With interest thereon from the — day of —, the time of recovering the within-mentioned judgment, until paid," giving the correct date.

In certain cases, however, the above form of indorsement must be changed or modified. Where a judgment is taken against joint-debtors, on service on one or more only, the execution, though formally issued against all, must be specially indorsed.

By 2 R. S., 377, sections 3, 4, the attorney issuing such execution must indorse thereon, the names of such of the defendants as were not served with the process by which the action was commenced. He must also direct such execution not to be served upon the person of any defendant whose name is so indorsed thereon, or levied upon the sole property of any such defendant.

The former instruction is applicable to execution against the person, the latter to that against property. The direction is essential to the regularity of the execution, and necessary for the guidance of the sheriff. In form, the process runs against all the joint-debtors, and is leviable against any property jointly owned by them; but, if the direction be omitted, and he levies on the property, or takes the person of a defendant not served, the act will be wrongful, and the party omitting the direction responsible for it.

Another case where a special indorsement is requisite is that of judgment entered on confession, to secure the payment of a debt payable *in futuro*.

Execution in this case is thus provided for, by section 384:

When the debt for which the judgment is recovered is not all due, or is payable in instalments, and the instalments are not all due, the execution may issue upon such judgment, for the collection of such instalments as have become due, and shall be in the usual form, but shall have indorsed thereon, by the attorney or person issuing the same, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and the costs of said judgment.

And it is further provided that, notwithstanding such execution, the judgment shall remain as a security for future instalments, and that execution may, from time to time, be issued in like manner, for the collection of the latter.

Another case of special indorsement is, where the judgment is in respect of a debt secured by mortgage of real estate. In such a case, the equity of redemption in such mortgaged premises, is not salable on execution; and a special form of indorsement is thus prescribed. *Vide* 2 R. S., 368, section 32.

Whenever execution shall be issued upon such judgment, "the plaintiff's attorney shall indorse thereon a brief description of the premises mortgaged, referring to the page and book of the record in which such mortgage is recorded, with a direction to the sheriff not to levy such execution upon the said premises or any part thereof."

Where execution is issued on judgment against a *feme covert*, a special direction should now be indorsed, that it be levied and collected from her separate property, and not otherwise.

(d.) ALIAS EXECUTION.

In form, an alias or *pluries* execution is the same as one originally issued, except that, to be technically correct, the words, "As we have before commanded you," may be inserted after the words, "We command," at the commencement.

The process will, in all respects, be the same, except that, if any thing has been received, the amount actually due must be correctly stated, and the indorsement made accordingly.

(e.) LODGMENT WITH SHERIFF.

When complete, prepared, and indorsed as above, the writ of execution must, in the last place, be lodged with the sheriff, or, when there are several, with the sheriff of each county into which one is issued.

On such lodgment, the sheriff is bound, if required, to give to the party delivering the same, a minute, in writing, specifying the names of the parties, the general nature of the process, and the day of receiving the same, on payment of the fees allowed by law, being nineteen cents. *Vide* 2 R. S., 440, section 75.

The docketing of the judgment in such county must, in all cases, precede this lodgment, as, until actual docketing, the judgment has no effect as a lien, the provisions of section 287 being express upon the subject.

When issued to the sheriff of a distant county, the usual course is to forward the writ by mail, and, if the judgment has not been already docketed, to enclose a transcript for that purpose, with instructions to the sheriff to file it in the county clerk's office, and to charge the payment in the account with his fees.

It is obvious that, in case any information is possessed by the plaintiff, in relation to the property seizable under such execution, such information should be communicated to the sheriff at the time the process is lodged, by letter or otherwise.

Upon the receipt of the execution, it is the duty of the sheriff or other officer to indorse thereon the year, month, day, and hour of the day when he received the same. 2 R. S., 364, § 10.

(f.) PRIORITIES.

The following are the rules upon this subject, as fixed by the Revised Statutes (see 2 R. S., 365, sections 13 to 17, inclusive):

Section 13 provides that the goods and chattels of the defendant, within the jurisdiction of the officer to whom the execution is issued, shall be bound, only from the time of the delivery of the same to be executed.

Section 14, that, if there be several executions issued out of a court of record, against the same defendant, that which shall have been first delivered to the officer to be executed, shall have preference, notwithstanding a levy be first made under another execution, but, if a levy and sale have been made under the second, before levy under the first, such sale is to stand.

Under section 15 the same rule is to prevail in determining preferences, where there are one or more executions, and one or more attachments, against the property of the same defendant, or if there be several attachments. See *Yale vs. Matthews*, 20 How., 430 ; 12 Abb., 379.

By section 16, an actual levy under an execution or attachment of a court not of record, takes precedence over any other execution of any other court, whether of record or not, not previously levied.

And, under section 17, the title of a *bonâ fide* purchaser of goods

The levy under an execution may comprise current coin, and also bills, and evidences of debt, circulated as money, belonging to the defendant. *Vide* 2 R. S., 366, §§ 18, 19.

When a sale of property has been made, a surplus in the hands of the officer may be levied upon by him, on another execution, or attachment against the same defendant. *Wheeler vs. Smith*, 11 Barb., 345.

But, it has been held, that money collected by the sheriff cannot be applied by him, to satisfy another execution against the plaintiff. See *Muscott vs. Woolworth*, 14 How., 477; reversing *same case*, 13 How., 336. The strict technical rule was held still to prevail, and such money must be paid over to the plaintiff, before it could be levied upon as his property.

So also, where property had been sold under a junior execution, it was held that the officer who sold it, could not retain the money to satisfy an execution against the plaintiff, but was bound to hand it over to another officer, holding the senior execution. *Betts vs. Hoyt*, 19 Barb., 412. The opinion contains, however, a *dictum*, adverse to the decision in *Muscott vs. Woolworth*, as applicable to a case where the counter-execution was in the hands of the same officer. *Vide* p. 414, per Harris, J.

On an execution against one member of a partnership, the copartner-ship property may be seized, with a view to a sale of the interest therein of such member, subject to an accounting between the parties on dissolution. *Hergman vs. Dittlebach*, 11 How., 46 (47). See also, as to a special partnership, *Artisans' Bank vs. Treadwell*, 34 Barb., 553.

But, where a partner had retired, the firm-name being continued, under a *bonâ fide* arrangement, his property could not, it was held, be levied upon, on behalf of a creditor, whose debt accrued subsequently to such retirement. See *Hamil vs. Willett*, 6 Bosw., 533.

But, as above shown, the sole property of a joint-debtor, not served with process, cannot be levied upon; nor can real property, comprised in a mortgage, on execution for the mortgage-debt.

Nor can a plaintiff, who has obtained a receiver of the defendant's estate, levy upon property covered by the receivership. *Gouverneur vs. Warner*, 2 Sandf., 624.

An unrealized chose in action cannot be levied upon, under an execution. *Ransom vs. Miner*, 3 Sandf., 692; 1 C. R. (N. S.), 98. Supplementary proceedings, or a creditor's bill, would be the proper course to reach it.

Nor can the bonds of a railway company, in the hands of an agent for the purpose of negotiation, be levied upon, as its property, before they are negotiated, even under an attachment. *Coddington vs. Gilbert*, 5 Duer, 72; 2 Abb., 242; affirmed, 17 N. Y., 489.

Nor can property be levied upon, the equitable ownership in which is not in the debtor, but in a third party. *Wood vs. Lester*, 29 Barb., 145. Or, goods sold and delivered, under a contract for payment by instalments, by the terms of which, the property therein is not to pass, until full satisfaction of the price. *Herring vs. Hoppock*, 3 Duer, 20; 12 L. O., 167; *Same case*, 15 N. Y., 409.

Trust property cannot be levied upon, under a judgment confessed by the trustee. *Mallory vs. Clark*, 9 Abb., 358; 20 How., 418.

A levy will hold good, against the claims of a receiver subsequently appointed, and the latter will be bound to account to the sheriff. *Rich vs. Loutrel*, 18 How., 121; 9 Abb., 356; *In re North American Gutta Percha Company*, 17 How., 549; 9 Abb., 79.

But the sheriff cannot levy upon property, or hold its avails, if sold, with notice, as against a receiver previously appointed. *Fessenden vs. Woods*, 3 Bosw., 550. And this, even though the security of such receiver be subsequently perfected. *Steele vs. Sturges*, 5 Abb., 442.

Fixtures annexed to, and forming part of, the real estate, to be habitually enjoyed therewith, cannot be levied upon and sold as personalty. See generally, *Breese vs. Bangs*, 2 E. D. Smith, 474, and cases cited.

Of this nature is a shanty erected for permanent use, and not removable, by stipulation. *Fisher vs. Saffer*, 1 E. D. Smith, 611.

But not so, as to a building erected by a lessee, and removable by license of the landlord. See *Dubois vs. Kelly*, 10 Barb., 496.

Removable machinery is in the nature of tenants' fixtures, and may be levied upon and sold. *Vanderpoel vs. Van Allen*, 10 Barb., 157. So also, as to looms, or other independent machines, which may be removed, without losing their character and value, though the motive power and gearing by means of which they have been worked, will, on the contrary, be held annexed to the freehold. *Murdock vs. Gifford*, 18 N. Y., 28.

In *Stevens vs. Buffalo and New York City Railroad Company*, 31 Barb., 590, and *Beardsley vs. Ontario Bank*, 31 Barb., 619, it was held that the rolling-stock and general implements of a railroad company, are personalty, and may be taken on execution; overruling the views to the contrary, as entertained in *Farmers' Loan and Trust Company vs. Hendrickson*, 25 Barb., 484.

Where, under the terms of a chattel-mortgage, the mortgagor retains a right to the possession of the mortgaged property, for any definite period, such property may be levied upon, under an execution against him, at any time whilst that right to possession continues, and may be sold and delivered by the sheriff, without any special reservation or declaration that the sale is only of the mortgagor's interest. At the expiration of the period, the mortgagee, on becoming entitled to the

possession, may follow such property in the hands of the purchasers. *Hull vs. Carnley*, 1 Kern., 501; 1 Abb., 158; reversing *same case*, 2 Duer, 99; 11 L. O., 334; *Hull vs. Carnley*, 17 N. Y., 202; *Asseler vs. Goulet*, 22 N. Y., 225; reversing *same case*, 1 Bosw., 467, note; *Galen vs. Brown*, 22 N. Y., 37 (39); *Mattison vs. Bancus*, 1 Comst., 295; *Hall vs. Sampson*, 23 How., 84; *Dillingham vs. Ladue*, 35 Barb., 38.

But a receiver has not the same power as a sheriff, and, if authorized to sell, must expressly limit the sale to the temporary right, and declare that it is made subject to the mortgage. *Manning vs. Monaghan*, 1 Bosw., 459. See, however, reversal, on ground of mistrial, 23 N. Y., 539.

See also, as to right of mortgagee to reclaim, as against purchasers, after the mortgage has become due, *Manning vs. Monaghan*, 23 N. Y., 539. In the same case, it was considered by Comstock, J., and a majority of the judges, that a mortgagee might recover, for damages to his reversionary interest, by reason of a sale being made in parcels. The question was not, however, passed upon. See Report, p. 552.

Where a mortgage was payable on demand, but, by agreement, the mortgagor was allowed to retain possession until default in payment, it was held that, until demand and failure, the property could be levied upon in his hands. *Liver vs. Orser*, 5 Duer, 501. See also, as to an agreement, under which the mortgagee had an option given him to take possession before the prescribed time of payment, but which option had not then been exercised, *Hall vs. Samson*, 19 How., 481. See *The Same vs. The Same*, 23 How., 84. But, under a similar contract, giving a right to take the property, in the event of any removal or disposition of it, it was held that the mortgagee had a right to claim the property, and to take it out of the sheriff's hands after it had been actually seized. *Conkey vs. Hart*, 4 Kern., 22. And, when the mortgagee has immediate right to possession, he is, in judgment of law, the owner, and the mortgagor has no leviable interest. *Stewart vs. Slater*, 6 Duer, 83; *Gelhaar vs. Ross*, 1 Hilt., 117; *Baxter vs. Gilbert*, 12 Abb., 97.

When, before sale, and whilst the property is in the hands of the officer, the mortgagor's interest terminates, the mortgagee is therefore entitled to claim an unconditional delivery to him. *Fairbanks vs. Bloomfield*, 5 Duer, 434.

A levy will stand good, as against a mortgage, void against creditors as made in violation of the statute, or presumably so, where the presumption is not rebutted. *Spies vs. Boyd*, 1 E. D. Smith, 445; *Allen vs. Cowan*, 28 Barb., 99; *Thompson vs. Van Vechten*, 6 Bosw., 373. Or, where such mortgage has not been duly filed. *Murdock vs. Gifford*, 18 N. Y., 28.

A levy will stand good against a colorable gift of property. *Allen*

vs. *Cowan*, *supra*. Or a colorable sale. *Ludden* vs. *Hazen*, 31 Barb., 650.

Not so, however, as against a *bond fide* gift. *Allen* vs. *Cowan*, 23 N. Y., 502. Or an actual transfer, in payment of a debt, even though, as between the parties, such debt might be usurious. *Mills* vs. *Carnley*, 1 Bosw., 159.

The interest of a pledgor of goods may be levied upon and sold, and the purchaser will acquire title, on complying with the terms and conditions of the pledge. 2 R. S., 366, section 20.

But, after sale, and until redemption, the pledgee is entitled to possession. *Stief* vs. *Hart*, 1 Comst., 20. See also *Brownell* vs. *Carnley*, 3 Duer, 9 (14). See, as to levy upon property, on which a third party has a lien, *Glassner* vs. *Wheaton*, 2 E. D. Smith, 352; *Brownell* vs. *Carnley*, 3 Duer, 9.

The interest of the pledgee may be levied upon and sold, the purchaser obtaining his right or interest in the goods. *Saul* vs. *Kruger*, 9 How., 569.

Since the recent amendment of the Code (1862), a levy may now be made upon the separate property of a married woman, under the special process authorized by section 287. Before that amendment, it could only be reached by a proceeding *in rem*. See heretofore, under the heads of *Judgment* and *Parties*, and cases there cited.

But, even under that state of the law, it had been held that, when property was used by wife and husband jointly, in such a manner as would lead the law to imply an assent on her part, that he should trade with it for his own benefit, or when such user on his part was apparent, or the property was in fact his, though traded upon in the wife's name, the property so used, or goods purchased with, or out of the profits of it, were in law the husband's property, and might be taken on execution for his debts. See *Switzer* vs. *Valentine*, 4 Duer, 96; 10 How., 109; *Lovett* vs. *Robinson*, 7 How., 105; *Freeman* vs. *Orser*, 5 Duer, 476 (qualified, however, in a considerable degree by *Burger* vs. *White*, 2 Bosw., 92); *Sherman* vs. *Elder*, 1 Hilt., 178; *Same case*, 1 Hilt., 476; *Gage* vs. *Dauchy*, 28 Barb., 622.

When made, a levy upon personal estate must be actual, and the property must be in the sight, or placed within the power of the sheriff at the time. If not, such a levy, though it may bind the judgment-debtor himself, will be ineffectual, as against other creditors, or purchasers in good faith. *Dresser* vs. *Ainsworth*, 9 Barb., 619; *Learned* vs. *Vandenburgh*, 7 How., 379; affirmed, 8 How., 77. A manual interference is, however, unnecessary. It is sufficient that the property is present, and subject to his control, and that he then openly states that he levies upon, and asserts authority over it by virtue thereof. *Barker*

vs. *Binninger*, 4 Kern., 270 ; *Watts* vs. *Cleveland*, 3 E. D. Smith, 553 ; *Mills* vs. *Thursby* (No. 5), 11 How., 121. Nor is acquiescence of the debtor or owner of the goods, essential to give validity to the levy. *Artisans' Bank* vs. *Treadwell*, 34 Barb., 553.

The sheriff's right in goods levied upon, is in the nature of a special, and not a general ownership. *Pierce* vs. *Kingsmill*, 25 Barb., 63.

The mere fact that property has been wrongfully designated as property of the defendant, by an unauthorized person, will not estop the real owner from showing property in himself. *New York Car Oil Company* vs. *Richmond*, 6 Bosw., 213 ; 19 How., 505 ; 10 Abb., 185.

A levy secretly made, without knowledge of the debtor or a sub-purchaser, will be void. *Price* vs. *Shipps*, 16 Barb., 585. And, if made in bad faith, it will be set aside. *Jones* vs. *McCarl*, 7 Abb., 418.

Nor can a levy, once made, be countermanded, for the purpose of shifting the burden of payment, as between joint-debtors, and screening one of them. *McChain* vs. *McKeon*, 2 Duer, 645. And an irregular levy and sale, without proof of authority, will be no justification. *Underhill* vs. *Renior*, 2 Hilt., 319.

If the judgment-debtor can show any fraud or collusion, in omitting to levy on property or otherwise, the court will take care it is not effectuated, and will interfere for that purpose. *Engle* vs. *Bonneau*, 2 Sandf., 679 ; 3 C. R., 205.

If, too, the judgment-creditor omit to levy on property, assigned by the debtor, after the execution was placed in the sheriff's hands, and allow the execution to be returned, without asserting his claim, his priority over the assignee will be gone, and he cannot assert it, as against the latter, on supplemental proceedings. *Watrous* vs. *Lathrop*, 4 Sandf., 700.

If property, actually levied on, be relinquished, on an agreement between the debtor and the officer, for the substitution of other specific articles for it, that agreement will be void, and a subsequent *bonâ fide* mortgagee will acquire a title, as against the sheriff. Where, however, property so substituted is subsequently levied upon, without any intervening rights, the levy will stand good, though the agreement for substitution is void. *Shelton* vs. *Westervelt*, 1 Duer, 109.

See, however, as to the right of the sheriff to abandon a levy, on discovery that it is wrongful, and the burden of proof which then lies upon him, *Bliven* vs. *Bleakley*, 23 How., 124.

When made, a levy dates back, and transfers title to the object levied upon, as of the date when the execution was lodged in the hands of the sheriff, save only as regards the rights of intermediate purchasers, or mortgagees without notice. *Thompson* vs. *Van Vechten*, 5 Abb., 458. So also, as regards the lien of an attachment, as against an intermediate

assignee. *Wilson vs. Forsyth*, 24 Barb., 105; *Burckhardt vs. Sanford*, 7 How., 329; *Yale vs. Matthews*, 20 How., 430; 12 Abb., 379.

When an attachment has been issued, the sheriff, after execution, may demand of any person, having property of the debtor in his hands, the certificate of such property prescribed by section 236. The demand must be made, however, under the execution, and not under the original attachment, the vitality of which is then exhausted. If not so made, the ulterior examination provided for by the section, cannot regularly be had. *Schieb vs. Baldwin*, 22 How., 278; 13 Abb., 469.

To constitute a valid levy upon real estate, there must be an intention to make such levy at the time, and it must be announced to the debtor, when a simultaneous levy is made upon personalty. *Mills vs. Thursby* (No. 5), 11 How., 121. There need not, however, be any actual taking of possession. The return of the sheriff will be sufficient to secure the lien. *Learned vs. Vandenburg*, 7 How., 379; affirmed, 8 How., 77.

Such levy must, however, be actual, in the manner last referred to, and the return of the writ, or the inventory attached, is the evidence of the seizure. *Yale vs. Matthews*, 20 How., 430; 12 Abb., 379.

Nor will the suffering the execution against real estate to remain dormant, destroy that lien. It remains available, until the expiration of the ten years' statutory limitation. *Muir vs. Leitch*, 7 Barb., 341. But when that limitation has expired, the court will order a perpetual stay of execution, as against *bonâ fide* purchasers. *Wilson vs. Smith*, 2 C. R., 18.

A levy, as against a person in actual possession, passes whatever interest he may have, and he cannot defeat it, by showing outstanding title in another. *Dickinson vs. Smith*, 25 Barb., 102.

A valid levy under execution, upon property sufficient to satisfy the debt, is in law a satisfaction of the judgment; and if, through the negligence or misconduct of the sheriff, the property is lost, and the defendant deprived of the benefit of it, the plaintiff must seek his remedy against the sheriff. *Peck vs. Tiffany*, 2 Comst., 451. And the plaintiff may also lose his claim, by undue interference after levy, as by an improper countermand. *McChain vs. McKeon*, 2 Duer, 645.

And, once made, a levy inures, not merely for the benefit of the execution creditor on whose writ it is made, but for that of all others, whether senior or junior, which may come to the sheriff's hands before sale. *Peck vs. Tiffany, supra*. And this, even although, at the time of sale, the execution, under which the original levy was made, may have become dormant.

But, where the defendant has not been deprived of his property, a levy is not *per se* a satisfaction of the debt. *Peck vs. Tiffany, supra*; *Radde vs. Whitney*, 4 E. D. Smith, 378. Nor is a levy, supposed to be sufficient, a satisfaction, when, on sale, it proves to be otherwise. The

officer may, in such case, make an additional levy, for the purpose of satisfying the balance due (*Denvrey vs. Fox*, 22 Barb., 522); or, for that of raising the amount of any other executions, either senior or junior, which may be in his hands at the time. *Peck vs. Tiffany, supra*.

Nor does a levy under an attachment, work any satisfaction whatever. It is merely inchoate, until perfected by judgment and execution, and, if the defendant appears and defends, he assumes any risk. *McBride vs. Farmers' Branch Bank*, 28 Barb., 476; 7 Abb., 347.

Where, upon a sufficient levy made in one county, proceedings were stayed, and, during the stay, the property was eloigned, the proceedings of the sheriff of another, under a levy made by him, were refused to be restrained. *Mills vs. Thursby* (No. 4), 11 How., 119.

Where property was in the hands of the officer, for want of buyers, a renewal of the execution was allowed, so as to retain the lien, instead of ordering a return. *Chapman vs. Fuller*, 7 Barb., 70.

A levy remains good, as against the debtor, though the process may have become dormant as to junior executions; the sheriff retains the control of the property, and, after sale, may apply the avails in payment of the executions in his hands, according to their actual priorities, though not discovered until after actual sale under a junior execution. *Peck vs. Tiffany*, 2 Comst., 451. As to the rights of the sheriff to apply moneys come to his hands, in payment of tax-warrants, in priority to a collateral execution, see *Ellice vs. Van Rensselaer*, 6 How., 116.

The mere fact that a sale is made ostensibly under a dormant execution, does not invalidate it, if there is, at the time, a subsisting process in the hands of the sheriff. *Richards vs. Allen*, 3 E. D. Smith, 399 (406).

The fact that an execution has become dormant, does not relieve the debtor from liability; it merely gives a right to junior and more vigilant creditors to be paid first, in the application of the proceeds of a general sale. *Richards vs. Allen, supra*; *Peck vs. Tiffany, supra*. But the question must be brought up by means of a direct application, and cannot be raised collaterally, on a motion for attachment against the sheriff. See *Wilson vs. Wright*, 9 How., 459.

Any interference with the proceedings of the sheriff, creating delay, or giving the debtor control of the property, or any actual agreement with the debtor himself, to give time, will render an execution dormant, as against junior claimants, or *bonâ fide* purchasers. See *Price vs. Shipps*, 16 Barb., 585; *Thompson vs. Van Vechten*, 5 Abb., 458; *Dunderdale vs. Sauvestre*, 13 Abb., 116.

But a mere acquiescence, or even an actual consent to delay by the sheriff in selling the property in his hands, will not render an execution dormant, in the absence of any agreement with the debtor, or any use

of the property by him in the mean time. *Thompson vs. Van Vechten, supra*; *Paton vs. Westervelt*, 2 Duer, 362; 12 L. O., 7.

And the doctrine of dormancy is only applicable to a levy on personalty, and not to a sale of real estate. See *Muir vs. Leitch*, 7 Barb., 341.

As to the measure of diligence which will be required of the sheriff, whilst in custody of property levied upon, see *Moore vs. Westervelt*, 21 N. Y., 103; reversing *same case*, 1 Bosw., 357. He must safely keep it, and will not be warranted in making or allowing any examination into books or papers, seized without the special authority of the court, nor can he properly take letters or correspondence at all. *Hergman vs. Dittlebach*, 11 How., 46. And he will be liable, for any neglect or misfeasance of his deputies. See *Waterbury vs. Westervelt*, 5 Seld., 598.

A levy, when previously made, is not avoided by the subsequent giving of security on appeal. The only effect is to suspend further proceedings under it, the priority of the creditor remaining. *In re Berry*, 26 Barb., 55; *Smith vs. Allen*, 2 E. D. Smith, 259; *Cook vs. Dickerson*, 1 Duer, 679. The court may, however, supersede it, on good faith and ample security being shown. See *Strecker vs. Wakeman*, 13 Abb., 85.

An appeal to the general term of the Marine Court, duly taken, and security duly given, acts as a sufficient suspension of proceedings. *Ritterband vs. Marryatt*, 12 L. O., 158.

If an undertaking on appeal, or the service of it upon the sheriff be insufficient, it will not stay the proceedings, or justify him in a refusal to levy, when directed. *Clark vs. Carnley*, 3 C. R., 136.

As to the rights of contesting creditors under different executions, see *Booth vs. Bunce*, 35 Barb., 496.

§ 281. *Exemption from Execution.*

The following articles are, by statute, exempt from levy and sale under execution:

The following property, when owned by any person being a householder: such articles as are movable to continue exempt, while the family of such person, or any of them, may be removing from one place to another.

1. All spinning-wheels, weaving-looms and stoves, put up or kept for use in any dwelling-house. 2 R. S., 367, section 22, subdivision 1.

Also, one sewing-machine, with the appurtenances thereto belonging. Chapter 152 of 1860, p. 245.

2. The family Bible, family pictures, and school-books used by or in the family of such person; and books, not exceeding fifty dollars, which

are kept and used as part of the family library. 2 R. S., 367, section 22, subdivision 2.

3. A seat or pew, occupied by such person or his family, in any house or place of public worship. *Ibid.*, subdivision 3.

4. All sheep, to the number of ten, with their fleeces, and the yarn or cloth manufactured from the same; one cow, two swine, the necessary food for them; all necessary pork, beef, fish, flour, and vegetables actually provided for family use; and necessary fuel for the use of the family for sixty days. *Ibid.*, subdivision 4.

5. All necessary wearing apparel, beds, bedsteads, and bedding for such person and his family; arms and accoutrements required by law to be kept by such person; necessary cooking utensils; one table; six chairs; six knives and forks; six plates; six teacups and saucers; one sugar dish; one milkpot; one teapot and six spoons; one crane and its appendages; one pair of andirons; and a shovel and tongs. *Ibid.*, subdivision 5.

6. The tools and implements of any mechanic, necessary to the carrying on of his trade, not exceeding twenty-five dollars in value. *Ibid.*, subdivision 6.

In addition to the above, there are also exempt, under section 1 of chapter 157 of 1842, amended by chapter 134 of 1859, p. 343, the following:

Necessary household furniture and working tools, and team, owned by a person being a householder, or having a family for which he provides, to the value of not exceeding two hundred and fifty dollars; and, in addition thereto, there shall be also exempted from such levy and sale the necessary food for said team, for a period not exceeding ninety days: provided that such exemption shall not extend to any execution issued on a demand for the purchase-money of such furniture, or tools, or team, or the food for said team, or the articles now enumerated by law.

Before the amendment of 1859, the above exemption only extended to one hundred and fifty dollars, and the provision as to necessary food was not included.

Under chapter 107 of 1858, p. 206, the provisions of this last act are not to apply to any judgment, rendered for a claim accruing for work and labor performed in a family as a domestic. This act repeals a similar statute, chapter 303 of 1857, volume 1, p. 616, providing to the same effect, but limiting it to cases of a claim not exceeding fifty dollars.

Materials procured, or partially procured, under a contract with the canal commissioners, are exempt from execution. 1 R. S., 223, section 38.

Under chapter 85 of 1847, lands set apart and actually used as a family or private burying ground, to the extent of one quarter of an acre, designated by the owner, by description recorded in the manner there prescribed, are also exempt. But, to claim the benefit of the exemption, such record must be duly made by the owner. See *Cox vs. Stafford*, 14 How., 519.

And, lastly, under chapter 260 of 1850, p. 499, the homestead of a householder, having a family, owned by him and occupied as a residence, is also exempt from execution, on debts thereafter contracted, to the value of one thousand dollars, on the forms prescribed by that act being complied with, and such benefit inures to his widow and family after his decease. See, however, exceptions from such exemptions, declared in section 2 of that measure, as regards sales for taxes and assessments, or for a debt contracted for the purchase-money thereof or prior to the record of the deed or notice declaring the property a homestead, as prescribed by that section.

The following are recent decisions upon the subject, cited under the principle stated in the last section, without professing to go into the whole of the law upon the matter :

The act of 1842 was decided, in *Morse vs. Gould*, 1 Kern., 281, to extend to judgments and executions on debts contracted before as well as after its passage, and the principle laid down applies equally to the other statutes above enumerated.

The exemptions thus created are positive, and, with the exception of that under the homestead act, cannot be waived, even by express stipulation in the original contract. *Crawford vs. Lockwood*, 9 How., 547; *Harper vs. Leal*, 10 How., 276; *Kneettle vs. Newcomb*, 31 Barb., 169; affirmed, 22 N. Y., 249.

But the privilege of exemption under the homestead act is capable of waiver, by writing, subscribed by the householder and acknowledged as a deed. Chapter 260 of 1850, section 1. It will not, however, be waived by mere representations, where the action sounds in contract. See *Robinson vs. Wiley*, 15 N. Y., 489. See also same case in court below, *Robinson vs. Wiley*, 19 Barb., 157, in which the same principle is concurred in, though a new trial was granted, on a question of pleading, under which the case might possibly be looked upon as sounding in tort, and, therefore, not within the exemption.

The claim under any of these provisions is, however, a personal claim, and cannot be set up by an assignee of the debtor, or a grantee of the homestead. See *Smith vs. Hill*, 22 Barb., 656 (660); *Allen vs. Cook*, 26 Barb., 374.

As regards the persons entitled to claim such exemptions, the following distinctions must be observed :—The original exemption under the

Revised Statutes is in favor of any person being a householder—that under the statute of 1842, in favor of a person, being a householder, or having a family for which he provides—that under the homestead exemption act, in favor of a person being a householder, and having a family, occupying the homestead as a residence, or of such family, so occupying it after his death. The qualifications are, therefore, somewhat different under each statute.

Under all, the person must be a householder. A person who rents a house and keeps boarders, is within the exemption act of 1842, though he may have no wife or children for which he provides. *Hutchinson vs. Chamberlin*, 11 L. O., 248; *Van Vechten vs. Hall*, 14 How., 436. Nor, when he has a family for which he provides, does his having temporarily ceased to keep house, and stored his furniture, with the intention of renewing housekeeping, deprive him of the benefit of the statute. *Griffin vs. Sutherland*, 14 Barb., 456. Nor need his family be actually living with him, when he provides for them in fact. *Robinson's case*, 3 Abb., 466.

A party claiming exemption must, however, show affirmatively, the facts which entitle him to the privilege. *Same case*. And that, directly, and not by hearsay. *Eastman vs. Caswell*, 8 How., 75.

To a reasonable extent, the debtor has the privilege of selection of the articles claimed by him as exempt. See *Dickerson vs. Van Tine*, 1 Sandf., 724; *Lockwood vs. Younglove*, 27 Barb., 505; *Brigham vs. Bush*, 34 Barb., 596. But he must make such election at the time of levy, or, in replevin, he cannot recover more than damages, for the detention of property, after demand made. *Seaman vs. Luce*, 23 Barb., 240. See likewise *Morse vs. Keyes*, 6 How., 18 (20).

Property exempt under the Revised Statutes cannot be taken even on execution for its purchase-money. That power is confined to cases coming within the statute of 1842. Nor does the power to seize exempt property, on execution for purchase-money, extend to the goods of a surety on such purchase. See *Davis vs. Peabody*, 10 Barb., 91; *Cole vs. Stevens*, 9 Barb., 676; 6 How., 424; *Cox vs. Stafford*, 14 How., 519. But the power to seize, under an execution for purchase-money, is not confined to a proceeding for purchase-money of the specific article, but also for purchase-money of any exempt property, either under that statute or the Revised Statutes. See *Cox vs. Stafford*, and *Cole vs. Stevens*, *supra*.

A judgment, arising out of a cause of action in tort, is not a debt contracted within the meaning of the homestead exemption act, though such judgment be recovered after its passage. The exemption under that statute will not extend to a case of this description. See *Newman vs. Cook*, 11 L. O., 62; *Cook vs. Newman*, 8 How., 523; *Schouton vs. Kilmer*, 8 How., 527.

Although, when recovered back by process of replevin, an exempt article retains its privilege, yet if the owner elects to sue in trover, and recovers the value, the value so recovered is no longer affected by the exemption, but may be levied upon. *Mallory vs. Norton*, 21 Barb., 424.

The exemption of a team, in favor of a householder or head of a family, granted by the statute of 1842, extends both to a wagon or cart used by such a person, and also to the horse or the horses by which it is drawn, and likewise to a horse ridden by such a person in the exercise of his trade or profession. See *Van Buren vs. Loper*, 29 Barb., 388; *Eastman vs. Caswell*, 8 How., 75, as to the wagon and horse; and *Wheeler vs. Cropsey*, 5 How., 288, as to the horse of a practising physician. See also, as to the horse, harness, and cart of a public carman, *Hart-house vs. Rikers*, 1 Duer, 606; 11 L. O., 223; or of a pedler, *Hutchinson vs. Chamberlin*, 11 L. O., 248. See likewise generally, *Hoyt vs. Van Alstyne*, 15 Barb., 568. These cases seem to overrule the stricter view, as to a wagon not being comprised within the word team, as taken in *Morse vs. Keyes*, 6 How., 18.

If the debtor have only the part ownership of a team, that ownership is equally exempt. *Radcliff vs. Wood*, 25 Barb., 52. Or, if only having one horse, he hires another to work with it. *Lockwood vs. Younglove*, 27 Barb., 505.

A watch, actually necessary for the purposes of an employment by which the debtor earns his livelihood, was considered to be within the spirit of the exemption, in *Bitting vs. Vandenburg*, 17 How., 80. So also, as to the professional books and instruments of a surgeon, the former as part of the family library, and the latter as tools. *Robinson's case*, 3 Abb., 466.

As to the exemption of a cow, the property of her deceased husband, used by his widow in support of his family, see *Brigham vs. Bush*, 33 Barb., 596.

A threshing-machine was held not to be exempt, in *Ford vs. Johnson*, 34 Barb., 364.

§ 282. *Proceedings before Sale in Certain Cases.*

If property of the defendant be wrongfully taken by the sheriff, an action will lie against him and the execution-plaintiff, as trespassers, and, on a proper application, and a clear case shown, the court might possibly interfere to stay a sale. If exempt articles have been seized, they may be retaken by process of replevin (see section 207, subdivision 4), but, in other cases, the plaintiff will be left to his remedy for the conversion, and cannot repossess himself of the property itself. Process, regular on its face, is a sufficient protection. If manifestly irregular,

or if its validity be disputed, replevin might then lie, as an action, though, possibly, the provisional remedy might be held inadmissible.

But, if the goods of a third party be levied upon, his rights will not be affected, and he can maintain that form of procedure.

In the event of a claim of this description being made, the sheriff is not bound to proceed further, unless indemnified by the plaintiff. It is competent for the latter to tender that indemnity at once, on the claim being made, and, if the question is in any manner doubtful, it will probably be the easier course to do so.

But the regular mode of procedure, under these circumstances, is, for the sheriff to summon a jury, and try the title set up by the claimant. His right to hold a court for that purpose is expressly saved, at 2 R. S., 286, section 58, but those statutes do not contain any further provision upon the subject.

This proceeding is one solely for his own protection, and is in no wise conclusive on either party. When the jury is summoned, both parties are entitled to notice, though no particular time or form is prescribed. The claimant then appears and proves his claim, in the usual form, and the execution-plaintiff has the right to oppose. If the demand set up be clearly nugatory, the jury will, of course, negative its existence; but if it be in any manner substantial, or even if there exist any doubt as to whether it may, or may not be maintainable, the usual course will be a verdict in favor of the claimant. A verdict of this latter description decides nothing, in effect, except that the sheriff is entitled to demand an indemnity, and, unless that indemnity be given, is not bound to proceed further. The verdict on such inquiry, when rendered, serves as the sheriff's justification for making a return of *nulla bona* on the one hand, or, on the other, for proceeding to sell, without regard to the claim set up, and will protect him from more than a mere technical responsibility, in either case, should the ultimate results be different.

If the verdict be against the claim set up, the sheriff is bound to go on, such verdict protecting him against any claim for vindictive damages, on the part of the claimant, who may prevent a sale by means of a replevin. If the claim be not negatived, the sheriff may demand, and the plaintiff must give, a sufficient bond of indemnity. The sureties must, of course, be sufficient, and the indemnity complete. A form will be found, in *Herring vs. Hoppock*, 3 Duer, 20 (22, 23); 12 L. O., 167; *Same case*, 15 N. Y., 409. As to the necessity of the indemnity being taken, in an amount sufficient to cover all probable liability, see *Westervelt vs. Frost*, 1 Abb., 74.

If the goods taken and sold under such an indemnity, be subject to any paramount lien, both the execution-creditor and the surety will be liable to the party holding such lien. *Herring vs. Hoppock, supra.*

Such a bond may be required by the sheriff, in the event of a *bonâ fide* adverse claim, even after levy and sale. See *Westervelt vs. Frost*, 1 Abb., 74.

If a sufficient indemnity be given, the sheriff will then be bound to proceed with the sale of the property; and, if he refuse to do so, after tender of such indemnity, he will be liable to the creditor for such breach of duty.

When, after indemnity given, the property was taken on replevin, by the claimant, who ultimately failed in the suit, but, on judgment for a return, the goods could not be retaken, the sheriff was held bound to procure an assignment of the undertaking in replevin, and to prosecute that undertaking, for the benefit of the indemnifying plaintiff, and, having failed to do so, was held responsible to the latter. *Swezey vs. Lott*, 21 N. Y., 481.

§ 283. *Sale of Personal Property.*

If no claim of the above description be made, or if made, a sufficient indemnity be given, the sheriff is bound to proceed to a sale of the goods levied upon, disposing of the personalty in the first instance, and making any deficiency out of the real estate.

Notice must be given of such sale, six days successively, by fastening up written or printed notices thereof, in three public places of the town where such sale is to be had, specifying the time and place where the same is intended to be had. 2 R. S., 366, section 21. The sale must be at public vendue, between 9 A. M., and sunset. 2 R. S., 369, section 36.

Taking down or defacing such a notice, unless upon consent of the parties, or satisfaction of the execution, is punishable by forfeiture of \$50. 2 R. S., 369, section 39. And such taking down or defacing, or the omission to give such notice, will not affect the title of a *bonâ fide* purchaser, without notice of such omission or offence. *Ibid.*, section 40.

The sheriff or officer to whom the execution is directed, and his deputy holding the execution and conducting the sale, are absolutely prohibited from purchasing any property at such sale, and any such purchase will be void. 2 R. S., 370, section 41. This rule is applicable to all sales whatever, whether of realty or personalty.

As to the latter, it is also provided (2 R. S., 367, section 23), that no personal property shall be exposed for sale, unless the same be present, and within the view of those attending the sale; it shall be offered for sale, in such lots and parcels as shall be calculated to bring the highest price.

Where the property is valuable, it is usual to advertise it, and often

to give a longer notice than the six days prescribed by the statute; but that form is all that is strictly necessary. The sale may either be made by the sheriff or deputy in person, or an auctioneer may be employed. It may also be adjourned by the sheriff, if necessary; notice being given of the adjournment, in the same manner as upon an original sale.

When made, it must be made at a reasonable time, and in such a manner as to give all proper opportunity for the attendance of purchasers. A sale after sundown has been held absolutely void, and that the irregularity rendered the sheriff a trespasser *ab initio*. *Carrick vs. Myers*, 14 Barb., 9.

The officer or party making a sale of this nature, is bound to separate the property which he sells, from other property, of the same nature, belonging to the debtor, or the title to it will not pass. *Stevens vs. Eno*, 10 Barb., 95.

And it must be pointed out and specifically designated. *Warring vs. Loomis*, 4 Barb., 484.

But the provision that the property must be in view, must receive a reasonable construction. Where, therefore, on the sale of the establishment of a publishing house, certain stereotype plates remained in a vault connected with the building, but such vault was not locked, and any intended purchasers had full opportunity for examination, and the sale was conducted according to the usual custom as to such articles, the proceeding was sustained. It was also held that a *bonâ fide* sale of several articles in one lot, with the debtor's assent, and at the request of parties interested, who were present, did not invalidate it. *Bruce vs. Westervelt*, 2 E. D. Smith, 440. See, as to sale of property subject to a chattel mortgage in one lot, opinion of Comstock, J., in *Manning vs. Monaghan*, 23 N. Y., 539, before considered, under the head of *Levy*.

Property subject to a lien, may be sold, but cannot be taken out of the possession of the lien-holder, except for the purposes of exposure, and, when sold, must be restored, until the lien is paid, unless he voluntarily surrenders it. *Glassner vs. Wheaton*, 2 E. D. Smith, 352. And parties selling such property, to the prejudice of the lien-holder, will be liable for its conversion. *Herring vs. Hoppock*, 3 Duer, 20; 12 L. O., 167; *Same case*, 15 N. Y., 409.

Where the interest of the debtor, in property sold, is partial, the sale only passes that interest, and creates a tenancy in common, with any others jointly interested. *Fiero vs. Betts*, 2 Barb., 633; *Mowbray vs. Lawrence*, 22 How., 107; 13 Abb., 317. But if, under such circumstances, the entire property is sold, as being such debtor's, the sale will be void, and all concerned will be liable as trespassers. *Bates vs. James*, 3 Duer, 45.

The sale, when made, dates back to the time of the levy, and will

transfer a complete title, as against any intermediate claims. *Fuller vs. Allen*, 16 How., 247; 7 Abb., 12.

Real and personal property cannot be sold together, on the same occasion, and upon the same notice; unless the full statutory notice be given, as to the former, the whole sale will be bad. *Breese vs. Bangs*, 2 E. D. Smith, 474 (493).

And, as soon as the full amount of the process in the sheriff's hands is made, any sale in excess will be wrongful. *Peck vs. Tiffany*, 2 Comst., 451. But, although a sale may be ostensibly made, under an actually dormant execution, it will still be valid, if there be actually valid process in the hands of the officer. *Richards vs. Allen*, 3 E. D. Smith, 399.

If the debt and costs have been satisfied, the sheriff cannot proceed to make a sale, merely for the purpose of obtaining payment of his fees. They are no part of the judgment, though, on a sale to satisfy any portion of the debt due to the plaintiff, he may proceed to raise them also. *Craft vs. Merrill*, 4 Kern., 456. See also *Bank of Whitehall vs. Weed*, 8 How., 104.

As to the power of purchasers of a plank-road, or turnpike-road sold under execution, to associate themselves, for the purpose of forming a fresh incorporation, see chapter 482 of 1857, vol. II., p. 26.

§ 284. *Sale of Real Property.*

The proceedings for this purpose, are more minutely and specially regulated, than those in relation to personalty, and will demand a more extended consideration.

As above noticed, such a sale cannot be made of the equity of redemption of mortgaged property, on judgment for the mortgage debt. *Vide* 2 R. S., 368, sections 31 to 33, inclusive. The remedy of the plaintiff, under such circumstances, lies by way of foreclosure, as against that specific estate. His common-law rights, by way of execution, only extend as against the remainder of the mortgagor's property.

(a.) NOTICE OF SALE.

The notice to be given, is thus prescribed at 2 R. S., 368, sections 34 and 35, as follows:

§ 34. The time and place of holding any sale of real estate, pursuant to any execution, shall be publicly advertised previously, for six weeks successively, as follows:

1. A written or printed notice thereof, shall be fastened up, in three public places of the town where such real estate shall be sold, and, if such sale be in a town different from that in which the premises to be sold are situ-

ated, then such notice shall also be fastened up, in three public places of the town in which such premises are situated.

2. A copy of such notice shall be printed, once in each week, in a newspaper of such county, if there be one.

3. If there be no newspaper printed in such county, and the premises to be sold are not occupied by any person, against whom the execution is issued, or by some person holding the same, as tenant or purchaser, under such person, then such notice to be published in the state paper, once in each week.

§ 35. In every such notice, the real estate to be sold shall be described with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there be any, and, if there be none, by some other appropriate description.

The taking down or defacing of any such notice, is punishable by fine, and such taking down or defacing, or even the omission to give notice, is not to affect the validity of a sale, made to a *bonâ fide* purchaser, without notice. 2 R. S., 369, §§ 39, 40.

In *Olcott vs. Robinson*, 21 N. Y., 150, it is decided, by a majority of the Court of Appeals, that it is sufficient to post a notice, as required by the statute, forty-two days previous to the sale, and to publish a copy thereof, in six successive numbers of a weekly newspaper, although the first publication may be less than six weeks prior to the sale. This reverses the *same case*, 20 Barb., 148, holding that the full period of six weeks must be fulfilled, both as regards posting, and also publication. See, however, as to the giving of due notice being a condition-precedent, *Cunningham vs. Cassidy*, 17 N. Y., 276 (281); 7 Abb., 183.

Where real and personal estate are sold together, without giving the full notice prescribed, as to the former, the sale will be void. *Breese vs. Bangs*, 2 E. D. Smith, 474.

(b.) SALE, AND WHAT PASSES.

By 2 R. S., 369, section 36, the sale, when made, must be at public vendue, between the hours of nine o'clock in the morning and the setting of the sun. See *Carrick vs. Myers*, 14 Barb., 9, above cited, as to a sale after sundown, being absolutely void.

Any officer selling real estate without the previous notice, or otherwise than as prescribed, is to forfeit to the injured party one thousand dollars, besides any damages which such party may sustain. 2 R. S., 369, § 37.

Under section 38, when real estate offered for sale under execution, shall consist of several known lots, tracts, or parcels, such lots, tracts, or parcels, shall be separately exposed for sale; and, if any person claiming to be the owner of any portion of such estate, or of such lots,

tracts, or parcels, or either of them, or claiming to be entitled, by law, to redeem any such portion, shall require such portion to be exposed for sale separately, it shall be the duty of the sheriff to expose the same for sale accordingly. No more of any real estate shall be exposed for sale, than shall appear to be necessary to satisfy the execution.

Under 2 R. S., 370, section 43, the sheriff or other officer, or his deputy, holding the execution and conducting the sale, are positively prohibited from purchasing, and any purchases made by them are void.

And the following provision is made in the concluding portion of section 287 of the Code, first inserted by amendment in 1851, and revised in 1852:

Real property, adjudged to be sold, must be sold in the county where it lies, by the sheriff of the county, or by a referee appointed by the court for that purpose; and thereupon, the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold.

This clause seems more peculiarly applicable to sales on foreclosure or partition, though inserted in the chapter as to execution, especially as regards the provision for sale by a referee. Some portions of it, as regards the duties of the sheriff, are, however, clearly pertinent.

The sale cannot comprise property in another state, and, if this be attempted, will be void. *Runk vs. St. John*, 29 Barb., 585.

In selling real estate, the sheriff acts under a power; and, if he sells irregularly or improperly, no title will pass. *Carpenter vs. Stilwell*, 1 Kern., 61; reversing *same case*, 12 Barb., 128. So likewise, where the judgment is in effect satisfied at the time. *Craft vs. Merrill*, 4 Kern., 456; *Neilson vs. Neilson*, 5 Barb., 565. Or, where judgment has been irregularly taken. *Farnham vs. Hildreth*, 32 Barb., 277. Or, where it is insufficiently proved. *Townsend vs. Wesson*, 4 Duer, 342. Or where the execution is void. *Clarke vs. Miller*, 18 Barb., 269. But a trifling irregularity in the execution will not avoid it. *Peet vs. Cowenhoven*, 14 Abb., 56.

The provisions of the statute as to selling the property in parcels and not in gross, are directory, and an omission to comply with them will render the sale voidable only, and not void, the objection being waivable by delay. *Cunningham vs. Cassidy*, 17 N. Y., 276; 7 Abb., 183. But the making of a sale in this manner, will always be sufficient cause for setting it aside. *Ames vs. Lockwood*, 13 How., 555. So also, title will pass, although the sheriff neglect to observe other directory provisions, in respect of which the debtor has his remedy against that officer. See *Neilson vs. Neilson*, 5 Barb., 565.

On selling real estate, in separate parcels, under different executions

of different dates as to liens, the sheriff must apply the bid on the first sale, in satisfaction of the oldest lien. *Barker vs. Gates*, 1 How., 77.

The sale, when made, will pass any legal right to the possession vested in the judgment-debtor. But the case of a purchaser who has entered into possession under an executory contract for purchase, is an exception to this rule. His interest cannot be taken under execution, but can only be reached by proceedings in equity. 1 R. S., 744, section 4. See *Bigelow vs. Finch*, 11 Barb., 498; *Same case*, 17 Barb., 394; *Sage vs. Cartwright*, 5 Seld., 49; *Kellogg vs. Kellogg*, 6 Barb., 116. Nor can any other merely equitable interest in lands, be reached in this manner. *Garfield vs. Hatmaker*, 15 N. Y., 475; *Wright vs. Douglass*, 3 Barb., 554. See likewise *Richards vs. Varnum*, 8 How., 79.

Estates by will or by sufferance, though chattel interests, are likewise specially exempted from sale on execution. See 1 R. S., 722, section 5. *Bigelow vs. Finch*, *supra*, both cases; *Colvin vs. Baker*, 2 Barb., 206. But this exception does not include a tenancy from year to year. *Bigelow vs. Finch*, 17 Barb., 394.

Where the interest of the vendor under an executory contract is sold, the sale is subject to the equities of the purchaser, who is entitled to performance, and to the benefit of any payments, made by him, on account of his purchase-money, without actual notice of the judgment. *Moyer vs. Hinman*, 3 Kern., 180.

Under the general mechanics' lien act, chapter 402 of 1854, p. 1086 (extended by chapter 204 of 1855, p. 324), sections 11, 12, execution may issue for the amount of a lien enforced under that statute, in the same manner as in ordinary executions, except that the execution shall direct the sheriff or officer to sell the right, title, and interest which the owner had in the premises, at the time of filing the notice. Under the New York and Kings and Queens county statutes the sale is, however, similar to that under a foreclosure, and passes such right and interest absolutely, without right of redemption. *Randolph vs. Leary*, 3 E. D. Smith, 637; 4 Abb., 205. See above, under the head of *Sale under Foreclosure*.

There is no restriction as to one defendant becoming the purchaser of the right or interest of another. *Neilson vs. Neilson*, 5 Barb., 565. If the execution-plaintiff himself buys the property, no money need be paid by him, beyond the amount of the sheriff's fees, the balance going in extinguishment of his debt. See collaterally, as to a sale on attachment, *Wood vs. Chapin*, 3 Kern., 509. But, if the plaintiff's attorney bids off the property, and takes the certificate in his own name, the presumption is that it is his own purchase, and not his client's, and he will be liable for the amount of his bid. See *Chappell vs. Dann*, 21 Barb., 17.

Objections to the regularity of a sale cannot be raised by strangers to the execution. *Smith vs. McGowan*, 3 Barb., 404.

But, where the execution-creditor has been misled by the sheriff or his deputies, especially where the property has been sacrificed, the sale will be set aside. *Ames vs. Lockwood*, 13 How., 555. See also, as to setting aside a sale, made in disregard of existent equities, *Welch vs. Tittsworth*, 22 How., 474.

(c.) CERTIFICATE, AND INTERMEDIATE INTERESTS.

Upon the sale, the officer making it is to make out and subscribe duplicate certificates of sale, containing—

1. A particular description of the premises sold ;
2. The price bid for each distinct lot or parcel ;
3. The whole consideration money paid ;
4. The time when such sale will become absolute, and the purchaser will be entitled to a conveyance, pursuant to law. 2 R. S., 370, section 42.

One of the duplicate certificates shall, within ten days after such sale, be filed in the office of the clerk of the county, and the other shall be delivered to the purchaser. If there be two or more purchasers, a certificate shall be delivered to each. *Ibid.*, section 49.

Under chapter 60 of 1857, vol. 1, p. 93, the clerk or registrar of the county is bound to record such certificate when filed, and is entitled to the usual fees for recording conveyances, to be paid by the sheriff out of the avails of the sale, the record of which, or a certified copy, is made evidence. Under section 44, 2 R. S., 379, the original certificate, duly proved and acknowledged, or a certified copy, were also receivable, as presumptive evidence of the facts therein contained.

As to the effect of the attorney of the plaintiff taking such certificate in his own name, see *Chappell vs. Dann*, 21 Barb., 17, *supra*. It is competent for the party who has acquired this species of inchoate title to abandon it, if he so think fit, and to acquire and rely upon title from another source, and no one can question the legality of the proceeding, except a creditor, who may stand in a situation to challenge the transaction, as a fraud upon his rights. *Wright vs. Douglass*, 3 Barb., 554.

During the fifteen months that must elapse before the purchaser can become entitled to a deed, he does not obtain the legal title, nor the equity of redemption, but merely holds a lien for the amount of his bid. *Vaughn vs. Ely*, 4 Barb., 159.

During the same fifteen months, the right and title of the execution-debtor is not divested. At their expiration, however, the grantee who takes the deed, is vested with the legal estate from the time of the sale, for the purpose of maintaining an action for intermediate injury. 2 R.

S., 373, section 61. See also, as to his right to maintain an action for waste, 2 R. S., 336, section 20.

And intermediate waste may be restrained or punished. 2 R. S., 337, sections 23 to 29. But, in the mean time, and during the fifteen months, the person then entitled to the possession of the property sold, may use and enjoy the same as follows, without being guilty of waste :

1. He may use and enjoy such property as before the sale, doing no permanent injury to the freehold.

2. If buildings, he may make necessary repairs, but not alterations in the form or structure.

3. If land, he may use and improve it, in the ordinary course of husbandry, but he is not to be entitled to any growing crops thereon at the expiration of the fifteen months.

4. He may apply any wood or timber to the necessary repair of fences or buildings.

5. If the land is occupied by him, he may take necessary firewood for the use of his family. 2 R. S., 336, section 22.

The certificate forms a cloud upon the title of the equitable owner, which he may maintain an action to remove, without waiting for the expiration of the period for redemption. *Lounsbury vs. Purdy*, 18 N. Y., 515.

(d.) REDEMPTION.

The statute provides a long and intricate process, by means of which, the execution-debtor in the first instance, and afterwards other creditors, holding charges upon the estate, are entitled to redeem, or to acquire the title of the purchaser under the certificate of sale.

The first provision is, that, within one year from the time of sale, the estate sold, or any distinct lot, tract, or portion, separately sold, may be redeemed, by the payment to the purchaser, his personal representatives or assignees, or to the officer who made the sale, for the use of such purchaser, of the sum bid upon the sale, with interest at ten per cent. 2 R. S., 370, section 45.

Such redemption may be made :

1. By the execution-debtor.

2. By his devisee, or heir, as the case may be.

3. By any grantee of such person, who shall have acquired an absolute title by any means to the premises, or to any portion separately sold. 2 R. S., 370, section 46.

Any heir, devisee, or grantee, who shall have acquired title to any portion of the whole, or of any separate part of the property as above, may redeem the lot, tract, or parcel sold, as if he were grantee of the whole, and shall have the same remedy for contribution, against the

owners of the residue, as if the amount paid by him had been collected by sale of his portion. *Ibid.*, section 47.

And, if there be several joint tenants, or tenants in common, of premises, or of a part of premises so sold, each may redeem his own interest, on payment of a proportionate part of the purchase-money. *Ibid.*, section 48.

And, upon such payment being made, by any person so entitled to redeem any real estate so sold, the sale of the premises so redeemed, and the certificates of such sale, shall be null and void. *Ibid.*, section 49.

A party, redeeming as above, and paying the amount to the creditor in person, will, of course, for his own protection, see to the sheriff being duly notified, to prevent any further trouble in the matter, and likewise that an entry of the payment is made by the county clerk, against the record of the certificate of sale, that it may no longer stand as an encumbrance against the property.

The right of the equitable owner to redeem, does not debar him from maintaining proceedings to set aside the sale as fraudulent, during the time allowed. *Lounsbury vs. Purdy*, 18 N. Y., 515.

But, if he do not redeem within the year allowed him, he will be estopped from afterwards questioning the regularity of the proceedings. *Symonds vs. Peck*, 10 How., 395. See also *Buck vs. Fox*, 23 Barb., 259.

And, when he contests the validity of the sale, it will be proper for him to redeem, and try the question with the purchaser, as regards the money, instead of the land. *Burckhardt vs. Sanford*, 7 How., 329.

In *Miller vs. Lewis*, 4 Comst., 554, it was held, that an agreement, on sufficient consideration, enlarging the time, within which the judgment-debtor may redeem or extinguish the lien acquired by the sale of real property, under an execution, is a valid agreement, and will bind third parties, and, in particular, subsequent judgment-creditors, and overreach their rights of acquiring title, by redemption, under the forms of the statute.

In *Wright vs. Douglass*, 10 Barb., 97, it was held, that the taking of a release from the execution-debtor, to the party holding the certificate, within the twelve months, will be equivalent to a deed from the sheriff, and, by conjoining the legal and equitable interest, will vest in him a complete title, and shut out any subsequent acquisition. The reversal at 3 Seld., 564, does not touch this specific point. The regular practice will, however, be found the most convenient.

Redemption by the debtor, restores a junior judgment, under which the sale was also had, but which was overreached in the application of the proceeds, to the same lien which it had before the sale. And the conversion of the land into money, by sale under a prior mortgage, and

application of the proceeds in extinguishment of the claim of the purchaser, will have the like effect. *Bodine vs. Moore*, 18 N. Y., 347.

(e.) REDEMPTION, AND ACQUISITION OF PURCHASER'S RIGHTS, BY THIRD PARTIES.

The provisions for this purpose are chiefly contained in article II, title V., chapter VI., part III. of the Revised Statutes, and are to the following effect:

If the owner, or party representing him, omits to redeem the premises within the prescribed year, then the interest vested in the purchaser may be acquired, within three months after the expiration of such year, by the persons, and on the terms thereafter prescribed. 2 R. S., 371, section 50.

Any creditor, having, in his own name, or as assignee, representative, trustee, or otherwise, a decree in chancery, or a judgment at law, rendered at any time before the expiration of fifteen months from the time of such sale, or having a mortgage, duly recorded, within the same period, and which shall be a lien, or charge upon the premises sold, or upon any parcel which shall have been separately sold, by paying the sum of money which was paid on the sale of such premises, or upon any parcel which shall have been separately sold, together with interest thereon at the rate of seven per cent. a year, from the time of such sale, shall thereby acquire all the rights of the original purchaser, subject to be defeated by any like creditor, in the manner mentioned in said title, and in the amendatory act of the 26th of May, 1836 (2 R. S., 371, section 50, amended by chapter 243 of 1847, section 1); and, by section 2 of the last statute, all the provisions of the above title are to be extended, and to apply to liens by mortgage, in the same manner as they do to liens by judgment or decree.

If the lien of the redeeming creditor be on any parcel separately sold, the creditor may separately acquire the title to such parcel. 2 R. S., 371, section 52. And, if it be a lien on only part of any lot, tract, or parcel sold, the creditor may acquire the title to the whole. 2 R. S., 372, section 53. And, in like manner, the redeeming creditor, having a lien on any undivided share or interest, may acquire the title of the purchaser to such share or interest, by making a proportional payment. *Ibid.*, section 54.

Whenever any creditor shall have acquired title as above, any other creditor, who might have acquired such title as above, may become a purchaser from the first creditor, upon the following conditions:

1. By reimbursing to such first creditor, his personal representatives, or assigns, the sum which may have been paid thereon, to acquire such

title, with interest at seven per cent. from the time of such payment to the time of such reimbursement.

2. If the lien, by virtue of which the first creditor acquired the purchaser's title, be prior to the lien of the second creditor, then the second creditor shall also pay to the first the amount of such lien.

3. But if the lien of the first creditor, at the time he acquired title, has ceased to be a lien against the second creditor, it shall not be necessary to pay the amount. 2 R. S., 372, section 55, as enlarged by operation of chapter 243 of 1847, section 2, above referred to.

In the same manner, any third or other creditor, who might have originally acquired the title, may, in like manner, become a purchaser on the same terms and conditions. 2 R. S., 372, section 56.

If the original purchaser be also a lien creditor, he may avail himself of his lien, to acquire the title of any other. *Ibid.*, 57. The execution-plaintiff cannot acquire title, by virtue of the decree or judgment under which his execution issued. He may, however, avail himself of any other lien, in the same manner, and on the same terms, as any other creditor. 2 R. S., 373, section 58.

(f.) PROCEEDINGS ON ACQUISITION.

The forms of such acquisition are prescribed at 2 R. S., 373, section 60, as to judgments and decrees; and chapter 325 of 1836, section 2, as to mortgages, as follows:

To entitle a creditor by judgment or decree, or a creditor by mortgage, his assignee or representative, to acquire the title of the original purchaser, or to become, or to be substituted as a purchaser from any other creditor, he shall present to and leave with such purchaser or creditor, or the officer who made the sale, the following evidence of his right:

1. A copy of the docket of the judgment or decree under which he claims the right to purchase, duly certified by the clerk of the court, or of the county in which the same is docketed.

Or, if a mortgagee,

A copy of the mortgage, under which he claims the right to purchase, duly certified by the clerk of the county, where said mortgage is registered and recorded.

2. A true copy of all the assignments of such judgment or decree, which are necessary to establish his claim, verified by his affidavit, or by the affidavit of some witness to such assignments.

Or, if a mortgagee,

A copy of the assignment or assignments, where the mortgage has been assigned, verified, etc. (in the same manner).

Also, in the case of a mortgage, a copy of the letters of administration or letters testamentary, where an executor or administrator applies to be substituted as a purchaser.

3. An affidavit by such creditor, or by his attorney or agent, of the true sum due on such judgment or decree, at the time of claiming such right to purchase.

Or, if a mortgagee,

An affidavit by such mortgage-creditor, his assignee, or representative, or by his attorney or agent, stating the true sum due or to become due on such mortgage, at the time of claiming such right to purchase, over and above all payments.

(g.) PAYMENT OF AMOUNT.

The payments required in order to acquire title, as above, may be made to the purchaser or creditor, his representatives or assigns, or to the officer who made the sale, for the use of the purchaser or creditor entitled to the same. Upon such payment being made, the title of the purchaser or creditor is thereby transferred to the acquiring creditor from time to time. 2 R. S., 373, section 59. If the sheriff die, or be removed from office, the moneys may be paid to the under-sheriff, or to the clerk of the county, in the same manner, and with the like effect, as if paid to the sheriff. 2 R. S., 374, section 67.

Further provisions are made, and the power of acquisition materially increased, and abuse guarded against, on the other hand, by chapter 243 of 1847, as follows:

By section 3, to this effect—

All redemptions made on or after the last day of the fifteen months, by any creditor, shall be made at the sheriff's office of the county in which the sale took place; and it shall be the duty of the officer making the sale, to attend at said office during the last day for making such redemptions, and during the time thereafter in which redemptions may be made; and, in case of the absence of the officer who made the sale from the sheriff's office at such time, then such redemption may be made to the sheriff; and, in his absence, to the under-sheriff, or to any deputy present at such office.

When any redemption shall be made prior to the last day of the fifteen months, the officer to whom the redemption shall be made shall, immediately thereafter, file in the office of the clerk of the county a statement of such redemption, which shall contain the title of the cause, or, if it be a mortgage, the parties to the mortgage; the amount of the judgment, decree, or mortgage; the assignees, representatives, or trustees thereof, if any; and the amount paid to redeem, the time when such

redemption was made, and the sum claimed to be due on such judgment, decree, or mortgage, at the time of such redemption.

The following important provision is then made:

§ 4. Any creditor having a right to redeem, may redeem, within twenty-four hours after any preceding redemption; and no deed upon any sale or redemption shall be executed, until after the lapse of twenty-four hours after the last redemption.

By section 5, it is made the duty of the officer, on any redemption being made, to execute to the person making it, a certificate, stating the matters transpiring before him, sufficient to show the fact of such redemption; which certificate may, under section 6, be proved and recorded, with the same effect as a deed, for which certificate, the officer is to receive the same compensation as on a certificate of sale. Section 7.

(h.) DEED.

After the expiration of the fifteen months, the officer making the sale is to complete the same, by executing a conveyance of any premises, not redeemed, either to the original purchaser, or to the last acquiring creditor, as the case may be; which conveyance shall be valid and effectual to convey all the right, title, and interest, which was sold by such officer (2 R. S., 373, section 62), the legal estate to vest in such purchaser, from the time of the sale. *Ibid.*, section 61.

Or, if the certificate of sale has been assigned by the purchaser, the deed may be made to the assignee, or to the executors or administrators of any deceased assignee, such assignments being previously recorded. See chapter 189 of 1835.

In case of the decease of any person entitled to a conveyance, such conveyance may be made to his executors or administrators. 2 R. S., 374, section 63.

Should the sheriff die, or be removed from office, the under-sheriff may act or convey. *Ibid.*, section 65. And, if there be no under-sheriff, a suitable person may be appointed by the court. *Ibid.*, section 66.

And, lastly, the above provisions are made applicable to the sale and right of redemption of leasehold property, where the lessee or assignee of the lease, shall be possessed of at least five years' unexpired term of the lease, and also of any building or buildings that may be erected thereon. Chapter 462 of 1837.

By article III., title V., chapter VI., part III. of the Revised Statutes, *i. e.*, that succeeding the above, sundry remedies are provided, for failure of title to real estate sold as above, and to enforce contribution, between several owners of land subject to the same judgment. *Vide* 2 R. S., 375 to 377.

(i.) SUNDRY DECISIONS, AS TO FORM AND MODE OF ACQUISITION.

The affidavit of the claimant to acquire title, must state positively the amount of his demand, or in such a manner as that perjury may be assigned, or it will be fatally defective. *The People vs. Becker*, 20 N. Y., 354.

Merely technical defects, however, may be disregarded, and an affidavit, setting forth the contents of assignments, under which the claimant derived title, *in extenso*, in its body, instead of making the copies separately, and identifying them, was held sufficient, in *Aylesworth vs. Brown*, 10 Barb., 167. Technical errors in the assignments themselves were likewise disregarded, there being no pretence that there was any other judgment between the parties.

Nor will a mere error in stating the amount, invalidate the affidavit, if made in good faith and proper form. *Muir vs. Leitch*, 7 Barb., 341.

But, if a copy assignment, served with the other papers, be neither verified nor identified, the evidence will be insufficient, and the party will acquire no title. *Hall vs. Thomas*, 27 Barb., 55.

An assignment by operation of law, need not be proved in form, by a party holding a judgment or decree. A copy assignment, cannot be verified by the oath of the agent or attorney, the statute requiring that of the party. But such agent or attorney may verify, if a subscribing witness. And, where there is no subscribing witness, any person who saw it executed and delivered, is a witness, within the meaning of the statute. *The People vs. Fleming*, 2 Comst., 484.

The holding of collateral security for the amount due, does not, *per se*, disqualify a creditor entitled to redeem from exercising his rights. *Muir vs. Leitch*, *supra*.

As to the statutory right of the execution-creditor to exercise the right of acquisition in respect of another judgment held by him, see *The People vs. Fleming*, *supra*.

The acquisition of an independent claim to the equitable ownership under a subsequent receivership, will not prevent a creditor from exercising his statutory right to acquire. But, in such case, any other creditor may exercise his right also, and, on such exercise, will be entitled to the sheriff's deed, nor can the subsequent equitable interest be set up, as against the prior legal lien. *Chataque County Bank vs. Risley*, 19 N. Y., 369.

A judgment, under which property was sold, but which was not reached in the application of the proceeds, will retain its priority over a junior judgment, under which there has been no sale. *Bodine vs. Moore*, 18 N. Y., 347.

Where a creditor, having acquired a prior title, pays the amount of

the certificate, with ten per cent. interest, within the year allowed, he cannot afterwards claim that the payment was in acquisition of the title, and, if he takes a deed from the sheriff, it will be void, as against a purchaser under a junior judgment-creditor. *Stafford vs. Williams*, 12 Barb., 240.

But whether, under doubtful circumstances, a transaction was in effect a redemption, or a purchase of the sheriff's certificate, is a question of fact, and the burden of proof will lie upon the party assailing the title. *Pennell vs. Hinman*, 7 Barb., 644.

As to the right of both the mortgagor and mortgagee, to redeem, as against a sale on execution, the former during the first twelve, the latter during the three succeeding months, see *North River Insurance Company vs. Snediker*, 10 How., 310.

The taking of an assignment of the sheriff's certificate, will not entitle the mortgagor to stay proceedings by the mortgagee, for sale under a foreclosure. The latter is not confined to his right of redemption, but may assert his independent remedies. *New York Shot and Lead Company vs. Cary*, 20 How., 444; 10 Abb., 44.

A prior mortgage, though unregistered, takes priority over a subsequent judgment, even in respect of future advances, unless the withholding from record has been fraudulent. See *Thomas vs. Kelsey*, 30 Barb., 268.

The payment to the sheriff in order to the acquisition of title, must be of the whole amount due. And, in acquiring the title of any creditor who has acquired the sheriff's certificate, another judgment-creditor must pay the full amount of his bid, without reference to priorities, between himself and such creditor. *Barker vs. Gates*, 1 How., 77.

The giving of notice to the sheriff not to part with money paid on redemption, will not invalidate the effect of the payment. *Spraker vs. Cook*, 16 N. Y., 567.

Where the sheriff had neither died nor been removed from office, payment to the county clerk, was held to be wholly ineffectual for the purpose of effecting a redemption or acquisition, such county clerk not holding any special deputation, even although the business of both was carried on in the same office, and although neither the sheriff nor any of his deputies were in attendance. Nor did the fact that, on the following day, the original purchaser took the money from the county clerk, and used it to effect a second redemption from the first redeeming creditor, avail to give the transaction validity. *People vs. Rathbun*, 15 N. Y., 528. See also *Griffin vs. Chase*, 23 Barb., 278.

Though it is not the sheriff's duty to calculate the amount, still, if he assumes to do so, the court will not allow the party redeeming to suffer through his mistake, but will hold the redemption good. A payment

in current bank bills, if accepted by him, will also be sufficient. *Hall vs. Fisher*, 9 Barb., 17.

When a sale is made under several judgments, a party, to entitle himself to the sheriff's deed, must acquire the rights under all. And, where two junior judgment-creditors each paid the amount of the bid, but neither paid the judgment of the other, the senior of them was held entitled to the preference. And a senior judgment-creditor, may acquire the rights of a purchaser under a junior judgment. *The People vs. Fleming*, 2 Const., 484.

(j.) SHERIFF'S DEED.

It seems that the party entitled to the sheriff's deed, may, if he elect to do so, abandon his title under the certificate, and rely upon a release from the judgment-debtor, and that the concurrence, in such case, of the legal and equitable interest will confer upon him a complete title. *Wright vs. Douglass*, 10 Barb., 97. *Same case*, 3 Barb., 554. The reversal of the latter decision at 3 Seld., 564, does not seem to affect this particular doctrine. The regular practice will be found, however, the more convenient.

So long as the recitals sufficiently set forth the authority under which the sale is made, it is not necessary to set forth the judgment and execution in detail. *Averill vs. Wilson*, 4 Barb., 180 (183). Nor will the insertion of impertinent matter in the recitals, invalidate the instrument, if otherwise sufficient. *Spraker vs. Cook*, 16 N. Y., 567.

The description inserted must be sufficient and certain, or the deed will be void. *Peck vs. Mallams*, 6 Seld., 509.

Till the actual execution and delivery of the deed, no title passes, and the legal estate, with all its incidents, remains in the debtor. *Smith vs. Colvin*, 17 Barb., 157; *Farmers' Bank of Saratoga County vs. Merchant*, 13 How., 10.

But, when so executed and delivered, the title conferred by such deed dates back by relation, to the time of the sale, and shuts out all subsequently acquired interests. 2 R. S., 373, section 61. See *Thomas vs. Crofut*, 4 Kern., 474; *Chatauque County Bank vs. Risley*, 19 N. Y., 369.

When a judgment-creditor has redeemed, in respect of a partial interest, he is only entitled to a conveyance of the interest so redeemed by him. *Neilson vs. Neilson*, 5 Barb., 565. Whatever right the debtor has, passes by the deed, with all the incidents and burdens appendant to it. *Dickinson vs. Smith*, 25 Barb., 102. But, if such right has lapsed before the deed is given, the purchaser will take no title. *Bigelow vs. Finch*, 17 Barb., 394.

In *Bartlett vs. Judd*, 23 Barb., 262, a patent mistake in a sheriff's deed was reformed, as between the parties to the suit, no rights of other

creditors being in question. But, where there exist such rights, it seems this cannot be done. See *dictum*, *Laub vs. Buckmiller*, 17 N. Y., 620 (625); *Mason vs. White*, 11 Barb., 173. Evidence may, however, be admissible, in explanation, or to locate the property. See *last case*. But, a radical mistake in the deed, or in the proceedings conducing to it, cannot be reformed, after delivery. *Clarke vs. Miller*, 18 Barb., 269.

Where the debtor was in possession of the property, at the time the judgment was docketed against him, he, and any one coming into possession under him, will become tenant at will to the purchaser. *Colvin vs. Baker*, 2 Barb., 206; *Dickinson vs. Smith*, 25 Barb., 102. And such tenancy possesses all the usual incidents, with reference to the right of dispossession by summary proceedings. *Vide Spraker vs. Cook*, 16 N. Y., 567.

But, where the property is subject to an executory contract for sale, the purchaser takes it, subject to the equities of the holder of that contract, who may require a strict performance. *Moyer vs. Hinman*, 3 Kern., 180.

On taking his deed, the purchaser becomes entitled to redeem, and cancel a prior outstanding mortgage. He cannot, however, claim an assignment of it, unless he can show it was necessary for his protection, the land being the primary fund for payment. But, before sale, and whilst the judgment is a mere lien, it seems an assignment may be claimed. *Dauchy vs. Bennett*, 7 How., 375.

§ 285. *Execution Against Person.*

STATUTORY PROVISIONS.

The right to issue an execution of this description is thus conferred by the Code, section 288:

If the action be one in which the defendant might have been arrested, as provided in section 179 and section 181, an execution against the person of the judgment-debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property, unsatisfied in whole or in part.

But no execution shall issue against the person of the judgment-debtor, unless an order of arrest has been served, as in this act provided, or unless the complaint contains a statement of facts, showing one or more of the causes of arrest required by section 179.

The following provisions of the Revised Statutes may possibly be held to retain their vitality in this respect (see reservation, Code, section 291):

Under article I., title V., chapter VI., part III., section 5, 2 R. S., 364, it is provided that, if the defendant be imprisoned on execution in another cause, execution may issue against his body, without any previous execution against his property. The remainder of the section relates to the charging in execution, of a defendant, already imprisoned on *mesne* process, or on surrender by his bail. See provisions as to *supersedeas*, below cited.

Under section 8 of the same article, it is provided that, if any person who shall have been taken on an execution, shall escape, he may be retaken, by a new execution against his body, or an execution against the property of such prisoner may be issued, in the same manner as if the body of such prisoner had never been taken in execution.

Under chapter 427 of 1857, vol. I., p. 850, whenever any debtor shall have remained charged in execution for thirty days, any creditor at whose suit he is charged, may, by a written notice, require the sheriff to discharge him from imprisonment, and thereupon he shall be discharged, and such creditor may have the same civil remedies to enforce payment, as if execution against the person had not issued. But no further execution against the body shall be issued, on the same judgment.

If any person charged in execution shall die whilst charged, new executions may be issued against his property, as if he had never been charged, but without prejudice to the right of intermediate purchasers of real estate. 2 R. S., 368, sections 28 to 30, inclusive.

Article IV. of title V., above referred to, provides as to the custody of the party whilst charged in execution. *Vide* 2 R. S., 376, sections 76, 77. Under chapter 32 of 1846, the jail liberties of New York comprise the whole of the city and county.

At the time of arrest, the sheriff is bound, if required by the defendant, to deliver to him a copy of the process, without expenses. *Vide* 2 R. S., 440, section 76.

Provisions to the following effect, are also made on the subject of *supersedeas*, at 2 R. S., 556, sections 36, 37.

When any defendant, at the time judgment shall be rendered against him in any court of record, shall be in custody, either on process or surrender by his bail in the same suit, "the plaintiff in such judgment shall charge such defendant in execution thereon, within three months after the last day of the term, next following that at which such judgment shall have been obtained." And, where such defendant shall be surrendered by his bail after judgment, and the bail exonerated, then the plaintiff must charge the defendant in execution within three months after such surrender, or, if execution against the property shall have been issued, within three months after the return-day of such execution. Section 36.

If any plaintiff shall neglect so to charge any defendant in execution, such defendant may be discharged from custody, by a *supersedeas*, to be allowed by any judge of the court in which such judgment shall have been obtained, unless good cause to the contrary be shown ; and, after such discharge, the defendant shall not be liable to be again arrested on the same judgment.

Under chapter 150 of 1846, an attorney, or other male person, in a fiduciary capacity, is liable to imprisonment, in actions upon contract, for moneys received, in the same manner as in actions for wrongs. This in effect anticipates the provisions of the Code, in section 179.

Although section 179 has been before cited in book V., it will be obviously convenient to repeat the citation here, to prevent the necessity of a back reference. Section 181 is unimportant on the present occasion ; its operation being merely that of giving the other a retrospective effect.

Section 179 runs thus :

The defendant may be arrested, as hereinafter prescribed, in the following cases :

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property.

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled, or fraudulently misapplied, by a public officer, or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation, or banking association, in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed, or disposed of, so that it cannot be found, or taken by the sheriff, and with the intent that it should not be so found, or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud, in contracting the debt or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female shall be arrested in any action, except for a wilful injury to person, character, or property.

(a.) GENERAL OBSERVATIONS.

Cases in which execution against the person may be issued, may be divided into two principal classes:

1. Those in which the right to that form of execution is apparent upon the ordinary judgment-record.

2. Those in which some extrinsic statement, not strictly necessary in order to the entry of judgment, is requisite, to demonstrate the existence of that right.

But, in both cases, the issuing and the return unsatisfied of a previous execution against property, is a condition precedent; unless, possibly, in the case provided for at 2 R. S., 364, section 5, above noticed.

(b.) WHEN RIGHT APPARENT.

By the provision added to section 288, on the recent amendment (1862), the allegations of the complaint, form henceforth the governing test, as to whether the right to execution against the person, is or is not apparent on the record.

The fact must not be lost sight of, that the whole class of actions for damages, not arising out of contract, do not necessarily fall within the first subdivision of section 179.

An action in trover, or for an injury to person, character, or property, must necessarily show the right to this remedy, upon the face of a properly drawn complaint. But, in other actions for damages, not falling within the above class, the right to arrest depends upon the extrinsic facts of non-residence or intention to remove. If an issue of this last nature be tendered by the complaint, and suffered by the defendant to remain unexpunged, the right may then be apparent; if not, an order of arrest will be necessary to sustain it.

An action against an innkeeper for loss of a guest's baggage, has been held to be a case in which the right to arrest is not apparent, but extrinsic. *The People vs. Willett*, 26 Barb., 78; 15 How., 210; 6 Abb., 37.

And a proceeding for damages for breach of contract, does not of course, fall within subdivision 1.

Under subdivision 2, the complaint will frequently show, upon its face, facts showing the defendant's liability to arrest, tendering upon them a material issue. In such a case, the right will be clearly apparent. In an action for money received, it may as frequently be extrinsic, as the proceeding may, in this case, be founded on the mere contract or *assumpsit*, the facts showing fraud, being extraneous to the plaintiff's right to recover. See *Alden vs. Sarson*, 4 Abb., 102.

Whether the strict doctrine held in this case is applicable, under the amended section, seems doubtful. The defendant, if he wishes to con-

test his liability, has his remedy, by motion, to expunge any such matter as irrelevant. If he omits to do so, thus leaving the statement of facts of this nature apparent upon the complaint, it may be well contended that the present provisions of the section are satisfied. See *Humphrey vs. Brown*, 17 How., 481, below referred to; *Pettengill vs. Mather*, 12 Abb., 436.

Subdivision 3 seems to fall, *prima facie*, within the class of cases where the right to arrest is extrinsic, unless the complaint contain a statement of facts, bringing the case within its provisions.

Subdivision 4 seems open to the same observation. The cases in which allegations of fraud may be properly inserted in the complaint, will, however, be more frequent.

Subdivision 5 seems still more clearly to be extrinsic in its nature.

Where right to arrest is apparent upon the record, that right will be available, after judgment, not merely to the plaintiff, but also to the defendant, who, if the former fails in his action, may have execution against his person for costs. See *Kloppenbergh vs. Neefus*, 4 Sandf., 655; *Merritt vs. Carpenter*, 30 Barb., 61; *Miller vs. Scherder*, 2 Comst., 262.

Although judgment may originally have been entered in a justice's court, still, when the right to arrest is apparent on the record, execution against the person may issue from the county court, on a transcript being filed, and such execution will be valid, even though the defendant may have been previously discharged in the lower tribunal. *Ginocchio vs. Figari*, 4 E. D. Smith, 227; 2 Abb., 185; *Wesson vs. Chamberlain*, 3 Comst., 331; *Hall vs. McMahon*, 10 Abb., 319; modifying previous decision, in *same case*, at 10 Abb., 103.

In the last of these cases, the fact that the defendant had received moneys claimed against him, in a fiduciary capacity, being admitted upon the face of a stipulation signed by him, warranting the entry of judgment, it was held that such admission rendered the right of arrest apparent on the face of the record.

But, where the action is not one in which the defendant appears by the record to be arrestable, the mere filing of a transcript will not support an execution against the person. *Livesey vs. Sanders*, 12 How., 25; 3 Abb., 176. Nor can an omission to show the liability to arrest, on the justice's docket, be cured by a subsequent order made by him. *Carpenter vs. Willett*, 6 Bosw., 25; 18 How., 400.

When no liability to arrest is incident to the cause of action, or apparent upon the record, execution against the person, if not otherwise justified, will be void, and the parties issuing it liable for false imprisonment. *Sleight vs. Leavenworth*, 5 Duer, 122.

Where facts constituting a liability to arrest, though alleged in the

complaint, were negatived by the verdict of the jury, on the trial, it was held that, although the plaintiff recovered his demand in the suit, on the ground of a liability on contract, execution against the person was not issuable. *Fowler vs. Abrams*, 3 E. D. Smith, 1. See, as to the effect of the discharge of an order for arrest, *Steele vs. Palmer*, 11 Abb., 62, below cited. Where allegations of fraud were merely collateral, and not essential to the cause of action, it has been considered that such allegations cannot be held as admitted, by merely suffering judgment by default, and that execution against the person is not warranted by such record, standing alone, without an order. See *Humphrey vs. Brown*, 17 How., 481 (485). See also *Field vs. Morse*, 7 How., 12; *Steele vs. Palmer*, 11 Abb., 62 (65); *Alden vs. Sarson*, 4 Abb., 102.

But whether this class of cases are not deprived of their authority by the present provisions of section 288, seems doubtful. See also, prior to the amendment, *Humphrey vs. Brown*, above cited.

There is, however, a manifest justice in the view taken in *Fowler vs. Abrams*. The statements in the complaint are now, it is true, made the test of the plaintiff's right to execution against the person. Suppose, however, that those statements are not only denied, but are disproved at the trial, and found to be unfounded, by the verdict of the jury, or by the decision of the court or referee. Can they then be considered as retaining any vitality, for the purposes of ulterior proceedings? Can such proceedings be based on *ex parte* allegations, nullified by an adverse adjudication? Can the plaintiff, though he has failed on the evidence to make out a case warranting any interference with the personal liberty of the defendant, arrest him, nevertheless, on the ground that he has himself made a statement, which the result of the trial has proved to be unwarranted? It may well be contended that, after trial, an allegation, the existence of which is ignored by the result of that trial, must be regarded as non-existent for all purposes whatsoever.

The rule, that where the defendant's liability to arrest is direct, and not collateral, and is apparent upon the face of the record, execution against the person would issue, as of course, was recognized and established, even before the amendment in section 288, by the following series of cases: *Cooney vs. Van Rensselaer*, 1 C. R., 38; *Burkle vs. Ells*, 4 How., 288; 2 C. R., 148; *Masten vs. Scovill*, 6 How., 315; *Delamater vs. Russell*, 4 How., 234; 2 C. R., 147; *Strauss vs. Schwarzwalden*, 4 Bosw., 627. See also *Humphrey vs. Brown*, 17 How., 481; *Keedenburg vs. Morgan*, 4 Bosw., 646; 18 How., 469.

It has been held that, in an action of ejectment, execution against the person could not issue, though a wrongful withholding of the property was charged. *Fullerton vs. Fitzgerald*, 18 Barb., 441; 10 How.,

37. A contrary view was taken, on the ground that ejectment, in respect of a wrongful withholding, was, in one of its aspects, in the nature of an action for trespass for *mesne* profits, and, as such, fell within the class of actions for injuring property, mentioned in section 179, subdivision 1, in *Merritt vs. Carpenter*, 30 Barb., 61.

(c.) WHEN RIGHT EXTRINSIC.

The subject of execution against the person, and when it will or will not be issuable as of course, is very fully considered by Hogeboom, J., in *Humphrey vs. Brown*, 17 How., 481, in which case the following principles are laid down :

It is held that such execution may issue without an order of the court—

1. When the action is one which, from its very nature, and from the facts necessarily stated in the complaint as the cause of action, the plaintiff would necessarily have been entitled to an order of arrest. (See above subdivision.)

2. If, when the action is one in which the facts entitling the plaintiff to an order of arrest, are not inherent in the cause of action itself, but independent thereof, an order of arrest has been, in fact, granted and enforced in such action.

In *Keedenburg vs. Morgan*, 4 Bosw., 646; 18 How., 469, similar propositions are thus enounced :

1. When the cause of action, established by the judgment-roll, sounds essentially in tort, and creates, *per se*, the right to arrest, under section 179, then, execution against the person issues as of course. (See previous subdivision.)

2. But, when the action sounds in contract, and the right to arrest depends upon extrinsic facts, and not upon the nature of the cause of action itself, that right must be asserted and determined, before judgment, in the manner prescribed by the Code; and execution against the person cannot issue, unless an order to arrest and hold to bail has been made, before judgment was recovered. See likewise *Alden vs. Sarson*, 4 Abb., 102; *The People vs. Willett*, 26 Barb., 78; 10 How., 210; 6 Abb., 37; *Squire vs. Flynn*, 8 Barb., 169; 2 C. R., 117; *Molenaar vs. Kerner*, 22 How., 190; 13 Abb., 241, note; *Caldwell's case*, 13 Abb., 405; 35 Barb., 444.

The amendment of section 288 removes much of the difficulty previously experienced upon this latter subject. The mere fact that an order of arrest has been served, seems now to be the sole criterion. If so served, execution against the person is now issuable in all cases; if not so served, it cannot be sustained.

The section omits, however, to provide for the case of an order made

and served, but afterwards vacated. The point has not yet been passed upon, but it seems reasonable that, under such circumstances, the order, though originally served, so as to satisfy the strict wording of the section, can no longer be invoked, in justification of a subsequent execution. Being vacated, it has, in fact, ceased to exist, and, being non-existent, cannot properly form the basis of an ulterior proceeding. See similar views entertained, before the amendment, in *Steele vs. Palmer*, 11 Abb. 62; and *Molenaar vs. Koerner*, 22 How., 190; 13 Abb., 241, note.

The amendment seems to dispose of the doubts previously entertained, as to whether a plaintiff might or might not, in the absence of an order for arrest, issue execution against the person, at his peril, and afterwards support it, if impeached, by proof of facts which, if brought forward at the outset, would have justified the granting of such an order before judgment. See *Lockwood vs. Van Slyke*, 18 How., 45; *Field vs. Morse*, 7 How., 12 (16); *Masten vs. Scovill*, 6 How., 315. See also *Humphrey vs. Brown*, 17 How., 481; and *Caldwell's case*, 13 Abb., 405; 35 Barb., 444.

Also, on the point as to whether an order may be applied for after judgment, see *Humphrey vs. Brown*, *supra*. Section 183 clearly provides to the contrary. See also *Bull vs. Meliss*, 13 Abb., 241.

The plaintiff is not, however, remediless under these circumstances, but may obtain redress, under the non-imprisonment act of the 26th of April, 1831, section 4.

If an order for arrest has been granted and served, and has never been vacated, it was settled, even before the amendment, that the defendant was arrestable on execution, and that, after judgment, the plaintiff's right to the remedy could no longer be impeached. See *Corwin vs. Freeland*, 2 Seld., 560; reversing *same case*, 6 How., 241; *Cheney vs. Garbutt*, 5 How., 467; 1 C. R. (N. S.), 166; *Sellar vs. Sage*, 13 How., 230 (231); *Fake vs. Edgerton*, 5 Duer, 681; 3 Abb., 229; *How vs. Freer*, 21 How., 343; 13 Abb., 241, note; *Bull vs. Meliss*, 13 Abb., 241; *Crowell vs. Brown*, 17 How., 68; 9 Abb., 107, note. See, however, *dicta* to the contrary in *Harris vs. Cone*, 10 How., 259; *Moon vs. Cockroft*, 9 How., 479; *Bridgewater Paint Manufacturing Company vs. Messmore*, 15 How., 12; *Moore vs. Calvert*, 9 How., 474.

And it was also previously decided, that execution could be grounded on an order vacated on condition, but which condition had never been performed. *Edgerton vs. Ford*, 11 Abb., 415.

The existence of the order, has been held sufficient to authorize subsequent process, without its actually being made part of the judgment-roll. See *Corwin vs. Freeland*, 2 Seld., 560, *supra*; overruling *Gridley vs. McCumber*, 5 How., 414; 3 C. R., 211, and *Barker vs. Russell*, 1 C. R. (N. S.), 5. To annex it, seems, however, the better practice, and

such annexation seems to have actually taken place in *Corwin vs. Freeland*, *supra*, 2 Seld., 560. See also, reference to this point, in *Fake vs. Edgerton*, 5 Duer, 681; 3 Abb., 229.

The taking of security, subsequently accepted in part payment of an original debt for money received in a fiduciary capacity, was held not to destroy the character of the indebtedness, or to have the effect of depriving the plaintiff of his remedy against the person, in *Pettengill vs. Mather*, 12 Abb., 436.

(d.) FORM OF EXECUTION.

As above stated, and, as provided by section 288, the execution, when issued, should show, upon its face, that an execution against the property of the defendant has been already issued, and returned unsatisfied in whole or in part.

It has been held, however, that the omission to issue such a previous execution, does not reach beyond the extent of irregularity, and that it renders the subsequent process voidable only, and not void. *Renick vs. Orser*, 4 Bosw., 384. See also, *Hutchinson vs. Brant*, below cited; *Hall vs. Ayer*, 19 How., 91; 9 Abb., 220.

Nor is it indispensable, that the process should state, upon its face, the time and place of its return; or, that the whole statutory period of sixty days, should have intervened, between the issuing and return of the previous execution against property, where there has been an actual *bonâ fide* return to that process. *Fake vs. Edgerton*, 5 Duer, 681; 3 Abb., 229.

Nor is it indispensable, that the facts rendering the defendant arrestable, should appear upon the face of the process itself. It is sufficient, if those facts exist. *Hutchinson vs. Brand*, 5 Seld., 208; affirming *same case*, 6 How., 73. See also *Fullerton vs. Fitzgerald*, 18 Barb., 441; 10 How., 37.

But, there can be no question, that, in all cases, the fact of the issuing and return of a previous execution, ought to appear upon the face of the process; and such statement is both usual and proper.

Where the judgment is against joint-debtors, the plaintiff's attorney must be careful in affixing the necessary indorsement, directing the execution not to be served upon the person of any defendant, not served with the process by which the action was commenced. As to the exemption of such a party, until a personal judgment has been obtained against him, *vide in re Lowenstein*, 7 How., 100.

As to the power to issue an execution against the person, after the expiration of five years, without leave of the court, where an execution against property has been originally issued, and returned unsatisfied, within that period, see *Kress vs. Ellis*, 14 How., 392.

(e.) AMENDMENT.

Execution against the person is amendable, in respect of merely formal defects or omissions. See *Hutchinson vs. Brand*, 5 Seld., 208; affirming *same case*, 6 How., 73, above cited. See also, as to the similar amendment of previous process, in order to sustain it, *Hall vs. Ayer*, 19 How., 91; 9 Abb., 220.

(f.) SUPERSEDEAS.

If the defendant be already in custody, on *mesne* process, it is necessary for the plaintiff to charge him in execution against the person, with due diligence. If he fail to do so, he will lose his remedy altogether, and the prisoner will be entitled to his discharge. See provisions of Revised Statutes, above cited.

This remedy was granted in *Wells vs. Jones*, 2 Abb., 20. In the same case, it was decided by a majority (Clerke, J., dissenting), that such application may be made to any judge, in any district, without regard to the restrictions of the Code, in section 401, with respect to the venue of motions.

The three months after the last day of the term, next following that in which judgment shall have been obtained, prescribed by those statutes as the limit, within which the defendant must be charged in execution, will run from the actual entry, and not the time at which the plaintiff could have entered up judgment, even though he could, and may be chargeable with negligence, in not having done so sooner. *Lippman vs. Petersberger*, 18 How., 270; 9 Abb., 209.

Where the defendant has been surrendered by his bail, the time within which the plaintiff must charge him in execution, will run, not from the actual surrender, but from the exoneration of the bail. *Hills vs. Lewis*, 13 Abb., 101, note.

(g.) REMEDIES AGAINST PROPERTY.—WHEN RESTORED.

It will be seen, by the provisions of chapter 127 of 1857, above cited, that it is in the power of the plaintiff, at any time after the defendant shall have been charged in execution for thirty days, to discharge him voluntarily.

In this case, his remedy against the property is restored, but he loses any further rights against the person. And, of course, such a discharge has the effect of nullifying the intermediate effect of the doctrine that execution against the person is, whilst it lasts, a satisfaction of the judgment. See *Bank of Beloit vs. Beale*, 20 How., 331 (336); 11 Abb., 375 (379).

And the death or escape of the prisoner also restores the remedy

against property, or, in the latter case, an alias execution may, if the plaintiff choose, be issued, and such prisoner retaken under it. See provisions of Revised Statutes, also above cited.

(h.) DISCHARGE OF DEFENDANT.

On payment of the amount for which he is charged in execution, the defendant is, of course, entitled to be discharged. If this be not done, he must remain in custody, unless he avail himself of the privileges extended to insolvent debtors, and obtain his discharge under the statutory provisions for that purpose.

The case of insanity, existing at the time of arrest, or supervening during the actual period of confinement, presents considerable difficulty. In *Bush vs. Pettibone*, 4 Comst., 300; 1 C. R. (N. S.), 264, it was held that, under the common law, a defendant could not be discharged from imprisonment in a civil suit, on the ground that he was insane at the time of the arrest, or became so afterwards; but that relief might be extended in such a case, under the act in relation to the State Lunatic Asylum, passed on the 7th of April, 1842. The sending of the prisoner to that asylum is, however, a condition precedent to such relief; and, an unconditional discharge having been granted in that case, it was held that such discharge was void, and that the sheriff was not at liberty to obey it; and a verdict against the latter for an escape, under these circumstances, was accordingly sustained.

§ 286. *Return.—Its Preliminaries and Incidents.*

On execution of the process, whether against the property or person, the sheriff is bound to make his return in due time, *i. e.*, within sixty days after its receipt. Code, section 290.

In case of any delay or neglect on his part to make such return in due time, he may be compelled to do so by process of contempt. The mode of procedure for that purpose is prescribed by rule 8. The plaintiff's attorney should, as directed by that rule, serve upon him a notice to make such return within ten days, or show cause, at special term, why an attachment should not issue against him. As to the proceedings under such attachment, see next section.

In such case, the *onus* lies upon the sheriff to excuse his default. He is bound to return the execution, according to the requisition of the statute, at his peril; and, if he fail to do so, he is liable to an attachment, or to an action, at the election of the party aggrieved. *Wilson vs. Wright*, 9 How., 459. See, as to his duty with regard to a return, 2 R. S., 440, section 77.

In other respects he must also execute the writ upon his own

responsibility, and at his own peril. The court will not give him directions upon the subject, but will leave the parties to their remedy against him, should his return prove false. So held, as to the execution of a writ of possession, *Bowie vs. Brahe*, 4 Duer, 676; 2 Abb., 161.

The sheriff, or other officer holding an execution, is entitled to the whole of the sixty days, before he can be compelled to return the writ, and any previous action against him will be premature. *Spencer vs. Cuyler*, 17 How., 157; 9 Abb., 382. See also, collaterally, *Bortel vs. Ostrander*, 15 How., 572.

He may, however, make such return sooner, if he has either made the debt, or is satisfied that there is no property. But, if he so returns it unsatisfied, he does so at his own risk. *Morange vs. Edwards*, 1 E. D. Smith, 414. In the latter case, his return will be good, if made *bonâ fide*. *Fake vs. Edgerton*, 5 Duer, 681; 3 Abb., 229; *Spencer vs. Cuyler*, 17 How., 157 (160); 9 Abb., 382.

A return, thus made, may constitute a sufficient basis on which to ground supplementary proceedings. See next chapter, and cases there cited.

But, to have that effect, the writ must be fairly issued, and fairly left with him, with proper directions, so as to enable him to collect the money upon it, if it can be done. Any directions which tend to relieve him from his responsibility, and to prevent the due execution of the process, will deprive it of its *bonâ fide* character, and render it ineffectual as a ground for ulterior action, such ulterior remedies being based upon the assumption, that the previous legal remedies of the plaintiff against the property of the defendant have been ineffectually exhausted. *Ritterband vs. Marryatt*, 12 L. O., 158; *Pudney vs. Griffiths*, 15 How., 410; 6 Abb., 211; *Nagle vs. James*, 7 Abb., 234; *Spencer vs. Cuyler*, 17 How., 157; 9 Abb., 382; *Farquharson vs. Kimball*, 18 How., 33; 9 Abb., 385, note. See, however, *per contra*, *Sperling vs. Levy*, 10 Abb., 426.

The objection that the writ has been returned too soon, must, however, be raised by means of a direct application by the debtor himself; it cannot be questioned collaterally, or by a third party. *Tyler vs. Willis*, 33 Barb., 327; 12 Abb., 465.

The return, when made, will of course be according to the actual circumstances of the case, and must be signed by the sheriff. When he has made the amount of the debt, or any part of it, the plaintiff, or his attorney, will be entitled to claim payment, immediately on the return. If not, the sheriff will be liable to an attachment, and also to an action for damages. *Vide* 2 R. S., 440, section 77.

If he has not made any portion, or cannot make the whole of the

debt, that officer will make either a total or a partial return of no effects, according to the circumstances. If this return be not impeached, the plaintiff must then resort to his further remedies, either by way of alias execution, creditors' bill, or supplementary proceedings, as the case may require; or, in cases where that remedy is admissible, by way of execution against the person. If the return be false, he has his remedy, by action against the sheriff. As to the power of the latter to relinquish an illegal levy, see *Bliven vs. Bleakley*, 23 How., 124.

There is, however, one other form of return, which may be available, in cases where it may be truly made, *i. e.*, that the sheriff has levied upon goods, which remain on his hands unsold, for want of buyers. In this case, the plaintiff has his remedy, by means of a writ of *venditioni exponas*, commanding him to expose such goods for sale, upon which he will be bound to proceed to sale, and, if he omit to do so, will be responsible, either by way of attachment or action. And it seems that, in such case, he may be held bound to make the amount, out of the goods so returned, where a sufficient levy has been made. *Bank of Whitehall vs. Weed*, 8 How., 104.

If a due return be omitted at the time, it may be subsequently supplied, under the direction of the court. *Hall vs. Ayer*, 19 How., 91; 9 Abb., 220. And if a return be incorrect, or be rendered incorrect by subsequent circumstances, it may be cancelled or amended, under the like direction. *Barker vs. Binninger*, 4 Kern., 270.

Or a correct return may be compelled, according to the legal situation of the parties, on an execution wrongfully countermanded. *McChain vs. McKeon*, 2 Duer, 645.

If the plaintiff or his attorney, interfere with the proceedings of the sheriff, it will form a justification, and exonerate him from the consequences of any delay, occasioned or sanctioned by such interference. *Humphrey vs. Hathorn*, 24 Barb., 278. But mere instructions to delay or depart from the usual course of law, will not have that effect, when not acted upon as given, nor will they excuse a delay or departure, not embraced within their direct purport. *Sheldon vs. Paine*, 6 Seld., 398.

Nor will mere acquiescence in delay, prejudice the rights of a plaintiff, where such delay is not directed by him; otherwise, however, where it is. *Thompson vs. Van Vechten*, 5 Abb., 458. See also *Paton vs. Westervelt*, 2 Duer, 362; 12 L. O., 7.

When money is stayed in the hands of the sheriff, at the instance of another creditor, the defendant ceases to be liable for interest. When money has come to the hands of that officer, for the purposes of an execution, that execution is thereupon paid, either wholly, or *pro tanto*, as the case may be. *Gray vs. Griswold*, 7 How., 44.

And, where an amount so contested has been ordered to be paid into

court, such payment will wholly exonerate the sheriff from further responsibility. *Acker vs. Ledyard*, 4 Seld., 62.

§ 287. *Sheriff's Fees.*

The fees of the sheriff, for services rendered under an execution, are prescribed by the Revised Statutes, part III., chapter X., title III., section 38, 2 R. S., 645. They are as follows:

For returning a writ, twelve and a half cents.

For serving an attachment for the payment of money, or an execution for the collection of money, or a warrant for the same purpose, issued by the comptroller, or by any county treasurer; for collecting the sum of two hundred and fifty dollars, or less, two cents and five mills per dollar; and, for every dollar collected, more than two hundred and fifty, one cent and two and a half mills.

Advertising goods or chattels, lands or tenements for sale on any execution, two dollars; and, if the execution be stayed or settled after advertising, and before sale, one dollar.

The fees allowed by law, and paid by such sheriff to any printer, for publishing an advertisement of the sale of real estate, for not more than six weeks, and for continuing such advertisement more than six weeks, or for publishing the postponement of any such sale, the expense of such continuance or postponement to be paid by the party requiring the same. The fees so allowed by law for publishing any advertisement are, not more than fifty cents per folio for the first insertion in any newspaper, and twenty cents per folio for every subsequent insertion. *Vide* 2 R. S., 648, section 45.

The fees herein allowed for the service of an execution, and for advertising thereon, shall be collected by virtue of such execution, in the same manner as the sum thereby directed to be levied.

But, when there shall be several executions against the defendant, at the time of advertising his property, in the hands of the same sheriff, there shall be but one advertising-fee charged on the whole, and the sheriff shall elect on which execution he will receive the same.

For every certificate on the sale of real estate, the same fees for drawing, and for two copies thereof, as are allowed for drafts and copies to attorneys in the court from which the execution issued, together with the clerk's fee for filing one of such certificates, to be collected as other fees on execution.

(See, as to fees for drawing, engrossing, and copying, the old fee-bill at 2 R. S., 630, section 15, allowing twenty-eight cents per folio for drawing, fourteen cents for engrossment to file, and seven cents for every copy. The clerk's fee for filing seems to be twenty-five cents.)

For drawing and executing a deed, pursuant to a sale of real estate, one dollar, to be paid by the grantee in such deed.

Serving a writ of possession or restitution, putting any person entitled into possession of premises, and removing the tenant, one dollar and twenty-five cents; and the same fees for travelling to serve the same as allowed on the service of a *capias*, *i. e.*, six cents per mile for going only, to be computed from the court-house of the county.

For any person committed to prison, and every person discharged from prison in civil cases, twenty-five cents for receiving, and twenty-five cents for discharging, to be paid by the plaintiff in such process.

For mileage on every execution, six cents per mile, for going only, to be computed from the court-house.

In addition to the above, the sheriff is also entitled to a fee of fifty cents for receiving and entering the execution in his books, searching for property, and paying the postage on the return of the execution, if by mail, to be collected from the person by whom the execution was issued. See chapter 225 of 1850, section 1. Such sum is to be charged as a disbursement, on the costs of the party, and is collectible under the execution, in the same manner as the sheriff's other fees. Section 2.

The provisions above noticed are the only law by which the fees of the sheriff are regulated; and though, in great part, they have become obsolete in terms, fees are to be now allowed for services actually rendered, as under those provisions for services of a similar character. *Vide Benedict vs. Warriner*, 14 How., 568.

Where nothing is done by the sheriff under an execution, he is not entitled to receive any fees. *Rathbun vs. Woodworth*, 1 How., 151. Nor can he claim poundage, unless a levy is actually made. The mere fact that the judgments are a lien does not, *per se*, entitle him to maintain a claim. *People vs. Adams*, 1 C. R. (N. S.), 226.

Though, on making the amount due on an execution, he is entitled to collect his fees also, he cannot sell, for the sole purpose of enforcing them, when the whole amount due to the plaintiff has been otherwise satisfied. *Craft vs. Merrill*, 4 Kern., 456; *Bank of Whitehall vs. Weed*, 8 How., 104.

§ 288. *Enforcement of Decree or Order.*

It remains to notice the remedy afforded by section 285, when the judgment requires the performance of any act, other than the payment of money, or the delivery of real or personal property.

In such a case, no formal execution is issued. The form of procedure is by service of a certified copy of the judgment, upon the party

against whom it is given, or the person or officer required to obey the same. If obedience be refused, such party is punishable as for a contempt.

(a.) STATUTORY AND OTHER PROVISIONS.

The Code makes no direction upon this latter remedy, which is regulated entirely by the Revised Statutes. The provisions upon the subject, will be found in title XIII., chapter VIII., part III., 2 R. S., 534 to 541.

The remedies for contempt of court in other matters, are embraced in the same provisions. Those relating to the matter now immediately in question, viz., the enforcement of a decree or order, may be shortly stated as follows :

Section 1 of the title in question provides thus :

Every court of record shall have power to punish, by fine or imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights of a party in a cause or matter depending in such court, may be defeated, impaired, impeded, or prejudiced, in the following cases :

Subdivision 1 provides for the punishment of all attorneys and persons appointed to perform judicial or ministerial services, &c. (including sheriffs and coroners) for misbehavior or neglect, or violation of duty, or "for disobedience to any process of such court, or of any lawful order thereof, or of any lawful order of a judge of such court, or of any officer authorized to perform the duties of such judge."

Subdivision 2 relates to deceit, or abuse of process or proceedings.

Subdivision 3 runs thus :

Parties to suits, attorneys, counsellors, solicitors, and all other persons, for the non-payment of any sum of money ordered by such court to be paid, in cases where by law execution cannot be awarded for the collection of such sum ; and for any other disobedience to any lawful order, decree, or process of such court.

Subdivisions 4 to 7 relate to criminal or personal contempts.

Subdivision 8 closes the section thus :

All other cases where attachments and proceedings, as for contempts, have been usually adopted, and practised in courts of record, to enforce the civil remedies of any party to a suit, in such court, or to protect the rights of any such party.

Sections 2 and 3 provide for the summary punishment of misconduct, in the immediate view and presence of the court.

Section 4 provides thus, as to disobedience to an order :

When any rule or order shall be made for the payment of costs, or of

any sum of money, and proof, by affidavit, shall be made of the personal demand of such sum of money, and of a refusal to pay it, the court may issue a precept to commit the party, so disobeying, to prison, until such sum and the costs of the proceeding are paid.

But this section has since been thus modified, by chapter 390 of 1847 :

§ 2. No person shall be imprisoned for the non-payment of interlocutory costs, or for contempt of court, in not paying costs, except attorneys, solicitors, and counsellors and officers of court, when ordered to pay costs for misconduct as such, and witnesses, when ordered to pay costs for attachment on non-attendance.

§ 3. Process in the nature of a *fiery facias*, against personal property, may be issued for the collection of such costs, founded on such order of the court.

And the original severity of the remedy is further mitigated by the following provisions in rule 57 (35) :

In all cases where a motion shall be granted, on payment of costs, or on the performance of any condition, or where the order shall require such payment or performance, the party whose duty it shall be to comply therewith, shall have twenty days for that purpose, unless otherwise directed in the order. But, where costs to be adjusted are to be paid, the party shall have fifteen days to comply with the rule, after the costs shall have been adjusted by the clerk on notice, unless otherwise ordered.

The title in question then goes on to provide further in relation to process of contempt, as follows :

§ 5. In cases, other than that specified in section 4 (*i. e.*, non-payment of costs, or of a sum directed by order to be paid), the court shall either grant an order on the accused party, to show cause, at some reasonable time to be therein specified, why he should not be punished for the alleged misconduct ; or shall issue an attachment, to arrest such party, and to bring him before the court to answer for such misconduct.

Rule 8 provides for the service of a notice under these circumstances, having the effect of an order to show cause, in the case of a sheriff or other officer, neglecting to return, deliver, or file any process, within ten days after service of such notice. This provision virtually supersedes the former practice of entering a rule for a return, and issuing an attachment in the event of disobedience. See section 6.

Sections 7 to 9 provide for the bringing up of any party charged with misconduct, but already in custody, by means of a *habeas corpus* for that purpose.

When an attachment is issued by special order, the court is, under section 10, to direct the penalty in which the defendant shall give bond for his appearance to answer. When issued without order, such pen-

alty is to be fixed by a judge, on proper application, and indorsed upon the attachment. Section 11. If not fixed, the defendant may then give bail in \$100. Section 15.

Sections 12 to 16, and also section 37, provide for the safe custody of the defendant, and the mode of that custody, and also for his discharge, in case he shall give bond, with two sufficient sureties, for the amount prescribed, or otherwise, as above.

The sheriff, or officer, must return the attachment by the return-day specified, without previous rule or order. If he make default, an attachment is issuable against him, from which he will not be discharged upon bail, or unless by special order. Sections 17, 18.

The course of procedure upon the return of the attachment, when issued, is thus prescribed :

§ 19. When any defendant, arrested upon an attachment, shall have been brought into court, or shall have appeared therein, the court shall cause interrogatories to be filed, specifying the facts and circumstances alleged against the defendant, and requiring his answer thereto; to which the defendant shall make written answers on oath, within such reasonable time as the court shall allow. The court may receive any affidavits, or other proofs, contradictory to the answers of the defendant, or in confirmation thereof; and, upon the original affidavits, such answers, and such subsequent proof, shall determine whether the defendant has been guilty of the misconduct alleged.

Section 20, amended by chapter IX. of 1843 :

If the court shall adjudge the defendant to have been guilty of the misconduct alleged, and if that misconduct was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of any party, in a cause or matter depending in such court, it shall proceed to impose a fine, or to imprison him, or both, as the nature of such case may require; but in all cases which have arisen, or may hereafter arise, under the provisions of this title, the court, or tribunal ordering such imprisonment, may, in their discretion (in case of inability to perform the requirements imposed), relieve the person or persons so imprisoned, in such manner, and upon such terms as they shall deem just and proper.

§ 21. If an actual loss or injury shall have been produced to any party, by the misconduct alleged, a fine shall be imposed, sufficient to indemnify such party, and to satisfy his costs and expenses, which shall be paid over to him, on the order of the court. And, in such case, the payment and acceptance of such fine, shall be an absolute bar to any action by such aggrieved party, to recover damages for such injury or loss.

§ 22. In all other cases, the fine shall not exceed \$250, over and above the costs and expenses of the proceeding.

§ 23. When the misconduct complained of consists in the omission to per-

form some act or duty, which it is yet in the power of the defendant to perform, he shall be imprisoned, only until he shall have performed such act or duty, and paid such fine as shall be imposed, and the costs and expenses of the proceeding.

§ 24. In such case, the order and process of commitment shall specify the act or duty to be performed, and the amount of the fine and expenses to be paid.

§ 25. In all other cases, where no special provision is made by law, if imprisonment be ordered, it shall be for some reasonable time, not exceeding six months, and until the expenses of the proceeding are paid; and also, if a fine be imposed, until such fine be paid; and, in the order or process of commitment, the duration of such imprisonment shall be expressed.

Section 26 provides for the power to maintain a collateral indictment, where admissible.

Section 27 provides that, if the defendant, against whom an attachment shall have been issued and returned served, do not appear on the return-day thereof, the court may either award another attachment, or may order the bond taken on the arrest to be prosecuted, or both.

The remainder of the title consists of provisions, relative to the prosecution of such bond, or to matters of practice under the former system, not material on the present occasion.

(b.) GENERAL OBSERVATION.

The service of the copy decree or order to be enforced, must, of course, be personal, upon the person required to obey the same. Code, section 418. If made on the attorney, it will be a nullity for any purposes of enforcement. *Fero vs. Van Evra*, 9 How., 148.

When an order is to be enforced, the proof of service should also show, that the original was produced to the disobedient party at the time. *Coddington vs. Webb*, 4 Sandf., 639. Though, where the party is well aware of the order, and can plead no excuse of ignorance, this formality may, in extreme cases, be disregarded. *The People vs. Compton*, 1 Duer, 512. And an attempt to prevent due service will be, in itself, a contempt of court. *Conover vs. Wood*, 6 Duer, 682; 5 Abb., 84. See likewise *Mayor of New York vs. Conover*, 5 Abb., 244 (251).

Where an order is an order of the court at special term, production of a certified copy will be sufficient, and the original need not be exhibited. *Mayor of New York vs. Conover*, 5 Abb., 244; *Smith vs. Smith*, 23 How., 134; 14 Abb., 130. Where the order directs payment of a sum of money, the party making the demand should be furnished with, and should exhibit a written authority to receive it. See *Smith vs. Smith*, *supra*.

As to the power of the court, on special grounds, to dispense with

personal service of an order bringing a party into contempt, see *Pitt vs. Davison*, 12 Abb., 385. See also, as to actual knowledge of the making and nature of an order, enjoining the payment of money, being sufficient to impose upon the adverse party the duty of obeying it, notwithstanding there may be a deficiency in its formal service upon him, *Livingston vs. Swift*, 23 How., 1.

In the case of a municipal corporation, service upon the mayor or principal officer, as representative of the whole body, will be sufficient, and will bind all members of that body, and render each, individually responsible for a contempt of court. *Davis vs. Mayor of New York*, 1 Duer, 451. This case, and that of *The People vs. Compton*, above referred to, are both affirmed, in *The People vs. Sturtevant*, 5 Seld., 263.

Even though an order be erroneous, a party is bound to obey it, whilst unreversed, and, if he disobeys, will be liable to an attachment. *Arctic Fire Insurance Company vs. Hicks*, 7 Abb., 204. But if a party be enjoined by final judgment, proceedings by way of attachment for disobedience of such injunction, will be stayed, by security duly given on appeal. *Howe vs. Searing*, 6 Bosw., 684; 11 Abb., 28.

Connivance at, or the suffering of disobedience to an order, by persons under the control of a party served with it, will be a personal contempt on his part. So also will be any passive hindrance to the order being carried out. *Mayor of New York vs. Conover*, 5 Abb., 244.

In a case where the sheriff is guilty of neglect or misconduct, he will be subject to a strict accountability, but the party seeking to hold him, will be also held to strict practice. *Van Tassel vs. Van Tassel*, 31 Barb., 439; *The People vs. Carnley*, 3 Abb., 215. Nor will he or any other party be punished as for a criminal contempt, when the transaction is capable of any construction, consistent with innocence of an intentional disrespect to the order of the court. *Weeks vs. Smith*, 3 Abb., 211. He cannot avail himself of any matter of defence, personal to the defendant, in answer to an attachment for not returning an execution. *Grosvenor vs. Hunt*, 11 How., 355.

To be punishable by process of contempt, resistance to the order of the court must be actual and positive. A mere refusal, on claim of right, cannot be so dealt with. *Mallory vs. Benjamin*, 9 How., 419. Where rights are contested, in an action between claimants to the same property, the court will not undertake to settle them, on a motion for attachment. *Wilson vs. Wright*, 9 How., 459. Nor will one court interfere in relation to matters, as to which process of contempt is pending in another (*Bennett vs. Le Roy*, 5 Abb., 156); or revise the adjudication upon such process collaterally (*The People vs. Orser*, 12 How., 550; *Pitt vs. Davison*, *supra*); save only that, on *habeas corpus*, the question of jurisdiction, and whether a sufficient offence is charged in the

commitment, may be inquired into. *Devlin's case*, 5 Abb., 281; *The People vs. Kelly*, 21 How., 54; 12 Abb., 150.

Nor can errors in a decree be brought up for correction, on a motion to discharge a party from contempt, for disobeying it. They must be made the subject of a special application. *Pitt vs. Davison*, 12 Abb., 385.

The enforcement of a decree for the delivery of the custody of children, can only be had by means of an attachment, or by *habeas corpus*. Process to the sheriff, commanding him to take and deliver over such children, cannot be issued. *Nicholls vs. Nicholls*, 3 Duer., 642. As to the powers of the court on such an attachment, and what will constitute a disobedience, see *The People vs. Kearney*, 21 How., 74.

A party, directed to execute a deed, is bound to do so, on tender of it, though it has not been submitted to the court or judge for approval. Such a direction is however proper, and may be applied for on motion. *Hilliker vs. Hathorne*, 5 Bosw., 710.

When an attachment has been issued, and the party in contempt has given bond for his appearance, it is not essential that he should be called the first day, especially if the attachment has not been filed; nor can he in that case, regularly appear by counsel on that day, and claim his discharge. An appearance on the second day, will be in time for either party. *The People vs. Monroe*, 15 How., 494.

The application for an attachment, when made, must be brought on upon notice, or more usually by means of an order to show cause. When made, it will be grounded, and must be noticed, on the judgment or order sought to be enforced, proof of due service, and upon affidavits showing a refusal, or omission to comply with the directions of the court, which affidavits must be served. *Vide In re Smethurst*, 2 Sandf., 724; 3 C. R., 55. On the hearing, the motion may be either granted at once, or a reference may be made, to inquire whether the alleged contempt has been committed, and, if so, what damages the moving party has sustained therefrom; the defendant being examined on interrogatories, in relation to the disobedience with which he is charged.

These interrogatories may be either prepared upon the spot, or beforehand, in readiness to be filed at once, in the event of the order being granted.

When the order is for contempt in non-payment of a sum of money, a precept to commit may issue, immediately on the hearing of the motion. The process to appear and answer to interrogatories is for contempts, other than those of that nature. *The People vs. King*, 9 How., 97. See also *Taylor vs. Baldwin*, 14 Abb., 166. A refusal to pay personal taxes, may, under special statute, be punishable, in the city of New York, by means of process of this description. *Kahn's case*, 19 How., 475; 11 Abb., 147.

Where it is clearly shown upon the opposing affidavits that the party was innocent of any intention to resist the order of the court, a reference may be refused. See *Conover vs. Wood*, 6 Duer, 682; 5 Abb., 84.

But, if there is any doubt upon the subject, a reference will probably be ordered. The defendant must then answer the interrogatories, and the sufficiency of his answers, by way of justification or excuse, will then be passed upon, either by the referee, or by the court, in continuance, or on renewal of the motion.

Although the filing of interrogatories be the regular course, still, if a reference be directed, and both parties appear before the referee and submit evidence, the objection will be waived. *Watson vs. Fitzsimmons*, 5 Duer, 629. And, where the proceeding is by order to show cause, the filing of interrogatories is not strictly necessary, though proper. The statute only prescribes that, in a case where the defendant is arrested in the first instance. *Same case*. See also *In re Smethurst*, 2 Sandf., 724; C. R., 55.

On the other hand, the matter may be brought up without a reference, upon filing the interrogatories and answers. In this case, the plaintiff may read affidavits, in opposition to the latter. *Smith vs. Smith*, 23 How., 134; 14 Abb., 130.

A motion to dissolve an injunction was allowed to be brought on, in opposition to one for an attachment for disobedience of it, in *Field vs. Hunt*, 22 How., 329; 13 Abb., 320. But, as a general rule, a party in contempt will not be heard on a matter of favor.

When a party is adjudged guilty of contempt, the mode and extent of punishment is clearly prescribed by the provisions of the statute as above cited. See, as to the extent of such punishment, *Ross vs. Clusman*, 2 Sandf., 676; 1 C. R. (N. S.), 91. To this may be superadded, in a proper case, the striking out of the pleading of the party guilty of disobedience, where such contempt is before trial, and has a direct tendency to defeat the rights of the adverse party. See *Farnham vs. Farnham*, 9 How., 231; *Barker vs. Barker*, 15 How., 568. See also similar cases before cited, under the heads of *Discovery* and *Examination of Parties*.

The payment of a fine imposed upon the delinquent party, discharges him from any further liability in respect of costs and expenses. *Davis vs. Sturtevant*, 4 Duer, 148. But the payment of such a fine, by a sheriff or other officer, does not *per se* amount to an extinguishment of the debt. It rests with the court to judge of its effect. *Carpenter vs. Stilwell*, 12 Barb., 128. The general reversal at 1 Kern., 61, does not touch this point.

The form of a commitment of a witness for contempt will be found in *The People vs. Sheriff of New York*, 29 Barb., 622; 7 Abb., 96. See also generally, *The People vs. Kelly*, 21 How., 54; 12 Abb., 150; *Matter of Hackley*, 21 How., 103; 12 Abb., 150; *Davison's case*, 13 Abb., 129.

Although a corporation is incapable of being reached by means of an attachment, its contempt may be punished, by means of the imposition of a fine, and by process of sequestration. *Vide* 2 R. S., 463, section 36. *The People vs. Albany and Vermont Railroad Company*, 20 How., 358; 12 Abb., 171.

That a claim is barred by the statute of limitations, forms a defence to proceedings by way of contempt to compel its satisfaction. See *Van Tassel vs. Van Tassel*, 31 Barb., 439.

§ 289. *Precept for Costs.*

This form of process, provided for by the statute of 1847, chapter 390, above cited, in lieu of the former process of contempt for non-payment of interlocutory costs, differs in no essential respect from the ordinary execution against property, save that the process is founded upon the order, and must of course recite it, and should likewise show the lapse of the period prescribed by rule 57, and non-payment after that lapse. As to this being the only remedy, there being no longer any power to issue an attachment under such circumstances, save only in the cases excepted by section 3, of the statute of 1847, see *Vreeland vs. Hughes*, 2 C. R., 42; *Buzard vs. Gross*, 4 How., 23.

To warrant process of this description, the amount of costs must be fixed by the order, or adjusted by the clerk; it cannot issue for an unliquidated demand. *Eckerson vs. Spoor*, 4 How., 361; 3 C. R., 70; *Boyce vs. Bates*, 8 How., 495.

It cannot issue for costs included in a judgment, which are enforceable by the ordinary process. *Wesley vs. Bennett*, 6 Abb., 12. Nor for those of a demurrer. *Moza vs. Sun Mutual Insurance Company*, 22 How., 60; 13 Abb., 304; *Palmer vs. Smedley*, 13 Abb., 185. And, to be so enforceable, the costs must be awarded by an order of the court; costs given by that of a judge, as in supplementary proceedings, cannot be thus collected. *Hulsover vs. Wiles*, 11 How., 446.

The party entitled to the costs must wait, before issuing the precept, the whole of the period prescribed by rule 57. But, when that period has expired, no demand is necessary, and the precept issues at once, and as of course, in the event of non-payment. *Lucas vs. Johnson*, 6 How., 121; *Mitchell vs. Westervelt*, 6 How., 265; affirmed, 6 How., 311; *Wetzel vs. Schultz*, 13 How., 191; 3 Abb., 468; overruling on this point, *Eckerson vs. Spoer*, above cited. In *Boyce vs. Bates*, *supra*, an order was held necessary before issuing the process. The liability in that case was, however, of a special nature, being that of the attorney of a non-resident defendant, who had failed to file security for costs. Under those circumstances, it was held that the costs must first be tax-

ed, demand then made ; and, on non-payment, that an *ex parte* order might be obtained, on which the precept would issue as of right.

Where process of this nature was issued against several defendants, one of whom was in fact dead, it was held to constitute no objection to it, in the mouths of the survivors. *Lucas vs. Johnson, supra.*

CHAPTER II.

OF PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

§ 290. *Statutory and Other Provisions.*

THE provisions on this subject comprise chapter II., title IX., part II. of the Code, and run as follows :

§ 292. (247.) When an execution against property of the judgment-debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides, or has a place of business ; or, if he do not reside in the state, to the sheriff of the county, where a judgment-roll, or a transcript of a justice's judgment for twenty-five dollars or upwards, exclusive of costs, is filed, is returned unsatisfied in whole or in part, the judgment-creditor, at any time after such return made, is entitled to an order from a judge of the court, or a county judge of the county to which the execution was issued, or a judge of the Court of Common Pleas for the city and county of New York, when the execution was issued to such city and county, requiring such judgment-debtor to appear and answer concerning his property, before such judge, at a time and place specified in the order, within the county to which the execution was issued. After the issuing of an execution against property, and upon proof by affidavit, of a party or otherwise, to the satisfaction of the court, or a judge thereof, or county judge, or any judge of the Court of Common Pleas for the city and county of New York, that any judgment-debtor, residing in the county where such judge or officer resides, has property, which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment-debtor to appear at a specified time and place, to answer concerning the same ; and such proceedings may thereupon be had for the application of the property of the judgment-debtor towards the satisfaction of the judgment, as are provided, upon the return of an execution.

Whenever it shall satisfactorily appear, by affidavit, to a justice of the Supreme Court, that such county judge, or judge of said Court of Common

Pleas, is incapacitated from acting in any of the proceedings whatever, herein authorized, from any cause or causes whatsoever, such justice of the Supreme Court shall have the same powers and authority, in all cases whatever, as are herein conferred upon him as to cases of judgments in the Supreme Court. On an examination under this section, either party may examine witnesses in his behalf, and the judgment-debtor may be examined in the same manner as a witness. Instead of the order requiring the attendance of the judgment-debtor, the judge may, upon proof by affidavit or otherwise, to his satisfaction, that there is danger of the debtor's leaving the state, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such judge. Upon being brought before the judge, he may be examined on oath, and, if it then appears that there is danger of the debtor's leaving the state, and that he has property which he has unjustly refused to apply to such judgment, he may be ordered to enter into an undertaking, with one or more sureties, that he will from time to time attend before the judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property, not exempt from execution. In default of entering into such undertaking, he may be committed to prison, by warrant of the judge as for a contempt. No person shall, on examination pursuant to this chapter, be excused from answering any question, on the ground that his examination will tend to convict him of the commission of a fraud ; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

This section was modelled in its present form upon the amendment of 1851. In 1858, the important words, "or has a place of business," were, however, first inserted by amendment in the first clause, and the provisions empowering a Supreme Court judge to act in the place of a county judge, when disqualified, were added in 1859.

In 1849, the section was less comprehensive and explicit. In 1848, it merely consisted of a provision to the effect of the present first clause.

§ 293. (248.) After the issuing of execution against property, any person indebted to the judgment-debtor, may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

Dates from 1849, as it stands. Substantially the same in 1848.

§ 294. (249.) After the issuing or return of an execution against property of the judgment-debtor, or of any one of several debtors in the same judgment, and upon an affidavit, that any person or corporation has property of such judgment-debtor, or is indebted to him, in an amount exceeding ten dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place, and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding to be given to any party to the action, in such a manner as may seem to him proper.

Dates, as it stands, from 1849. In 1848 the section was to the same purport, but less comprehensive.

§ 295. (250.) Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue.

§ 296. (251.) The party or witness may be required to attend before the judge, or before a referee, appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answers shall be on the oath of an officer thereof.

Dates, as it stands, from 1849. Less comprehensive in 1848.

§ 297. (252.) The judge may order any property of the judgment-debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment-debtor, to be applied towards the satisfaction of the judgment, except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied, when it is made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

The first portion of the section was in the original Code, the exception, as to earnings, was added upon the amendment of 1851.

§ 298. (253.) The judge may also, by order, appoint a receiver of the property of the judgment-debtor, in the same manner, and with the like authority, as if the appointment was made by the court, according to section 244. But, before the appointment of such receiver, the judge shall ascertain, if practicable, by the oath of the party, or otherwise, whether any other supplementary proceedings are pending against the judgment-debtor; and, if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to such receivership. No more than one receiver of the property of a judgment-debtor shall be appointed. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment-debtor not exempt from execution, and any interference therewith.

Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment-debtor, the same shall be filed in the office of the clerk of the county where the judgment-roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the said clerk shall record the order in a book to be kept for that purpose in his office, to be called "book of orders appointing receivers of judgment-debtors," and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment-debtor from the time of the filing and recording of the order as aforesaid. The

receiver of the judgment-debtor shall be subject to the direction and control of the court in which the judgment was obtained, upon which the proceedings are founded; or if the judgment is upon a transcript from justice's court filed in county clerk's office, then he shall be subject to the direction and control of the county court.

The last clause added in the amendment of 1862.

In 1848 and 1849 the section consisted only of the first and last sentences of the first clause. The intermediate portions were added in 1851.

§ 299. (254.) If it appear that a person or corporation alleged to have property of the judgment-debtor, or indebted to him, claims an interest in the property, adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such order may be modified or dissolved by the judge granting the same, at any time, on such security as he shall direct.

Dates, as it stands, from 1849. In 1848 the section was to the same purport, but much less comprehensive.

§ 300. (255.) The judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

Dates, as it stands, from the amendment of 1857. Before that year, there was no express provision enabling the appointment of a referee in the first order.

§ 301. (256.) The judge may allow to the judgment-creditor, or to any party so examined, whether a party to the action or not, witnesses' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs.

Dates from 1849. In the previous year, only travelling fees, not witnesses' fees and disbursements, were allowed, besides the fixed costs.

§ 302. (257.) If any person, party, or witness, disobey an order of the judge or referee, duly served, such person, party, or witness, may be punished by the judge, as for a contempt. And, in all cases of commitment under this chapter, or the act to abolish imprisonment for debt, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just.

In 1848 and 1849 the section consisted of the first sentence. The power to discharge from imprisonment, was added upon the amendment of 1851.

Rule 92 (76) provides thus upon the subject of the powers and duties of a receiver appointed under this title:

Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands, and rents, belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course, that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor, without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may, by leave of the court, sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.

§ 291. *General Incidents of Remedy.*

The remedy thus provided, being essentially a part of the regular procedure in an action, is not, in strictness, a special proceeding, within the purport of section 3 of the Code. *Dresser vs. Van Pelt*, 15 How., 19; 6 Duer, 687; *Bank of Genesee vs. Spencer*, 15 How., 412. It partakes very much of that nature, however, especially as regards the remedies provided against third persons, not parties to the suit. See *Davis vs. Turner*, 4 How., 190; *Conway vs. Hitchins*, 9 Barb., 378.

And likewise, on the ground that the proceeding is in itself statutory, and the authority conferred must be strictly pursued, and that the judge before whom it is pending acts in it, in his individual capacity, and not as a member of the court. See below. See also *Webber vs. Hobbie*, 13 How., 382; and *Squire vs. Young*, 1 Bosw., 690, there referred to. See likewise *Campbell vs. Foster*, 16 How., 275; and *Hulsover vs. Wiles*, 11 How., 446.

The whole of these provisions are made retrospective, by section 2, subdivision 2, of the supplemental act, and likewise by section 459 of the Code. See also *Jones vs. Lawlin*, 1 Sandf., 722; 1 C. R., 94; *Dickerson vs. Cook*, 16 Barb., 509. *Anon.*, 3 Duer, 673, holding the contrary, seems to be erroneous.

These proceedings are, in some respects, intended, and may be considered as effecting a substitute for the old procedure, by way of the statutory creditors' bill. They do not, however, prejudice that rem-

edy, which may still be resorted to in proper cases, especially where collateral or additional relief is sought. Supplementary proceedings are more peculiarly calculated, for the purpose of reaching property, the title to which is not disputed. Where there is any contest of title, or where the relief asked for involves the setting aside of any previous instrument or transaction, the remedy by way of creditors' bill will be the more appropriate. See *Gasper vs. Bennett*, 12 How., 307; *Catlin vs. Doughty*, 12 How., 457; *Taylor vs. Persse*, 15 How., 417.

There is no obstacle to these proceedings being carried on by an assignee of the judgment, as well as by the original creditor. *Ross vs. Chusman*, 3 Sandf., 676; 1 C. R. (N. S.), 91; *Orr's case*, 2 Abb., 457. See also *Hough vs. Kohlin*, 1 C. R. (N. S.), 232; *Lindsay vs. Sherman*, 5 How., 308; 1 C. R. (N. S.), 25; *Frederick vs. Decker*, 18 How., 96.

The lapse of five years from the entry of judgment, does not prevent these proceedings from being maintainable, without any special leave of the court, where, within those five years, an execution has been issued, and returned unsatisfied. *Miller vs. Rossman*, 15 How., 10. But, if the execution itself were irregular, then they might not be maintainable. See *Currie vs. Noyes*, 1 C. R. (N. S.), 198.

And, when proceedings are instituted on a judgment of this nature, the applicant must show, either that a former execution has been returned unsatisfied, or that the process, issued after the expiration of the five years, has been issued by leave of the court. *Belknap vs. Hasbrouck*, 13 Abb., 418, note.

To enable these proceedings to be taken on a justice's judgment, a transcript must have been duly filed, and the judgment itself must originally have been for the sum of \$25, exclusive of costs, inasmuch as such a judgment for a less sum, does not bind real estate of the defendant (Code, sections 63 and 64), so that an execution "against property" cannot have issued in the full sense of the latter word. Code, section 464. See *Butts vs. Dickinson*, 20 How., 230; 12 Abb., 60; *Vulte vs. Whitehead*, 2 Hilt., 596; *Anon.*, 32 Barb., 201. The contrary of this proposition is maintained in *Candee vs. Gundelsheimer*, 17 How., 434; 8 Abb., 435.

When such a judgment has been entered for the full amount of \$25, exclusive as above, and a transcript filed, so as to form a lien upon real estate, it is enforceable in all respects, as if originally entered in a court of record. See sections of Code above referred to. See also *Conway vs. Hitchins*, 9 Barb., 378.

It has been doubted whether these proceedings are maintainable, under a judgment obtained on service by publication. See *Barker vs. Johnson*, 4 Abb., 435.

Prior to the recent amendments in sections 274 and 287, it was held

that they were not maintainable against a *feme covert*, as no personal judgment could be taken against her. *Williams vs. Carroll*, 2 Hilt., 438. But, since those amendments, there seems no reason why she should not be examinable, concerning her separate property.

The decease of the judgment-debtor abates the right to these remedies, and they cannot be carried on, against parties holding property, until the suit has been duly revived. *Hazewell vs. Penman*, 13 How., 114; 2 Abb., 230.

It has been doubted whether proceedings of this nature were generally maintainable as against a corporation. See *Hinds vs. Canandaigua and Niagara Falls Railroad Company*, 10 How., 487; *Sherwood vs. Buffalo and New York City Railroad Company*, 12 How., 136; *Hammond vs. Hudson River Iron and Machine Company*, 11 How., 29. This proposition, no doubt, holds good, so far as proceedings under section 292 are concerned. As regards those under section 294, however, it stands controverted, it having been held that the remedy under that provision is existent, and that the debtors or officers of a corporation may be examined under it. See *McBride vs. Farmers' Branch Bank*, 28 Barb., 476; 7 Abb., 347; *Courtois vs. Harrison*, 1 Hilt., 109; 12 How., 359; 3 Abb., 96; *Lowber vs. Mayor of New York*, 5 Abb., 268; *The Same vs. The Same*, 7 Abb., 248.

The issuing of an alias execution, prior to or pending these proceedings, is no bar to their being maintained or continued, unless it be clear that the levy under that execution is sufficient to satisfy the judgment. *Sale vs. Lawson*, 4 Sandf., 718; *Owen vs. Dupignac*, 9 Abb., 180; *Farquharson vs. Kimball*, 18 How., 33; 9 Abb., 385, note; *Lillien-dahl vs. Fellerman*, 11 How., 528; 2 Abb., 155. See, however, *McArthur vs. Lansburgh*, 1 C. R. (N. S.), 211. Nor will the issuing of an attachment invalidate them. *Hanson vs. Tripler*, 3 Sandf., 733; 1 C. R. (N. S.), 154.

These proceedings are maintainable against a joint debtor served with process, nor need another, not served, be made a party to them. *Emery vs. Emery*, 9 How., 130. But no coercive measures can be taken against the latter, until duly brought in by service. *In re Lowenstein*, 7 How., 100.

Nor can such proceedings be maintained against a privileged party. *Griffin vs. Domingues*, 2 Duer, 656; 11 L. O., 285. Nor, pending a regular appeal from the judgment sought to be enforced, on which security, sufficient to effect a stay of proceedings, has been given. *Ritterband vs. Marryatt*, 12 L. O., 158.

And, whilst a defendant, charged on execution against the person, remains imprisoned, it is clear that proceedings of this nature cannot be had against him. If the plaintiff desires to enforce his remedies against

property, he must either take them prior to the charging on execution, or procure his discharge. See above under that head.

§ 292. *Jurisdiction of Officers.*

The parties named by section 292, by whom these proceedings are generally cognizable, are—

1. A judge of the court in which the judgment was entered.
2. A county judge of the county to which the execution was issued.
3. In the city of New York, a judge of the Court of Common Pleas, when execution was issued to such county.

4. Where a county judge, or judge of the New York Common Pleas is incapacitated from acting, a justice of the Supreme Court may assume cognizance of the case.

This list is applicable to the ordinary proceedings under the chapter in question. But where, under the second division of section 292, the examination of the judgment-debtor is had, on the subject of property which he unjustly refuses to apply, the list is wider. Application may then be made—

1. To the court ;
 2. To a judge thereof ;
 3. To a county judge ;
 4. To any judge of the New York Common Pleas ;
- Residing, in each case, in the county where such judgment-debtor resides.

In this last class of proceedings, the court may act as such. *Bitting vs. Vandenburg*, 17 How., 80.

But, in the ordinary examination under section 292, and in the other collateral or dependent proceedings, provided for in the chapter, the authority is personal, vested in the judge before whom the proceeding is originally commenced, and not in the court, or in such judge as a member of it. That authority being statutory, must be strictly pursued, and it continues in the same officer until the ultimate winding up of the proceedings, including, within its scope, the power to punish for a contempt. *Bitting vs. Vandenburg*, *supra* ; *Webber vs. Hobbie*, 13 How., 382 ; *Smith vs. Johnson*, 7 How., 39 ; *In re Smethurst*, 2 Sandf., 724 ; 3 C. R., 55 ; *In re Pester*, 2 C. R., 98 ; *Shepherd vs. Dean*, 13 How., 173 ; 3 Abb., 424 ; *Miller vs. Rossman*, 15 How., 10 ; *Bank of Genesee vs. Spencer*, 15 How., 14 ; *Squire vs. Young*, 1 Bosw., 690 ; *Wicker vs. Dresser*, 14 How., 465.

In the first district it has been held, that if these proceedings be commenced before one judge, they may, under the power conferred by section 27, be continued before another. *Dresser vs. Van Pelt*, 15 How., 19 ; 6 Duer, 687 ; *Kelly vs. McCormick*, 2 E. D. Smith, 503 ; *Shep-*

herd vs. *Dean*, 13 How., 173 ; 3 Abb., 424 ; *Wicker* vs. *Dresser*, 14 How., 465 ; *The Same* vs. *The Same*, 13 How., 331 ; 4 Abb., 93 ; *The People* vs. *Kelly*, 22 How., 309 ; 13 Abb., 459.

But these rules do not, it has been held, affect the general power of the court, as such, to punish for a contempt. See *Wicker* vs. *Dresser*, 13 How., 331 ; 4 Abb., 93, *supra*. Nor will the fact that an order in this class of proceedings has been made by, or is returnable before the judge exercising the jurisdiction, whilst actually sitting at special term, constitute a valid objection. *Same case* ; *Dresser* vs. *Van Pelt*, *supra*.

The recorder of Oswego has special power of acting, in proceedings pending in any court, conferred upon him by chapter 96 of 1857, section 4, vol. I., p. 203.

The recorder of Troy is also invested with similar powers. *Vide Hayner* vs. *James*, 17 N. Y., 316. And the same may be predicated of all other officers invested by statute with the powers of a county judge.

But an officer, merely invested with the powers of a judge of the Supreme Court at chambers, is not, it seems, vested with jurisdiction for that purpose. The city judge of Brooklyn was therefore held to have no power to entertain these proceedings, on a judgment of the Supreme Court, in *Cushman* vs. *Johnson*, 13 How., 495 ; 4 Abb., 256.

On the other hand, a judge of the Supreme Court, as such, has no jurisdiction over, or power to control, proceedings under the judgment of a county court, or of the New York Common Pleas, either originally entered, or become a judgment of such court, by being docketed under section 63. *Stright* vs. *Vose*, 1 C. R. (N. S.), 79, note ; *Blake* vs. *Locey*, 6 How., 108 ; 1 C. R. (N. S.), 406.

And, in courts whose jurisdiction is local, where the defendant is non-resident, and has no place of business within the limits, so as to bring him directly within the general scope of that jurisdiction, an application to the county judge of the county to which execution was issued, will be the proper, and the only admissible course. See *Sale* vs. *Lawson*, 4 Sandf., 718 ; *Hersenheim* vs. *Hooper*, 1 Duer, 594 ; 11 L. O., 222.

In the Supreme Court, on the contrary, an application to a judge of the court will, when practicable, be the better course, in view of the greater strictness of practice necessary, in proceedings before the county judge, in cases not pending in his own court. See *People* vs. *Hurlbut*, 5 How., 446 ; 1 C. R. (N. S.), 75 ; 9 L. O., 245. As to the general powers of a Supreme Court judge in this respect, see *Bingham* vs. *Disbrow*, 14 Abb., 257.

§ 293. *Proceedings on Ordinary Examination of the Debtor*

PRELIMINARIES.

When the special powers, conferred by the second clause of section 292, are not invoked, but an ordinary examination of the debtor, respecting his property, is merely sought, the following are essential prerequisites to that proceeding, and to the dependent remedies, provided for by other portions of the chapter.

An execution must have issued against the property of the judgment-debtor sought to be examined.

When a resident, such an execution must have been issued to the sheriff of the county, in which such debtor either resides, or has a place of business. See, however, *Bingham vs. Disbrow*, 14 Abb., 257.

If a non-resident, then to the sheriff of the county in which the judgment-roll is filed; or, if a justice's judgment, to the county where a transcript of such judgment is filed.

And such execution must have been returned unsatisfied, in whole or in part.

As in the case of a creditor's bill, these are essential prerequisites; the creditor must have first exhausted his remedy by execution, before he can claim the equitable interposition of the court, to reach property not attainable by that process.

And the authority conferred by the section must be strictly pursued, and all its requisitions complied with, or the officer will fail to acquire jurisdiction. *Campbell vs. Foster*, 16 How., 275; *Sackett vs. Newton*, 10 How., 560.

In relation to the return, it was held, in some of the earlier cases, that these proceedings could not be commenced, before the lapse of the entire period of sixty days allowed by section 290, even though, in fact, the return had been made sooner. See *Phelps vs. Brooks*, and *Sherwood vs. Littlefield*, 1 C. R., 85. See likewise, as to a creditor's bill, dissenting opinion of Bosworth, J., in *Forbes vs. Logan*, 4 Bosw., 475; and, more recently, *Field vs. Hunt*, 22 How., 329; 13 Abb., 320. This doctrine was, however, overruled. See below.

The sheriff is entitled to the whole of the sixty days, and he cannot be compelled to make his return sooner. See *Spencer vs. Cuyler*, 17 How., 157; 9 Abb., 382; *Bortel vs. Ostrander*, 15 How., 572.

But if he make such return in good faith, at an earlier period, it will be valid, and will form a ground for the institution of supplementary proceedings at once, upon the return being actually made. See *Messenger vs. Fisk*, 1 C. R., 106; *Simpkins vs. Page*, 1 C. R., 107; *Living-*

ston vs. Cleaveland, 5 How., 396 ; 1 C. R. (N. S.), 54 ; *Engle vs. Bonneau*, 2 Sandf., 679 ; 3 C. R., 205 ; *Tyler vs. Willis*, 33 Barb., 327 ; 12 Abb., 465 ; *Spencer vs. Cuyler*, *infra*. See likewise, *Sperling vs. Levy*, 10 Abb., 426.

And, in making such a return, he acts at his own risk. *Merange vs. Edwards*, 1 E. D. Smith, 414. See also, as to a creditor's bill, *Forbes vs. Logan*, 4 Bosw., 475.

But such return, to be available as the basis of supplementary proceedings, must be made in entire good faith. The execution must have been fairly left with him, so as to enable him to collect the money, if it can be done, and there must have been an exhaustion of the remedy by execution, by means of a *bonâ fide* attempt to do so, and a failure in that attempt. If such return be made untruly, or without due inquiry, or by collusion, or by the undue solicitation or procurement of the plaintiff, it will be wholly unavailable, and the proceedings grounded upon it void. See *Ritterband vs. Marryatt*, 12 L. O., 158 ; *Engle vs. Bonneau*, *supra* ; *Spencer vs. Cuyler*, 17 How., 157 ; 9 Abb., 382 ; *Pudney vs. Griffiths*, 15 How., 410 ; 6 Abb., 211 ; *Nagle vs. James*, 7 Abb., 234 ; *Farquharson vs. Kimball*, 18 How., 33 ; 9 Abb., 385, note ; *Sackett vs. Newton*, 10 How., 560.

The contrary of this proposition is, however, maintained, and it was held that, under such circumstances, the court will not go behind the return, except upon a direct motion to set it aside, by a majority of the New York Common Pleas, Brady, J., dissenting, in *Sperling vs. Levy*, 10 Abb., 426. See also *Tyler vs. Willis*, above cited.

It is also indispensable to the validity of the proceeding, that the return should be actually made, before the original order is taken out. *Engle vs. Bonneau*, 2 Sandf., 679 ; 3 C. R., 205. But, where such order had been procured, in the *bonâ fide* belief that the return had been made, and such return was actually filed, in the course of the same day, though at a later hour, the proceedings were sustained. *Jones vs. Porter*, 6 How., 286. See also cases there referred to, as to the power of amendment under similar circumstances.

As to what will or will not be a place of business of the defendant, within the meaning of the section, see *Belknap vs. Hasbrouck*, 13 Abb., 418, note.

(a.) AFFIDAVIT.

The existence of the state of circumstances, warranting the granting of this remedy, must be shown in the usual manner, by affidavit, which had better be made by the party, if possible. If not, that of his attorney or agent will suffice.

It is sufficient if the affidavit show the statutory requisites, of the

entry of judgment, the issuing of execution to the proper county, and the return of that execution unsatisfied. The statement of these facts entitles the applicant to the order. *Owen vs. Dupignac*, 9 Abb., 180 ; (also, 17 How., 512, dissenting opinion.) See also *Conway vs. Hitchins*, 9 Barb., 378.

Where, however, the statement of any other circumstance is necessary to give validity to the proceedings, it must of course be made. See *Belknap vs. Hasbrouck*, 13 Abb., 418, note.

When the above statutory prerequisites are directly asserted, it will not be necessary to go into minor details. See above cases. Nor will it be necessary to state in terms, that the execution was against property ; the presumption will be that it was so. *McArthur vs. Lansburgh*, 1 C. R. (N. S.), 211. Nor will it be requisite to allege that the defendant has property.

The creditor is not required to show this fact, in order to an examination. *Hatch vs. Weyburn*, 8 How., 163 ; *Anonymous*, 1 C. R. (N. S.), 113 ; *Hough vs. Kohlin*, 1 C. R. (N. S.), 232. See likewise, *Conway vs. Hitchins*, and *Lindsay vs. Sherman*, referred to in former part. These cases overrule the earlier decisions in *Tillou vs. Vere*, 1 C. R., 130 ; and *Jones vs. Lawlin*, 1 C. R., 94. A much stricter rule is applied, to proceedings before a county judge, as such, in *The People vs. Hurlbut*, 5 How., 446 ; 1 C. R. (N. S.), 75 ; 9 L. O., 245, where it is laid down that, in these cases, every material fact must be averred, necessary to confer jurisdiction upon that officer, in favor of which jurisdiction nothing could be presumed. Under these circumstances, the affidavit should be much fuller and more explicit in its detail of that class of facts, than when the application is made to a judge of the court.

If the affidavit does not truly describe the judgment, proceedings grounded upon it will be void. *Kennedy vs. Weed*, 10 Abb., 62. See also, as to the omission of a statement of the return on execution, *Sackett vs. Newton*, 10 How., 560.

Where the defendant has been once examined, the affidavit for the purpose of a second examination should state upon its face the reasons for that proceeding. *Goodall vs. Demarest*, 2 Hilt., 534. See also *Orr's case*, 2 Abb., 457.

When the application is not made by the original judgment-creditor, but by an assignee, his title to the judgment must be alleged, so as to show by what right he moves in the matter. *Lindsay vs. Sherman*, 5 How., 308 ; 1 C. R. (N. S.), 25 ; *Hough vs. Kohlin*, 1 C. R. (N. S.), 232 ; *Frederick vs. Decker*, 18 How., 96. As to the rights of an assignee to maintain such proceedings, see *Orr's case*, 2 Abb., 457. *Ross vs. Chusman*, 3 Sandf., 676 ; 1 C. R. (N. S.), 91.

(b.) ORDER.

On the affidavit, as thus prepared, application is made to the judge or officer, for an order for examination of the judgment-debtor, either before the officer himself, or before a referee. The former will be the better course, where possible, the presence of the judge or officer affording greater facilities for disposing of any incidental questions which may arise; the latter will be the more convenient, when attendance before the judge may involve inconvenience, or where the examination is likely to be protracted.

An application to a judge of the court will be the better course, wherever possible, as the case will not be surrounded with the same difficulties, incident to the exercise of jurisdiction by the county judge as such, in proceedings not originating in his own court. See *The People vs. Hurlbut*, 5 How., 446; 1 C. R. (N. S.), 75; 9 L. O., 245; *Bingham vs. Disbrow*, 14 Abb., 257.

Since the amendment of 1857, there is now no doubt as to the power of the judge to appoint a referee, in the first instance, and in the original order. See section 300, above cited. Prior to that amendment, considerable controversy had arisen upon the question. The power was maintained to exist, not merely in a judge of the court, but also in a county judge, and was exercised, without question, in *Wilson vs. Andrews*, 9 How., 39; *Conway vs. Hitchins*, 9 Barb., 378; *Green vs. Bullard*, 8 How., 313; *Smith vs. Johnson*, 7 How., 39; *Hulsaver vs. Wiles*, 11 How., 446. In *Hatch vs. Weyburn*, 8 How., 163, the contrary was maintained, and that the judgment-debtor must appear before the officer making the order in the first instance, without which jurisdiction would not be acquired.

In the New York Common Pleas, the practice of the court is to refer, in the first instance, all cases originating in a justice's, or in the Marine Court, and to refuse to grant the order in any other form. A list of referees has also been fixed by the judges, to one of whom all such cases are referred, the parties being denied the power of selection, outside that list. So long as this rule is maintained, it will, of course, be necessary to comply with it. At an earlier period, that court had adopted the practice of appointing the justice by whom the judgment was rendered, as the referee in like cases. See *Hough vs. Kohlin*, 1 C. R. (N. S.), 232.

When made, the order will not necessarily be restricted to an examination under the first clause of section 292, but, in a case calling for such interposition, and where that interposition is authorized by the proof, it may be made to combine, in the same proceeding, the purposes to be attained by any other of the sections contained in the chapter.

See *Hulsaver vs. Wiles*, 11 How., 446. See likewise, as to an order, in part irregular, *Wilson vs. Andrews*, 9 How., 39.

In *Goodall vs. Demarest*, 2 Hilt., 534, it was held that, upon a proper affidavit, showing good grounds for such a proceeding, an order for a second examination might be granted *ex parte*, the examining party taking, as he must take, the risk of costs being imposed. In *Orr's case*, however, 2 Abb., 457, it was considered that such an order should not issue, unless upon notice to the adverse party.

The granting of the original order, does not affect any thing more than a mere inchoate charge upon the property of the defendant. Unless these proceedings be carried on and perfected by an order under section 297, and by the appointment of a receiver, no actual lien will be acquired. *Edmonston vs. McLoud*, 16 N. Y., 543. But, when proceedings are so perfected, a lien is acquired, and such lien will date back, by relation, to the date of the original order. *Porter vs. Williams*, 5 Seld., 142 (152); *Same case*, at special term, 5 How., 441; 1 C. R. (N. S.), 144; 9 L. O., 307. These cases seem to overrule *Voorhies vs. Seymour*, 26 Barb., 569; and *Conger vs. Sands*, 19 How., 8.

(c.) INTERIM INJUNCTION.

It is a matter of almost universal practice, to combine with the original order, the injunction against transferring or disposing of any property of the defendant, not exempt from execution, as authorized by section 298. This injunction is, however, obtainable, if then omitted, at any subsequent stage of the proceedings. No special affidavit will be required for the purpose, nor is any security necessary, the right of the party to satisfaction out of the property of the defendant, being already fixed, by the judgment and execution, and being therefore incapable of being drawn into controversy. See *Green vs. Bullard*, 3 How., 313.

A mere confession of judgment to a third party will not be, *per se*, a violation of the injunction; but, if such confession be accompanied by acts showing an intent to dispose of property by its means, it will then be so, and may be punished as a contempt. *Ross vs. Chusman*, 3 Sandf., 676; 1 C. R. (N. S.), 91.

Such an injunction does not interfere with the right of the defendant to dispose of his subsequent earnings, after the granting of the order. *Potter vs. Low*, 16 How., 549. See also *Caton vs. Southwell*, 13 Barb., 335.

An injunction of this nature cannot, it has been held, be granted, as against a third party, in the first instance, and unless he has been required to answer under section 294. *King vs. Tuska*, 1 Duer, 635.

Although the original order may be partly irregular, an injunction,

granted in connection with it, will stand, in case any portion of that order be valid. See *Wilson vs. Andrews*, 9 How., 39.

(d.) TIME AND PLACE OF EXAMINATION.

The directions of the statute, as regards place, must be strictly followed.

Where the debtor is resident, the examination must be had, in the county in which he resides, or in which he has a place of business.

Where he is not a resident of the state, the examination may be in the county in which the judgment-roll is filed, or in that in which, if the judgment be a justice's judgment, a transcript has been filed.

See, as to these requisites, *Sale vs. Lawson*, 4 Sandf., 718; *Hersenheim vs. Hooper*, 1 Duer, 594; 11 L. O., 222; *Wilson vs. Andrews*, 9 How., 39.

In *Bingham vs. Disbrow*, 14 Abb., 257, it is laid down that the proper county for the examination of the defendant, is that in which he resided at the time of issuing the execution, and that he cannot, by a subsequent change of residence, impede the subsequent proceedings of the plaintiff. Any inconvenience may be obviated, by directing the examination to be had before a referee.

The case of joint-debtors, resident in different counties, is unprovided for in terms, but there can be no doubt that, under these circumstances, a separate execution must be issued and returned in the county of residence of each, before he can be examined.

The section contains no specific directions, in relation to the time of examination. All that is necessary, therefore, will be to give the party reasonable notice, so as to leave him without any really valid excuse for non-attendance.

(e.) SERVICE.

It is obvious that, although not specifically provided for, a copy of the order must be served upon the defendant personally, accompanied by an exhibition of the original order, the proceeding being one directly tending to bring him into contempt. *Vide People vs. Hurlbut*, 1 C. R. (N. S.), 75 (79); 6 How., 446; 9 L. O., 245; *Barker vs. Johnson*, 4 Abb., 435 (437). See also *Kemp vs. Harding*, 4 How., 178; *Dorr vs. Noxon*, 5 How., 29.

The usual and the better practice is to serve, with the order, a copy of the affidavits, on which it was granted. It has been held however that, in strictness, this service is unnecessary. *Green vs. Bullard*, 8 How., 313; *Utica City Bank vs. Buell*, 17 How., 498; 9 Abb., 385; *Farguharson vs. Kimball*, 18 How., 33; 9 Abb., 385, note.

Service, when made, must be proved by affidavit. The official certifi-

cate of the sheriff will not be sufficient, service by him not being an official act. *Utica City Bank vs. Buell, supra.* But the objection will be waived by appearance. *Same case; Green vs. Bullard, supra.*

(f.) PROCEEDINGS OF DEFENDANT UPON SERVICE.

As a general rule, the defendant, when served with an order of this nature, is bound to obey it. If he neglect to do so, he is liable to be brought up, and compelled to answer, by process of contempt.

If he have any valid objection to the order, he may present it, either by preliminary notice, or by appearance and refusal to answer, in which case the question may come up, either by motion made at the time, or in answer to the plaintiff's application for an attachment. Or, if of a fatal nature, the objection may be available on the plaintiff's motion, founded on a failure to appear.

In *Smith vs. Paul*, 20 How., 97, an order for examination was vacated on motion, on the ground that the plaintiff's debt had been extinguished, by the defendant's discharge in insolvency, the court refusing to try collaterally, the question of the validity of that discharge.

In *Courtois vs. Harrison*, 1 Hilt., 109; 12 How., 359; 3 Abb., 96, it is thus laid down: "If the affidavit on which the order was granted was insufficient, or if, for any cause, the order was improvidently made, the judge ought to vacate it, and it is the right of the defendant to have such a motion, under such circumstances, granted. The order in that case was, for the examination of a third party, and had been discharged on motion, upon its return. See, as to the invalidity of an order for examination of the defendant, under section 292, out of the county to which the execution was issued, *Wilson vs. Andrews*, 9 How., 39 (42).

But, on such an application, the objection must be to the order itself. The court will not go behind it, and allow an attack upon the judgment upon which it is founded. *Collins vs. Ryan*, 32 Barb., 647; *O'Neil vs. Martin*, 1 E. D. Smith, 404; *Saunders vs. Hall*, 2 Abb., 418.

On such an application, the presumption will be in favor of the validity of the proceeding. See *Whitlock's case*, 1 Abb., 320.

But, upon an application for a second examination, the applicant must show good reason for the proceeding, or the order will be discharged. *Orr's case*, 2 Abb., 457.

Merely formal objections will be waived by a general appearance, such as that of undue or insufficient service, or proof of service. *Utica City Bank vs. Buell*, 17 How., 498; 9 Abb., 385; *Green vs. Bullard*, 8 How., 313. So likewise, a formal objection to the jurisdiction of the officer before whom the proceedings are taken, may be waived, by submitting to an examination, and consequent proceedings, and cannot be collaterally raised. *Hobart vs. Frost*, 5 Duer, 672; 3 Abb., 119. But

otherwise, as to an objection which goes to the substance of the rights of the plaintiff. See *Sackett vs. Newton*, 10 How., 560 (566).

(g.) COURSE UPON EXAMINATION.

The plaintiff, or his counsel, is bound to be on hand, at the time and place appointed in the order, if not, the defendant will be entitled to have him called, and, if he does not answer, to have the order for his own attendance discharged. It may be prudent, though not strictly necessary, to indorse a short memorandum to this effect, upon the paper served, and procure the judge's signature, by way of evidence of what occurred, in the event of any subsequent attempt to proceed, on the part of the plaintiff. In *Squire vs. Young*, 1 Bosw., 690 (693), it was considered that a voluntary failure on the part of the plaintiff to appear, operated as a discontinuance, though no order might be made to vacate the proceedings.

In the event of the judge's being himself absent at the hour appointed, the defendant will not be justified in leaving immediately, and treating the order as a nullity. If he attempt it, he will do so at his peril, in the event of the proceedings being continued, within a reasonable time. See *Reynolds vs. McElhone*, 20 How., 454.

It seems that the proceeding cannot properly be adjourned, without the consent of the party against whom it is had. See *People vs. Hurlbut*, 1 C. R. (N. S.), 75 (79); 5 How., 446; 9 L. O., 245. With that consent, any number of adjournments will be regular.

Care should therefore be taken by the plaintiff's counsel, to procure the signature of the defendant, if possible, to a formal consent, to every adjournment which may be taken. If not, there may be a serious question as to whether a subsequent contempt would be punishable, should the objection be taken and relied on. If such signature cannot be had, then it may be advisable to obtain that of his counsel, if present, though it may be doubtful whether that species of consent would form a sufficient basis for ulterior process of contempt. Where an adjournment is taken before the judge or officer, his signature to a short memorandum of it should be procured. See *Squire vs. Young*, 1 Bosw., 690 (697). Whether an adjournment, taken by the plaintiff alone, without the presence of the defendant, would be of any avail, if objected to, seems very questionable; but this objection, and others of the same class, including those immediately above noticed, might not improbably be held waived, by a subsequent appearance and submission to examination.

If, on the occasion of any adjournment, the plaintiff fails to attend, the whole proceeding will fall through, and any subsequent steps, if taken, will be wholly irregular. *Squire vs. Young*, 1 Bosw., 690.

In the same case (692), it is also laid down that if, when the exami-

nation of the debtor has been completed, no motion is made thereupon to the judge, but, on the contrary, both parties leave, without an adjournment, or the appointment of a receiver being applied for by the judgment-debtor, the proceedings must be deemed to have been then abandoned. See likewise, as to the effect of an abandonment, *Edmonston vs. McLoud*, 16 N. Y., 543 (545), there referred to.

In the event of the proceedings going down by an accidental failure, the proper course will, it has been held, be to obtain a new order, on an affidavit conforming to the Code, and excusing the previous neglect or default. *Vide Squire vs. Young*, 1 Bosw., 690 (696), *supra*.

On a second examination, the creditor may be restricted to such relief as it may be proper to grant, if the previous proceeding had not been instituted. *Same case*. And the examination may be limited, to matters subsequent to a previous one, if already had. *Goodall vs. Demarest*, 2 Hilt., 534.

Under section 292, it is provided that, when examined, the judgment-debtor may be examined in the same manner as a witness. This examination is, accordingly, subject to the same rules, as that of a party to the action. *Le Roy vs. Halsey*, 1 Duer, 589; 11 L. O., 252; 1 C. R. (N. S.), 275.

He is, therefore, entitled to the assistance of counsel, and may be examined in his own behalf. The examination, when had, is in the nature of a cross-examination, and, accordingly, leading questions are allowable. *Corning vs. Tooker*, 5 How., 16 (20). In *Le Roy vs. Halsey*, above cited, the rules are laid down, *in extenso*, as to the mode in which an examination of this description may be conducted: "The object of the examination is to ascertain whether the debtor has any property, subject to or exempt from execution, which ought to be applied to the plaintiff's claim. He is required to appear and answer concerning his property, that is, the property belonging to him at the time of the examination, or bound by the judgment; and every question, tending to throw light on that subject, is pertinent. It is not sufficient, that the defendant answer generally that he has no property; the plaintiff may prosecute his inquiries, notwithstanding such an answer. If the defendant is in possession of any property, the plaintiff may ask when, and where, and how he obtained the possession, and on what terms he now holds it. If the defendant is not in possession of any property, he may be asked whether he had any, or was interested in any, a short time previous to the judgment, and what has become of it; and, if he answer that he has sold it absolutely, he may be asked what was the consideration of the sale, and what has become of the proceeds, so as to ascertain whether any portion of them is in his hands, or due to him. But, if it appear that he has not in his possession or under his control, any portion of

such proceeds, the inquiry respecting such proceeds can go no further. There is, in such case, nothing for the creditor to receive. If the answers to the questions throw any doubts as to the *bona fides* of the sale, the examination may be thorough on that point; as a fraudulent transfer of property may not afford any protection, against a creditor. *Green vs. Hicks*, 1 Barb. Ch. R., 315, 317." "It is impossible to lay down any particular rules on the subject, which shall be universally applicable, further than this, that the whole examination must have for its single object, to ascertain whether there is any property of the debtor which ought to be applied to the payment of the plaintiff's claim; and the extent of the inquiry in each particular case, must be left to the good sense of the officer under whose direction the examination takes place, having in view this general object."

See the above remarks concurred in, in *Sandford vs. Carr*, 2 Abb., 462. Nor will a debtor be bound to answer any questions, which do not tend to show whether he is in the possession of, or entitled to property, which a judge of the court might order to be applied towards the satisfaction of the judgment. *Hunt vs. Enoch*, 6 Abb., 212.

The examination can only, it has been held, be extended to the discovery of property in the possession or control of the defendant, which he can deliver over; nor is the debtor, or a witness standing in the position of the debtor, bound to go further in making disclosures. If the property be in the possession of another, claiming title, no matter how fraudulent the transfer, no order can be made to compel the defendant to deliver it, and therefore no questions can be put to the debtor, or to a witness, to discover or prove the fraud. Such an examination is a fishing one, and was not the object of these proceedings. The remedy is by direct action. *Town vs. Safeguard Insurance Company of New York and Pennsylvania*, 4 Bosw., 683.

A party, though bound to make discovery as to his property, need not be obliged to make discovery of the encumbrances upon it; nor will his answer that he is unable to give the information sought, be necessarily evasive. *Wicker vs. Dresser*, 14 How., 465.

When the party states that property has been sold, and its full value received, any further inquiry as to the purchaser is immaterial, unless it be shown that the property has been disposed of for less than its value, and that the debtor retains an interest. In that case, the inquiry may be pursued. *Williams vs. Carroll*, 2 Hilt., 438.

During the examination, or at its close, it will be proper for the plaintiff to inquire, whether any other supplementary proceedings are pending against the judgment debtor, and, if so, at whose instance; with a view either to the appointment of a receiver on his own behalf, or to discover whether one has been already appointed. *Vide* section 298.

When once formally closed, the examination cannot be reopened, under the same proceeding, or unless by special order. *Orr's case*, 2 Abb., 457.

Although the order is formally against the debtor, it has been held that it is not absolutely essential that he should be examined personally, in order to enable the calling of witnesses, to prove the same facts, under the power conferred by the section. *Wheeler vs. Maitland*, 12 How., 35.

§ 294. *Proceedings Generally Applicable.*

(a.) EXAMINATION OF WITNESSES.

Witnesses may be examined in this proceeding, by either party on his own behalf, section 292; and the power is again formally repeated in section 295, providing that they may be required to appear, and testify in any proceeding under the chapter in question, in the same manner as upon the trial of an issue; and, under section 296, the party or witness may be required to attend before the judge, or before a referee, appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath, except that, when a corporation answers, the answer shall be on the oath of an officer thereof.

Under these different powers, converging, though with some needless repetition, to the same object, it seems clear that the attendance of witnesses may be compelled, by process of subpoena; also, that all examinations, whether of a party or of a witness, are to be upon oath.

These last proceedings are, as will be seen, of general applicability, and not merely confined to an application under section 292.

In *Wheeler vs. Maitland*, 12 How., 35, above cited, it was held that witnesses may be examined separately, even though the debtor himself be not called.

But, as a general rule, this examination will be subsidiary in its nature, either by the plaintiff, for the purpose of bringing home to the defendant, or to a third person, the possession or disposing power over property, capable of being reached by the proceedings; or, by the defendant, in order to rebut an attempt of the plaintiff for that purpose.

A witness, when called, may be examined on the same subjects as the party, and also as to any collateral matter, bearing on the object of the examination, and tending to the discovery of property, as above.

And the examination, whether of a party or witness, may be full and complete, as to all matters within the legitimate scope of the inquiry, and may extend, even to matters tending to convict him of the commission of a fraud. See section 292, concluding clause.

And it has been held that, on examination of a witness under section 292, he can be compelled to submit to an inquiry, on the subject of title claimed by him to property in his possession, or as to a debt denied by him to be due, although, if examined under section 294, the mere claim of title would be sufficient to stop the inquiry, inasmuch as such property could only, in such case, be reached, by means of an action by the receiver. Section 299. *Sandford vs. Carr*, 2 Abb., 462; *Tompkins County Bank vs. Trapp*, 21 How., 17.

Whether this proposition can be sustained to the full extent, as above stated, seems doubtful, but there can be no doubt, that a full and searching examination was intended to be given, as regards property in general, and that, as respects a claim made by any other person than himself, a witness can be examined, to the full extent that would be legitimate upon the trial of an issue.

It may be doubted also, whether the rule in *Town vs. The Safeguard Insurance Company of New York and Pennsylvania*, 4 Bosw., 683, above cited, is not, upon the whole, somewhat too strictly laid down, so far as regards the examination of witnesses, not interested in the result.

There is no authority for the examination of witnesses by commission, on proceedings under this chapter. *Graham vs. Colburn*, 14 How., 52; 6 Duer, 678.

(b.) REFERENCE.



The subject of granting a reference has been, to a certain extent, anticipated in the previous section, as regards the power, now clearly established, of making that disposition of the case, on granting the original order. See cases there cited, under subdivisional head of *Order*. Also Code, section 300, as now amended.

But it is also in the power of the judge or officer, to make such a reference "at any time." See that section.

The reference may be, either to report the facts or the evidence. During the investigation, the referee possesses, and may exercise, all the incidental powers of the officer who makes the order, so far as regards the granting of adjournments, the enforcement of order before him, and the like; but it seems doubtful, whether the powers conferred upon a referee of the whole issue, by section 272, can be claimed as attributable to him. On his report being made, his authority ceases, and the power of the officer who granted the order, is resumed for all ulterior purposes.

Such referee may, under section 300, be either agreed upon by the parties, or appointed by the judge. In either case, an order should be procured as his authority. His report should be made to the officer who appoints him, inasmuch as the jurisdiction of that officer is per-

sonal, and not vested in him as a member of the court. See above, section 291. See also *Smith vs. Johnson*, 7 How., 39. But, where the reference is on a proceeding under the second clause in section 292, under which the court, as such, has power to act, the report may, in that case, be made in the usual manner. A reference of this nature is probably that alluded to in section 296.

There is no reported decision, as to whether a report of this nature requires to be filed, under rule 32. When made to the court, as above, there can be little doubt but that it should be so. But, when made to the officer who appoints, it would not appear to be necessary. The report is for information of that officer, not for that of the court, as such; nor can any application grounded on it be made to the latter, as provided for in the rule.

It follows, as a necessary consequence of the derivative nature of the referee's power, that he is bound by the same restrictions, as to the locality of the examination, as the judge by whom he is appointed. But, where a party has been arrested under a warrant, it has been held that these restrictions no longer operate, and that a referee has power to act, though he may reside in a county other than that of the residence of the judgment-debtor. See *Wilson vs. Andrews*, 9 How., 39.

When required by the order to report the facts, the referee is not at liberty to report the evidence instead of them; and if he do so, his report will be irregular, and may be sent back to him. *Dorr vs. Noxon*, 5 How., 29.

In *Hollister vs. Spafford*, 3 Sandf., 742; 1 C. R. (N. S.), 120, the Superior Court laid down, as a general rule, that a reference will not be granted by them in these cases, against the wishes of either party; unless it becomes apparent that a difficult and protracted investigation must ensue, and the examiners have counsel, in which case one will be directed. In proceedings not falling under this description, the examination must, it was there laid down, proceed, at the chambers of the court, and before, or under the superintendence of one of its judges.

And, in the other courts, the same rules substantially prevail, with regard to the examination of parties under their own judgments. In determining upon the course to be adopted, a good deal will depend upon the peculiar circumstances of the district in which the application is made, and the engagements of its judges. In the first, where a judicial officer of each of the higher courts is always in attendance at chambers, the general, and indeed it may almost be said, the universal course, is, for the defendant to attend there for that purpose, the examination being conducted in a different part of the room, and the judge being only applied to, for the purpose of swearing the party so examined, and also, on any incidental questions which may arise, pending the examination.

See above in section 293, under the head of *Order*, as to the practice of the New York Common Pleas, of appointing a referee, in all cases where the judgment has been originally rendered in the Marine or justices' courts, and restricting the parties in their selection of the persons to be appointed. This practice, though no doubt necessary, by reason of the other engagements of the judges, and the large number of these judgments, so far at least as regards the practice of taking the examination by means of a referee, is nevertheless productive of considerable hardship in this class of cases, by the imposition of a heavy additional expense upon the holders of judgments for a small amount, who are always the less able to bear it, and generally the less likely to obtain substantial redress, by means of these proceedings, as against the not inconsiderable class of dishonest debtors. The obtaining of justice is in fact rendered more circuitous in form, and more onerous in expense, to the poorer, as contrasted with the richer suitor.

§ 295. *Examination of Debtor, as to Specific Property.*

This examination, as authorized by the second clause of section 292, though tending substantially to the same result as that above considered, is nevertheless of a separate and distinct nature. The general examination, under the first clause leads to the discovery of property of the debtor; this, to the application of property already discovered, but concealed, or otherwise incapable of being reached by the ordinary process of execution. It has also this material difference, that this species of examination may be resorted to, without reference as to whether an execution has or has not been returned. All that is necessary to sustain it is, that an execution should have been issued. See *Sackett vs. Newton*, 10 How., 560; *Seeley vs. Garrison*, 10 Abb., 460.

But, to be the subject of an order of this description, the property must not be tangible, and such as can be reached without impediment, by means of a levy. In that case the creditor will be left to his ordinary remedy by execution. *Sackett vs. Newton, supra.*

It will be observable also, that, in this case, application may be made to the court as such. On the other hand, the choice of specific officers is limited by the provision, that the judgment-debtor must be "residing in the county where such judge or officer resides."

The application for an order of this nature is also *ex parte*; but it must be grounded on express affidavits, showing a state of facts, which brings the case within the scope of the above provision.

In a note to *Jones vs. Lawlin*, 1 Sandf., 722; 1 C. R., 94, it was held, that an affidavit of this nature, must state that the debtor has property of some kind, which ought to be applied to the debt, and which has not

been reached by the execution ; or some equivalent allegation. This position seems indisputable.

That assumed by the Court of Common Pleas, in *Tillou vs. Vere*, 1 C. R., 130, viz. : that a mere statement, that the plaintiff believes the defendant has property, attainable under the execution, is not sufficient, but that the affidavit must state positively that the defendant has property, and specify of what that property consists, is more questionable ; though, to a certain extent, confirmed by *Engle vs. Bonneau*, 2 Sandf., 679 ; 3 C. R., 205. In one branch of cases, especially, in which the application of this species of relief is most needed, *i. e.*, those where a plaintiff is aware that the defendant is fraudulently concealing some of his property, but cannot exactly ascertain what part of it, a too strict application of this rule, would practically deprive the former of all remedy. The courts in question appear, in fact, to have since receded from the position then taken ; the Superior Court, in *Anon.*, 1 C. R. (N. S.), 113 ; and the Court of Common Pleas, in *Hough vs. Kohlin*, 1 C. R. (N. S.), 232 ; and to have laid down that, for the future, they will grant orders of this nature, without any special allegations, on the subject of the property sought to be reached. The same conclusion is come to by the Supreme Court, in *Hatch vs. Weyburn*, 8 How., 163. See likewise *Lindsay vs. Sherman*, 5 How., 308 ; 1 C. R. (N. S.), 25.

It seems essential, though, that the facts, calling for the interference of the court in this respect, should be stated positively, and not speculatively, and that, if the plaintiff's statements be founded on belief, the reasons for such belief should be stated, so as to satisfy the court or judge, that such belief is seriously entertained, and that, on grounds sufficient to make out a *prima facie* case of fraud, calling for the interference of the court.

As to the necessity of a clear case being made out, to warrant the interposition of the court under this provision, and as to merely speculative statements being insufficient, see dissenting opinion of Brady, J., in *Owen vs. Dupignac*, 9 Abb., 180 ; reported separately, 17 How., 512. The adjudication in the case, was entirely based upon another point, and does not affect the ground taken in the opinion in question.

In framing the affidavit, care should accordingly be taken, to show a state of facts warranting this description of relief, and this, by specific and positive allegations, as far as practicable ; and those specific allegations should always be preceded or followed by a charge, in the actual words of the section, viz. : that the defendant "has property which he unjustly refuses to apply to the satisfaction of the judgment." The entry of the judgment itself, and the fact that an execution against property of the defendant has been issued, are jurisdictional facts, and must be positively alleged. The county of residence of the defendant

should also be stated, and it may be better to state the county of residence of the judge, in the order, that jurisdiction may appear upon the face of the papers.

There is considerable analogy between the above procedure, and that provided by subdivision 2 of section 4 of the act for the abolition of imprisonment for debt, of the 26th of April, 1831, which gives, in these cases, the more summary remedy of arrest, under the same state of circumstances. The proceedings under that statute have been already considered, in book V., chapter I., section 81.

As to the priority which may be gained by a vigilant creditor, by means of proceedings of this nature, see *Hall vs. Kellogg*, 2 Kern., 325. That they are maintainable by an assignee, as well as by the original debtor, is laid down, in *King vs. Kirby*, 28 Barb., 49.

But that remedy has fallen into comparative disuse, owing to the greater technicality of practice required, the warrant under the non-imprisonment act being strictly a statutory proceeding, whereas, those provided by the Code, being ordinary in their nature, are within the extensive powers of amendment conferred by that measure.

§ 296. *Warrant against Judgment-Debtor.*

The remedy, as provided by section 292, and the procedure by process of contempt, under the conjoint operation of sections 297 and 302, have also practically superseded the similar remedies, under the subdivision of the statute of 1831, above referred to, in cases of fraudulent concealment of property; though the former practice, when desirable, may still be adopted, but subject to the disadvantage of being held to more technical rules.

To obtain such a warrant under the Code, the plaintiff must show, by affidavit or otherwise, two essential things:

1. That there is danger of the debtor's leaving the state, or of his concealing himself;
2. That there is reason to believe he has property, which he unjustly refuses to apply to satisfaction of the judgment.

The affidavit must be full and specific on both heads, stating facts and circumstances, with all necessary detail, so as to raise a similar conviction in the mind of the judge, to that already arrived at by the party, as to the existence of danger, on the one hand, or reason to believe, on the other. As regards both, the precise words of the section should be incorporated into the statement; in neither case, would those words standing alone avail, without a statement of specific facts, leading to the conclusion arrived at.

There is a close analogy between those provisions, and those of sec-

tion 179, subdivisions 1, 3, 4, and 5, in relation to arrest, and section 227, respecting attachment, and many of the cases, cited in connection with those provisions, will be in point. *Vide supra*, book V., chapters I. and IV., sections 82, 109. A lower degree of proof may possibly, however, be accepted, the existence of danger being all that is formally required to be substantiated under the present section, whereas the others require proof of the facts from which the existence of such danger would be inferred, or of the intent, the carrying out of which would involve its existence.

But, in practice, a satisfactory affidavit will be equally requisite in both cases, and perhaps more so, as regards the issuing of a warrant, which involves a higher responsibility.

If satisfied that a warrant will be proper, the judge issues one, requiring the sheriff of any county where the debtor may be, to arrest and bring him before him. In *Wilson vs. Andrews*, 9 How., 39, it was held that a justice of the Supreme Court might issue such a warrant, though resident in a county to which no execution had ever been issued, and direct the debtor to be brought before him, at his chambers, or elsewhere within that county, though it might be inexpedient to do so, unless to prevent a failure of justice. In the same case it was also decided, that such a warrant would stand, even though issued and served in connection with an order, which, under the other branches of the section, was irregular.

But the above case is one of a somewhat exceptional nature, and, as a general rule, the application should be made to a judge, who would have jurisdiction to issue an original order, especially as the warrant may be executed in any county of the state.

The above is the only reported decision upon the subject, the practice being apparently unfrequent.

When brought before the judge, the examination of the debtor proceeds in the usual course, and, if the state of facts on which the warrant was issued be substantiated, he will be required to give the security prescribed by the section; or, in default, he will be committed for contempt. He will of course be entitled to be discharged from custody, in case the plaintiff fail in the proof required to substantiate the circumstances under which the proceeding is authorized.

§ 297. *Examination of Third Parties.*

This proceeding, as provided for by section 294, is one of a separate and independent nature, nor is it necessary, in order to its validity, that an order should be then pending, or that one should have been previously taken out, as against the judgment-debtor.

All that is required is, that an execution should, at the time, have been issued. *Seeley vs. Garrison*, 10 Abb., 460. It is not necessary that it should have been returned, or that the remedy by execution should have been exhausted.

Nor will a stay of the plaintiff's proceedings on execution, obtained by the defendant, prevent the former from examining a third party under this section. *Lowber vs. Mayor of New York*, 5 Abb., 268.

The treasurer or officer of a corporation, having its funds in his hands, or any party, having its property, or being indebted to it, may accordingly be examined, although, under section 292, the corporation itself cannot be reached. *Lowber vs. Mayor of New York*, 5 Abb., 268, *supra*; *The Same vs. The Same*, 7 Abb., 248; *McBride vs. Farmers' Branch Bank*, 28 Barb., 476; 7 Abb., 347; *Courtois vs. Harrison*, 1 Hilt., 109; 12 How., 359; 3 Abb., 96. These cases overrule *Hinds vs. Canandaigua and Niagara Falls Railroad Company*, 10 How., 487; *Kemp vs. Harding*, 4 How., 178, and *Sherwood vs. Buffalo and New York City Railroad Company*, 12 How., 136, so far as they hold to the contrary, and with reference to this particular section. The point seems, in fact, perfectly clear upon the face of the section itself.

And, for the same reason, the power to examine is not limited to the county of residence of the debtor. Any competent officer may, therefore, make the order; the person summoned under it may be examined in any county; and it will be proper to do so in the county of his own residence, without regard to that of the defendant. *People vs. Norton*, 4 Sandf., 640; *Foster vs. Prince*, 18 How., 258; 8 Abb., 407; *Courtois vs. Harrison*, *supra*.

And, whether notice is, or is not, to be given to the judgment-debtor, or to any other party at all, is, as will be seen, left wholly in the discretion of the judge, by the terms of the section itself. There may be cases, in which collusion is to be apprehended, in which the judge may properly decline to direct notice to be given. See *Seeley vs. Garrison*, 10 Abb., 460; *Foster vs. Prince*, *supra*. But, in ordinary cases, the giving of notice will be proper, and may be usually imposed, especially if there be any doubt or contest, upon the subject of the property sought to be reached. As to the propriety of this course, see *Gibson vs. Haggarty*, 23 How., 260.

And, on granting such an order, it has been held, that the judge may restrain any disposition of property belonging to the judgment-debtor, at the outset of the proceedings. *Seeley vs. Garrison*, *supra*. But such an injunction cannot be granted separately, or otherwise than in connection with an order for the examination of the party enjoined. *King vs. Tuska*, 1 Duer, 635.

Such order is granted *ex parte*, on affidavit of the plaintiff or his attorney. Such affidavit should show the existence of the judgment, in the usual manner, and also, that an execution has been issued, or issued and returned, as the case may be. It must likewise allege, that the person or corporation sought to be examined, has property of the judgment-debtor, or is indebted to him in an amount exceeding ten dollars. The allegation may be made in general terms, nor is it necessary that the property sought to be reached should be specified. See above, section 292. But that allegation should be positive and definite, and not in the alternative wording of the section, and should establish the existence of either one or the other of the conditions imposed, or of both. *Lee vs. Heimberger*, 1 C. R., 38. Forms of an affidavit and order will be found in *Seeley vs. Garrison*, 10 Abb., 460.

The order should particularize the persons or officers sought to be examined, and must specify a time and place for the examination, and require them to appear thereat, either before the officer granting the order, or before a referee, and be examined concerning the property in question. It must, of course, be served personally, in due time, so as to give the person to be examined full notice, and likewise upon any parties on whom the judge or officer may direct service to be made.

If the person proposed to be examined fails to appear, his attendance may be compelled, by means of process of contempt; if any of the persons summoned do not attend, the examination proceeds in their absence. The same rules, as to the general conduct of the examination, should be observed, as on one under section 292.

In the case of *Corning vs. Tooker*, 5 How., 16, the following rules are laid down, in reference to examinations of this nature:

1. The judge or referee may, in his discretion, allow corrections or explanations to be made by a party examined, after his examination has been concluded, by a supplemental statement, the original being left unaltered.

2. The party examined under section 294 is, in effect, a party to the proceeding, and his examination should be conducted, in the same manner as that of the judgment-debtor under section 292. The object in each case is to discover the debtor's property. No question which does not tend to effect that object, is relevant or proper, and the party may refuse to answer any irrelevant question, on peril of being adjudged in contempt, should the question be relevant or proper.

3. He is not entitled to a cross-examination, but may have the advice of counsel in framing his answers. The examination itself is, in fact, a cross-examination. When concluded, he has a right to add such explanations as above, to prevent misapprehension.

4. A person, not a party to the proceedings upon the examina-

tion, though interested in the matter, cannot be allowed to appear by counsel.

If it shall appear that a person or corporation, examinable under this section, claims an interest in the property, adverse to the debtor, or denies the debt, then such interest, or debt, is only recoverable in an action by the receiver. Section 299.

A party standing in this position cannot however totally stop the examination, by merely claiming an interest in the property. The plaintiff may proceed to make inquiries "into the manner in which, and the time when, the property came into the hands of the witness, and also into the nature and extent of the lien claimed, but he must go no further." *Barculows vs. Protection Company of New Jersey*, 2 C. R., 72.

In *Van Wyck vs. Bradly*, 3 C. R., 157, it was held that the claim alone of a person examined, "terminates all right to relief against him in this proceeding." That relief can only be obtained by an action under section 299. "If he claims the whole property, he need answer no further; the validity of the claim is to be settled in a suit against him," where he will have the usual advantages. "Still, the claimant may be required to state distinctly what the measure of his claim is, though not what his title is, that the receiver may know whether it covers all the property which the plaintiff alleges to belong to the defendants, or only a part of it; and, if the claimant refuses any explanation as to the origin or nature of his claim, it may, perhaps, be considered by the judge as a reason for allowing an injunction against him." A similar view is taken in *The People ex rel. Williams vs. Hurlbut*, 5 How., 446; 9 L. O., 245; 1 C. R. (N. S.), 75. See likewise, *Sherwood vs. Buffalo and New York City Railroad Company*, 12 How., 136 (139); *Tompkins County Bank vs. Trapp*, 21 How., 17.

Nor, however strong the suspicion of fraud, can the party so examined, be required to answer questions, with a view to elicit evidence to show its existence. The object of the examination is merely discovery of property. *Town vs. Safeguard Insurance Company of New York and Pennsylvania*, 4 Bosw., 683.

Whether the principle that a third party, standing in this position, cannot, when examined as a witness, under section 295, claim this privilege, but that he is, in such case, bound to answer fully, in the same manner as if examined upon the trial of an issue, as laid down in *Sanford vs. Carr*, 2 Abb., 462; *Tompkins County Bank vs. Trapp*, 21 How., 17, is sustainable to the full extent to which it is there enounced, seems questionable.

The restricted rules, with reference to the powers under this section, in relation to property, when discovered, as laid down in *Kemp vs.*

Harding, 4 How., 178, seem clearly erroneous, to the extent to which they are there carried.

Proceedings of this nature cannot be taken, in a suit actually abated at the time, unless, and until it has been duly revived. *Hazewell vs. Penman*, 13 How., 114; 2 Abb., 230. Nor will they be proper, in relation to surplus moneys in a forelclosure suit, in the hands of an officer of the court; the regular course being to apply by motion, or petition, in the suit itself. *Anon.*, 1 C. R. (N. S.), 211. Such an officer, it was there held, is not a person or corporation within the meaning of the section.

As to the power of the court to compel a disclosure of property in the hands of a third party, by requiring a certificate under section 236, in cases where an attachment has been originally issued, see *Schieb vs. Baldwin*, 22 How., 278; 13 Abb., 469.

§ 298. *Order for Application of Property.*

Any property, discovered in the hands of the debtor or of a third party, and not exempt from execution, may, under section 297, be ordered by the judge to be applied to the satisfaction of the judgment;

Except as to the personal earnings of the former, within sixty days previous, when it is made to appear that such earnings are necessary for the use of a family, supported wholly or partly by his labor.

This order is generally applied for at the close of the examination, the debtor or third party examined being present at the time, in which case no notice will be necessary. When sought to be obtained at any other time, or upon the report of a referee, notice should be given to the party against whom it is proposed to be taken.

Being a part of the proceedings, it can only be made to the individual officer before whom those proceedings are pending, and not to the court; except only, where the application of property discovered in the possession of the debtor by examination, is sought under the second clause of section 292, and not under the ordinary examination. In this case the court, as such, may be applied to. See *Bitting vs. Vandenburg*, 17 How., 80.

The application will not, as a general rule, be granted, unless the case is perfectly clear and without reasonable doubt. If there be any question as to ownership of the property, or as to its being actually in the hands or under the control of the debtor, or if there be any claim made against it, which is not clearly collusive or fraudulent upon its face, the usual course will be to deny the order, leaving the plaintiff to his other remedies, either by means of a receivership and an action by the receiver, or, in the latter of the above categories, by levy and sale under execution, or by filing a creditor's bill. See *Sandford vs. Mosher*, 13

How., 137; *Hall vs. McMahon*, 10 Abb., 103; *Dorr vs. Noxon*, 5 How., 29; *The People vs. Hurlbut*, 5 How., 446; 1 C. R. (N. S.), 75; 9 L. O., 245; *Corning vs. Tooker*, 5 How., 16; *Peters vs. Kerr*, 22 How., 3.

By omitting to levy in due season, the plaintiff may lose all rights against property assigned to another, by means of these proceedings, or an action grounded upon them. See *Watrous vs. Lathrop*, 4 Sandf., 700.

An order will not be proper, to compel the application of the income of a trust-fund. The creditor should be left to an action by the receiver. *Stewart vs. Foster*, 1 Hilt., 505.

The same is the case, as regards property in the possession of the defendant, as agent of a third person. *Vide Rodman vs. Henry*, 17 N. Y., 482.

In *Caton vs. Southwell*, 13 Barb., 335, it was considered to be beyond the power of the judge to direct property acquired by the debtor, after the commencement of the proceedings, to be applied in satisfaction of the judgment. Similar views are also entertained in *Campbell vs. Foster*, 16 How., 275; and *Potter vs. Low*, 16 How., 549.

These decisions are based upon the strict rules of the former practice with reference to creditors' bills, rather than upon the terms of the section now in question, which, to a certain extent, they seem to ignore.

Bush vs. White, 12 Abb., 21, lays down, on the contrary, that the period of sixty days, during which personal earnings are to be exempt, when the debtor succeeds in bringing himself within the terms of the exception made by the section, is to be computed, from the date of the order for application, and not from that of the commencement of the proceeding. This construction conflicts with the stricter rule, as laid down, in the above decisions, in *Potter vs. Low* especially, but seems to be more consonant to the spirit of the present provisions, which are evidently intended to give an effectual, rather than a technically restricted remedy.

In *Martin vs. Sheridan*, 2 Hilt., 586, a strict construction was placed upon the exemption in question, and where, although the defendant testified to having a family dependent upon him, it did not appear, in fact, that he contributed, in any way, to its support, but, on the contrary, that his wife supported it by keeping a boarding-house, his earnings were declared not to be exempt, and were directed to be applied.

An order directing a partial application of property does not, in any manner, affect the debtor's power of disposition over the remainder, not comprised within its terms. *Hauptman vs. Catlin*, 1 E. D. Smith, 729.

As to the similar lien, and right to priority of payment, acquired by a diligent creditor, on proceedings under the non-imprisonment act, see *Hall vs. Kellogg*, 2 Kern., 325.

An order directing the application of moneys in the hands of a third party, cannot be appealed from by the judgment-debtor. *Foster vs. Prince*, 18 How., 258; 8 Abb., 407. Nor can the denial of such an application be reviewed in that form. *Joyce vs. Holbrook*, 2 Hilt., 94; 7 Abb., 338.

In proceedings of this nature, when the funds are in the hands of the defendant himself, and there is no dispute as to the ownership, the proper order will be, that he pay the money, or apply it directly to the satisfaction of the judgment. Where, however, the title is in any wise in dispute, the proper course will be the appointment of a receiver, under the provisions next considered. If an order of the former description be disobeyed by the defendant, the precept issues to commit him directly. Where, however, the order provides that he pay a sum of money "in satisfaction of the judgment," non-payment, on demand of a receiver, will not bring him into contempt, the order importing a direct payment to the plaintiff, or to some one directly authorized by him, and not merely by the court. *The People vs. King*, 9 How., 97. See too *Corning vs. Tooker*, 5 How., 16.

Where there is nothing due to the defendant, from the party against whom the application is made, an order will not, of course, be proper. *McCormick vs. Kehoe*, 7 L. O., 184.

Where an order of this nature has been made, and not complied with, the plaintiff cannot proceed against the holder of the money by direct action. His course is to procure the appointment of a receiver. *Patten vs. Connah*, 13 Abb., 418.

§ 299. *Payment by Third Party to Sheriff.*

Analogous to the power of directing the application of moneys in the hands of a third party, is the power, conferred by section 293, enabling such third party himself to make such application, if he shall so think fit.

This proceeding being, to a certain extent, in the nature of a voluntary, or, at the very lowest, in anticipation of a compulsory payment, by the party resorting to this course, that party will be held to strict practice, and, unless he brings himself strictly within the terms of the section, the sheriff's receipt will be no protection to him.

The debt must be fully due, and not in an inchoate stage. Thus, a payment to the sheriff, of the amount of a verdict, for damages, in favor of the execution-debtor, against the party making such payment, immediately on the render of such verdict, and before judgment was entered up and perfected, was held to be premature, and no protection to the party paying. *Davenport vs. Ludlow*, 4 How., 337; 3 C. R., 66. But

when actually reduced into judgment, such a verdict becomes a debt, and a payment may then be made in this manner. *Mallory vs. Norton*, 21 Barb., 424.

Nor will such a payment avail, as against a *bonâ fide* assignee of the claim, so undertaken to be paid by a party so indebted. *Countryman vs. Boyer*, 2 C. R., 4; *Robinson vs. Weeks*, 6 How., 161; 1 C. R. (N. S.), 311; *Lyman vs. Cartwright*, 3 E. D. Smith, 117; *Richardson vs. Ainsworth*, 20 How., 521.

A payment of this nature, if attempted to be set up in justification, must be specially pleaded. *Calkins vs. Packer*, 21 Barb., 275.

And the party setting it up, will be held to strict proof. *Handley vs. Greene*, 15 Barb., 601.

§ 300. *Appointment of Receiver.*

The above remedies to obtain an application are, as already stated, only appropriate to cases, where the right to the amount sought to be applied is clear and undisputed. When there is any doubt whatever upon the subject, the proper course will be the appointment of a receiver, under the power conferred by section 298.

This appointment may be applied for, either at the close of the examination, while the judgment-debtor is present, or afterwards, upon the ordinary notice of motion. The former course is only applicable, where no other similar proceedings are pending against the defendant. If there be such, the application must, in all cases, be made on notice to the plaintiff or plaintiffs in such other proceedings, who are also entitled to notice of all other proceedings in relation to such receivership.

And, although not specially prescribed by the section, it is obvious that, whenever notice is given, the judgment-debtor himself should also be served. *Vide Kemp vs. Harding*, 4 How., 178; *Dorr vs. Noxon*, 5 How., 29; *Barker vs. Johnson*, 4 Abb., 435.

It is not necessary, however, to serve upon other creditors, a copy of the debtor's examination. A simple notice of motion is all that is requisite. *Todd vs Crooke*, 4 Sandf., 694; 1 C. R. (N. S.), 324.

When proceedings are taken against the debtor, under the second clause of section 292, the appointment may be made at once, on completing the examination under that clause, and without waiting for a return of the execution. *People vs. Hurlbut*, 5 How., 446; 1 C. R. (N. S.), 75; 9 L. O., 245. And a receiver may be appointed, under a warrant, as well as under an order. *Wilson vs. Andrews*, 9 How., 39.

Attention must be paid to the special directions, in relation to the appointment and powers of a receiver, inserted on the recent amendment of section 298 (1862). The order, when made, must now be filed

and docketed in the county clerk's office, in which the judgment-roll is filed, or transcript of a justice's judgment docketed, and is recorded in the same office. A certified copy of that order must be delivered to the receiver, and he is vested with the property of the debtor, from the filing and recording of the order. He is subject to the control of the court in which the judgment was obtained, and, where such judgment was originally rendered in a justice's court, to that of the county court of such county.

A receiver under these proceedings possesses, generally, the ordinary powers of one appointed under section 244, to which, under section 298, the equitable remedy of injunction may be superadded. Under the same section no more than one can be appointed. When chosen, such receiver represents, not merely the party in whose proceeding he is chosen, but the general body of creditors, and stands in the position of a general trustee for that body. He is to administer the property vested in him, under the direction of the court, for the benefit of all, first discharging those debts which have acquired an equitable priority. *Bostwick vs. Beizer*, 10 Abb., 197; *Porter vs. Williams*, 5 Seld., 142 (149, 150); 12 How., 107. Nor, when once appointed, can he be required, as of course, to give additional security, by reason of the pendency of other similar proceedings. See *Banks vs. Potter*, 21 How., 469.

When appointed, he now remains under the control of the court as such. See amendment of 1862, above noticed. Before that amendment he was held, on the contrary, to be under that of the judge or officer by whom he was appointed, and that such control continued, until the final order for application of the funds is made. *Webber vs. Hobbie*, 13 How., 382.

When there is any doubt as to ownership, or any conflicting rights are claimed with respect to property sought to be reached, the appointment of a receiver will be the proper course. See above, section 297, and cases there cited. See also *People vs. King*, 9 How., 97.

It is not essential to the power of appointing a receiver, that property should be actually disclosed, upon the examination of the debtor. The creditor, if he chooses, may still take his order. *Myres' case*, 2 Abb., 476; *Webb vs. Overman*, 6 Abb., 92.

The order appointing the receiver, should specially direct the delivery to him by the debtor of the latter's property. If this direction be omitted, such debtor cannot be punished as for a contempt, for his refusal to deliver, though he will be held responsible for any disposition of such property, in violation of the collateral injunction. *Watson vs. Fitzsimmons*, 5 Duer, 629. Nor can the receiver claim or enforce payment to himself, of moneys directed by order to be paid to the debtor.

The People vs. King, 9 How., 97. In *Porter vs. Williams*, 5 Seld., 142 ; 12 How., 107 ; affirming *same case*, 5 How., 441 ; 1 C. R. (N. S.), 144 ; 9 L. O., 307, it was held that no formal assignment is necessary on the part of the debtor, but that the title to the whole of his property vests in the receiver, by force of his appointment, when perfected. The express provisions of the last amendment, now put this beyond a doubt. See, before that amendment, *Sands vs. Roberts*, 8 Abb., 343.

In the same case of *Porter vs. Williams*, 5 Seld., 142, it was considered that the appointment, when perfected, operated to vest in the receiver, the real as well as the personal estate of the debtor. In *Chatauque County Bank vs. Risley*, 19 N. Y., 369 (a case of receivership, under section 244), the rule is thus generally laid down by Comstock, J., p. 374 :

“The personal estate becomes vested in the receiver, from the time, and by virtue of his appointment ; the real estate, only by virtue of a conveyance to him, which the court has power to compel ; and, in this way, the satisfaction is worked out.”

This view is preferred, and applied to a receiver under supplementary proceedings, in *Moak vs. Coats*, 33 Barb., 498. See also, doubts entertained, in *The People vs. Hurlbut*, 5 How., 446 ; 1 C. R. (N. S.), 75 ; 9 L. O., 245 ; and *West vs. Fraser*, 5 Sandf., 653. And there can be no doubt that the better course will be, in all cases, to apply for and obtain a conveyance.

No actual lien is acquired, as against the property of the defendant, until such appointment has been perfected. *Vide Edmonston vs. McLoud*, 16 N. Y., 543. But, when so perfected, that lien dates back by relation, to the making of the original order. *Porter vs. Williams*, *supra* ; *Rutter vs. Tallis*, 5 Sandf., 610 ; *West vs. Fraser*, 5 Sandf., 653 ; *Campbell vs. Genet*, 2 Hilt., 290. These cases seem to overrule the more restricted doctrine, in *Voorhies vs. Seymour*, 26 Barb., 569 ; and *Conger vs. Sands*, 19 How., 8. And, by section 298, the same is now specially provided.

And such retrospective title was enforced, as against a levy and sale by a subsequent creditor, even though the property levied on had been left in the possession of the judgment-debtor, there being no pretence of fraud or collusion, in *Fessenden vs. Woods*, 3 Bosw., 550.

And, generally, the title of a receiver, first appointed, will prevail by relation to the date of his original appointment, as against that of another, appointed in another proceeding, pending an appeal from the first, the original order being subsequently affirmed. See *Deming vs. New York Marble Company*, 12 Abb., 66.

But such title does not work any prejudice to prior liens. Where, therefore, a receiver had taken possession of and sold property, pre-

viously levied upon by the sheriff, it was held that he was bound to account to the latter for the proceeds. *In re North American Gutta Percha Company*, 17 How., 549 ; 9 Abb., 79.

The title so derived does not extend, however, beyond moneys due to or property owned by the defendant at the time. No right passes to future acquired property or earnings, or future payments under an executory contract. *Vide McCormick vs. Kehoe*, 7 L. O., 184 ; *Campbell vs. Foster*, 16 How., 275 ; *Potter vs. Low*, 16 How., 549 ; *Caton vs. Southwell*, 13 Barb., 335 ; *Scott vs. Nevins*, 6 Duer, 672 ; *Campbell vs. Genet*, 2 Hilt., 290.

Insurance moneys of property exempt from execution, destroyed by fire, after the receiver's appointment, stand in the same position of future acquired property, and cannot be reached, except through the medium of a fresh proceeding. *Sands vs. Roberts*, 8 Abb., 343.

Nor will it be proper to order the delivery to such receiver, of property to which the title is disputed. He should be left to his action. *Rodman vs. Henry*, 17 N. Y., 482 ; *Stewart vs. Foster*, 1 Hilt., 505.

In *Bunn vs. Fonda*, 2 C. R., 70, it was held that a non-resident judgment-debtor may, under these provisions, be compelled to convey property, but not to deliver household furniture, in use by him out of the state, and that such a party is entitled to the same benefit of exemption, as to property out of the state, as if he were a resident, and the property within the state.

A receiver will not be allowed to sell an inalienable life interest of the judgment-debtor, in the income of a trust-fund, provided for his maintenance. All that he can claim is any unappropriated surplus of such income, if any, in the hands of the trustees, and not necessary for such maintenance. Nor can any future surplus be claimed by him in that capacity. Such surplus can only be reached, by means of a creditors' bill, making the trustees parties, and by an order in the nature of a sequestration, in anticipation of such future surplus, beyond what may be necessary as above, from time to time. *Scott vs. Nevins*, 6 Duer, 672. See likewise *Genet vs. Foster*, 18 How., 50.

In *Tenbroeck vs. Sloo*, however, 13 How., 28 ; 2 Abb., 234, the receiver was declared entitled to claim from the debtor, an assignment of the surplus of an absolute annuity, not already disposed of by him.

And, in the same case, a cause of action in equity, seeking the payment of ascertained damages for breach of a contract, was declared to be property, and to pass to the receiver ; directions being given, on the one hand, to prevent inconvenience, in the prosecution of such suit in the name of the defendant ; and the latter being enjoined, on the other, from compromising or compounding it, or from making any other disposition, to the prejudice of the plaintiff's claim

Where the owner of goods sold by an auctioneer, had voluntarily allowed the latter to mix up the sale moneys with his own funds in a deposit in bank, it was held that he had thereby lost any special lien, and stood only in the position of a general creditor, and that a receiver, on supplementary proceedings against such auctioneer, was entitled to the whole sum deposited. *Levy vs. Cavanagh*, 2 Bosw., 100.

A receiver, if he sells mortgaged property, to which the debtor has only a temporary right of possession, without the order of the court, sells, it has been held by the Superior Court, at his peril. He can only sell that property, for such interest as the debtor possesses, and is bound to do so in one lot, so that it can be followed in the hands of the purchaser. *Manning vs. Monaghan*, 1 Bosw., 459. The reversal, at 23 N. Y., 539, goes upon the bare ground of mistrial.

The duties and powers of the receiver, in relation to such property as may come to his hands, are fully defined by rule 92, above cited *in extenso*. *Vide supra*, section 290.

His possession of such property, when appointed, is the possession of the court, and cannot properly be interfered with, by means of a collateral proceeding. *Van Rensselaer vs. Emery*, 9 How., 135.

The measure of the rights of a receiver over the choses in action of the debtor, and the extent to which the court will support his acts, within the proper exercise of his discretion, are broadly laid down in *Drought vs. Curtiss*, 8 How., 56.

(a.) ACTION BY RECEIVER.

Whenever a third party, in possession of property of the judgment-debtor, or indebted to him, claims an adverse interest, or denies the debt, an action by the receiver will be necessary, and is the only admissible course. Section 299.

A direction, or leave to commence such action, should be applied for at the time of examination, or, at all events, before its commencement. The same course had better be taken, with reference to any other suit, which the receiver may find it expedient to bring, in order to the due discharge of his trust (see above, book V., chapter V.); although, under rule 92, he has general powers of suing, either in his own name, or in that of the debtor. By taking this course, he will avoid any question, as to his liability for costs of the proceedings, if unsuccessful. But, if he prosecutes in good faith, he will not be liable, his position being that of a person authorized by statute to sue. Code, section 317. *Vide St. John vs. Denison*, 9 How., 343.

The application is, of course, *ex parte*, sufficient reasons for the proceeding being shown, either on the face of the examination taken, or upon separate affidavit.

And, at the same time, or at the close of the examination, an order should be taken, enjoining any disposition of the property in question, until the commencement of, and pending such proceeding. If aggrieved by such order, the defendant may apply for a modification or discharge of it, on giving security to the judge's satisfaction. Section 299.

The bringing of an action will be necessary, in all cases falling directly within the provision of the section, and proper in all others, whenever there exists a substantial controversy with respect to the existence, or ownership of property, claimed to be reached by these proceedings, or the rights of the parties or claimants are conflicting. *Vide Corning vs. Tooker*, 5 How., 16. See also *People vs. King*, 9 How., 97; *Rodman vs. Henry*, 17 N. Y., 482; *Stewart vs. Foster*, 1 Hilt., 505.

The receiver may maintain an action, in the nature of a creditor's bill, to set aside a fraudulent assignment, or to remove any similar obstruction, in the way of the realization of property covered by his receivership. He stands in the position of the creditors, whose interests he represents, and is entitled to the same remedies. *Porter vs. Williams*, 5 Seld., 142; 12 How., 107; *Bostwick vs. Beizer*, 10 Abb., 197; *Seymour vs. Wilson*, 15 How., 355 (357); reversing *same case*, 16 Barb., 294; and overruling *Hayner vs. Fowler*, 16 Barb., 300.

And such a proceeding is his only remedy, to set aside a completed sale, impeached by him on the ground of fraud. He cannot justify a forcible seizure of the property. *Brown vs. Gilmore*, 16 How., 527.

§ 301. *Costs of Proceedings.*

Under section 301, the judge may allow to the judgment-creditor, or to any party examined, whether a party to the action or not, witnesses' fees and disbursements, and a fixed sum, in addition, not exceeding \$30, as costs.

Ordinary witnesses' fees and disbursements are payable at once, to any party examined; but the allowance for costs cannot be claimed, until the proceeding has been brought to a close, and terminated in favor of the party applying for it. *Davis vs. Turner*, 4 How., 190. But such allowance cannot be asked for, it seems, as against a mere witness, not a party, or against whom no relief is sought, under section 294. *Same case*.

The plaintiff, on the proceeding being so terminated by the discovery of property, may be allowed the fees he has been liable to pay to his witnesses, and the referee, if any, his disbursements for exemplification of records, serving subpoenas, and the like, and a fixed sum besides, not exceeding \$30, as his costs, such sum being probably intended to

cover the whole expense paid to his attorney in conducting the proceedings. *Same case*. And the allowance so made, may be ordered to be paid by the receiver, out of the fund: *Webber vs. Hobbie*, 13 How., 382; the same case deciding that the order need not, necessarily, be made at the time of the appointment of the receiver, but may be deferred till the final winding up of the proceedings.

In *Ross vs. Chusman*, 3 Sandf., 670; 1 C. R. (N. S.), 91, the costs of a contempt were added to those of the supplementary proceedings, and the defendant ordered to stand committed, until payment of the whole was made.

The thirty dollars allowance includes all counsel fees, or, if allowed in that form, instead of as costs *eo nomine*, it will stand. See *Hulsover vs. Wiles*, 11 How., 446.

If no property be discovered on the examination, the plaintiff may be ordered to pay costs to the judgment-debtor, unless he can show some reason for having required him to submit to the examination. *Anonymous*, 1 C. R. (N. S.), 113; *Hulsover vs. Wiles*, 11 How., 446. But, the latter cannot claim costs, on a dismissal of the proceedings, nor unless he has been actually examined. *Engle vs. Bonneau*, 2 Sandf., 679; 3 C. R., 205.

In *Anonymous*, 11 Abb., 108, it was decided that, where a third party has been examined without success, he will be entitled to a full allowance. Also that, where he has always been willing to pay over the fund, and has only sought to protect himself against a double claim, he should be allowed reasonable costs out of the fund, as in cases of interpleader. See also *Hulsover vs. Wiles*, 11 How., 446; *Davis vs. Turner*, 4 How., 190, *supra*.

§ 302. *Enforcement of Orders.*

The subject of process of contempt has been already anticipated in the last chapter, section 287, to which the reader is accordingly referred.

And the question of the jurisdiction of the officers before whom these proceedings are maintainable, has been likewise treated in the present, section 291.

The power to punish, being expressly given to the judge before whom the proceedings are pending (see section 302), that power is exercised by him individually, and not as a member of the court. An attachment will, therefore, be valid, though made returnable before him at his own office, or elsewhere out of court. *In re Smethurst*, 2 Sandf., 724; 3 C. R., 55.

His jurisdiction in the matter, takes rise from the original order. Mere technical irregularities, rendering any portion of the intermediate

proceedings merely voidable, and not void, and not taken advantage of at the time, will not affect the ultimate remedy. *Myers vs. Janes*, 3 Abb., 301; *Kelly vs. McCormick*, 2 E. D. Smith, 503.

Nor will the defendant be justified in disobeying a merely erroneous order. But, if such order be null, he will not then be in contempt, as, being void, it cannot be enforceable. *Arctic Fire Insurance Company vs. Hicks*, 7 Abb., 204.

The remedy by process of contempt, will not be granted, unless the plaintiff makes out a clear case against the defendant. *Potter vs. Low*, 16 How., 549. Or, for the non-performance of an act, not required in terms by the order. *Watson vs. Fitzsimmons*, 5 Duer, 629.

If the contempt of the defendant be excusable, the fine, so far as it is intended as a punishment, may be nominal. *Arctic Fire Insurance Company vs. Hicks*, 7 Abb., 204. But, if the plaintiff have been put to expense for counsel or referee's fees, payment of those expenses may be imposed. See *Ross vs. Chusman*, 2 Sandf., 670; 1 C. R. (N. S.), 91.

As to the recitals, which may be sufficient in an order for commitment, see *Reynolds vs. McElhone*, 20 How., 454; *The People vs. Kelly*, 22 How., 309; 13 Abb., 459.

The form and incidents of such an order, differ in no respect from those on the enforcement of any other order made in the suit. See above, section 287.

But the period of imprisonment is unlimited by the section, and the power may be exercised in the judge's discretion, even though the defendant deny on oath, that he has any property to be affected by the order. *In re Pester*, 2 C. R., 98.

This case was decided before the amendment of 1851. Under section 302, as it now stands, the defendant has his remedy by means of an application to be discharged, in case of his inability to perform the act, or to endure the imprisonment.

Such application may be made on his behalf, either to the court or judge committing him, or to the court in which the judgment was rendered. It must be upon the usual notice to the plaintiff, the circumstances calling for the interposition of the court must be fully set forth in the moving affidavits, and those affidavits must bring the case indisputably, within one or other of the categories imposed by the section.

The plaintiff will, of course, be entitled to resist the motion, and to offer affidavits in disproof of the statements of the moving party, or to show a state of facts under which the imposition of terms will be proper, and also tending to show the nature of those proper to be imposed, which, by the section itself, rest clearly in the discretion of the court or judge.

BOOK XIII.

OF APPEALS.

CHAPTER I.

OF APPEALS IN GENERAL.

§ 303. *Statutory Provisions.*

THE subject of Appeals is regulated by title XI., part II. of the Code.

Of that title, the first chapter relates to appeals in general. The second, with the exception of the first section, regulates the manner in which security is to be given, in those to the higher jurisdictions. The remaining three chapters, and the section above alluded to, are applicable to appeals from specific tribunals.

It is proposed to cite, in this chapter, the provisions of general, and, in the chapters succeeding, those of specific application.

The first chapter of the title in question runs thus :

CHAPTER I.

Appeals in General.

§ 323. (271.) Writs of error in civil actions, as they have heretofore existed, are abolished, and the only mode of reviewing a judgment, or order, in a civil action, shall be that prescribed by this title.

The same subject is further provided for in section 457, inserted on the amendment of 1849, and running thus :

§ 457. No writ of error shall be hereafter issued in any case whatever. Wherever a right now exists to have a review of a judgment rendered, or order or decree made, before the first day of July, 1848, such review can only be had upon an appeal taken in the manner provided by this act ; and all appeals heretofore taken from such judgments, orders, or decrees, under the provisions of the Code of Procedure, which are still pending in an appellate court, and not dismissed, shall be valid and effectual. But this section

shall not extend the right of review to any case or question to which it does not now extend, nor the time for appealing, nor shall it apply to a case where a writ of error has been already issued.

§ 324. (272.) An order, made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

§ 325. (273.) Any party aggrieved may appeal, in the cases prescribed in this title.

§ 326. (274.) The party appealing, shall be known as the appellant, and the adverse party as the respondent. But the title of the action shall not be changed, in consequence of the appeal.

§ 327. (275.) An appeal must be made, by the service of a notice in writing on the adverse party, and on the clerk, with whom the judgment or order appealed from is entered, stating the appeal from the same or some specified part thereof. When a party shall give, in good faith, notice of appeal from a judgment or order, and shall omit, through mistake, to do any other act, necessary to perfect the appeal or to stay proceedings, the court may permit an amendment, on such terms as may be just.

The first sentence only, constituted the section in 1848. The second was added by amendment in 1849.

§ 328. (276.) Upon the appeal allowed by the second and third chapters of this title being perfected, the clerk with whom the notice of appeal is filed shall, at the expense of the appellant, forthwith transmit to the appellate court a certified copy of the notice of appeal and of the judgment-roll; or if the appeal be from an order, a certified copy of such order, and of the papers upon which the order was granted.

The first portion of the section was in the original Code; the concluding part, in relation to the return on an appeal from an order, was added by amendment in 1858.

§ 329. (277.) Upon an appeal from a judgment, the court may review any intermediate order, involving the merits, and necessarily affecting the judgment.

§ 330. (278.) Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.

Dates, as it stands, from 1849. In 1848, the last sentence was absent. The words, "and as to all or any of the parties," were also omitted in the first.

§ 331. (279.) The appeal to the Court of Appeals, under subdivision 2 of section 11 of this Code, must be taken within sixty days after written notice of the order shall have been given to the party appealing; every other

appeal allowed by the second and third chapters of this title must be taken within two years after the judgment shall be perfected by filing the judgment-roll.

Dates as it stands from the amendment of 1858.

In 1857, the section did not provide at all as to appeals under subdivision 2 of section 11, i. e., appeals to the Court of Appeals from orders.

Before that year the time was "within two years after the judgment."

§ 332. (280.) The appeal allowed by the fourth chapter of this title, must be taken within thirty days after written notice of the judgment or order shall have been given to the party appealing.

In the original Code only ten days were given; the period was extended to thirty upon the amendment of 1849.

The following provision is made as to appeals in old equity cases, by section 460 :

§ 460. An appeal may be taken from any final decree entered upon the direction of a single judge, in any suit in equity pending in the Supreme Court, on the first day of July, 1847, at any time before the first day of November, 1852. But this provision shall not apply to cases where a rehearing has already been had or ordered, or to the case of a decree entered before the passage of this act, and to review which no attempt in good faith has been or shall have been made, within thirty days after notice of the entry of such decree. Such appeal shall be taken in the manner provided in sections 327 and 348. In all cases of appeal to the Court of Appeals, in actions which were originally commenced in the late Court of Chancery of this state, the Court of Appeals shall review the cause upon the facts and the law, without any statement or specification of facts found, or any exception taken at the trial of any or either of them. And it shall be, and is hereby declared to be the duty of the Court of Appeals, in any and all such cases, to review the whole matter upon the evidence as well as the law.

This section was first introduced on the amendment of 1849, the latter clauses, in relation to the Court of Appeals, being omitted. Those clauses were added on the amendment of 1858. In 1851 and 1852, the previous portions were altered, by extension of the time of limitation originally prescribed.

Chapter II. is entitled "Appeals to the Court of Appeals." The first section, however, is the only one which is strictly confined to appeals of that nature. Those which follow, 334 to 343, inclusive, relate to the security to be given, and are made generally applicable to appeals from judgments to the Supreme Court from an inferior court, by section 345 (294), providing thus :

Security must be given upon such appeal, in the same manner, and to the same extent, as upon appeal to the Court of Appeals.

And also to appeals from judgments, or appeals from a single judge

to the general term of the same court, by the following clause, forming part of section 348 :

“Such an appeal, however, does not stay the proceedings, unless security be given, as upon an appeal to the Court of Appeals, and such security be renewed as in cases required by section 335, on motion to the court at special term, or unless the court, or a judge thereof, so order, which order may be made, upon such terms as to security, or otherwise, as may be just, such security not to exceed the amount required upon an appeal to the Court of Appeals.”

The sections of chapter II., thus made generally applicable to the above extent, run as follows :

§ 334. (283.) To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding two hundred and fifty dollars ; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

§ 335. (284.) If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed on the part of the appellant by at least two sureties, to the effect that if the judgment appealed from, or any part thereof, be affirmed or dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it shall be made satisfactorily to appear to the court that, since the execution of the undertaking, the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file, and serve a new undertaking as above ; and, in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the court, be dismissed with costs.

Altered by the insertion of the words “ or dismissed,” in the first clause, on the amendment of 1862 ; otherwise that clause has come down unchanged. The second was added on the amendment of 1859.

§ 336. (285.) If the judgment appealed from, direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint ; or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court, or a judge thereof, or county judge shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

Dates from 1849. Substantially the same in 1848.

§ 337. (286.) If the judgment appealed from, direct the execution of a conveyance, or other instrument, the execution of the judgment shall not be stayed by the appeal, until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

§ 338. (287.) If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that, during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon; and that, if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

§ 339. (288.) Whenever an appeal is perfected, as provided by sections 335, 336, 337, and 338, it stays all further proceedings in the court below, upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action, and not affected by the judgment appealed from. And the court below may, in its discretion, dispense with or limit the security required by sections three hundred and thirty-five, three hundred and thirty-six, and three hundred and thirty-eight, when the appellant is an executor, administrator, trustee, or other person acting in another's right; and may also limit such security to an amount not less than fifty thousand dollars, in the cases mentioned in sections three hundred and thirty-six, three hundred and thirty-seven, and three hundred and thirty-eight, where it would otherwise, according to those sections, exceed that sum.

The first clause was in the original Code, a trifling verbal alteration being made in 1849. The second branch of the section was added by amendment in 1851.

§ 340. (289.) The undertakings prescribed by sections 334, 335, 336, and 338, may be in one instrument or several, at the option of the appellant; and a copy, including the names and residence of the sureties, must be served on the adverse party, with the notice of appeal, unless a deposit is made, as provided in section 334, and notice thereof given.

The first portion of the section was in the original Code; the second, providing for the service of a copy, was added upon the amendment of 1849.

§ 341. (290.) An undertaking upon an appeal shall be of no effect, unless it be accompanied by the affidavit of the sureties, that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties, within ten days after notice of the appeal; and unless they or other sureties justify before a judge of the court below,

or a county judge, as prescribed by sections 195 and 196, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

Dates, as it stands, from 1849. In 1848, the provisions were somewhat different.

§ 342. (291.) In the cases not provided for in sections 335, 336, 337, 338, and 339, the perfecting of an appeal, by giving the undertaking mentioned in section 334, shall stay proceedings in the court below upon the judgment appealed from, except that, where it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

§ 343. (292.) The undertaking must be filed with the clerk, with whom the judgment or order appealed from was entered.

§ 304. *General Incidents.*

The remarks in the present chapter will be strictly confined to appeals in the courts of higher jurisdiction; those from the decision of a justice or court of analogous powers, have so many peculiar features incident to them, that the simpler course will be to separate them from the others, and to devote one chapter exclusively to that branch of the subject.

(a.) ABOLITION OF WRIT OF ERROR.

This abolition, as effected by sections 323 and 457, above cited, is complete, so far as regards all appeals whatever in civil actions, not already commenced, before the coming into operation of the Code of 1849. In those, should any exist, in which a writ of error was actually issued before that date, the ancient practice is still applicable. *Vide Teall vs. Van Wyck*, 10 Barb., 376. See also, as to the operation of the Code of 1848, *Dunlop vs. Edwards*, 3 Comst., 341; 3 C. R., 197.

It has been decided by the Court of Appeals, that the right to issue a writ of error is still existent, and that such is the only mode of obtaining a review by that court, in cases of *mandamus*: *Becker vs. The People*, 18 N. Y., 487; or of judgment on an award: *Isaacs vs. Beth Hamedrash Society*, 19 N. Y., 584.

The reasoning of these cases seems to include a large portion of the class of special proceedings. It seems questionable, however, whether the provisions of section 1 of chapter 270 of 1854, p. 592, which provides that "an appeal may be taken to the general term of the Supreme Court or the Superior Court, or Court of Common Pleas of the city and county of New York, from any judgment, order, or final determination, made at a special term of either of said courts, in any special proceeding therein," were not overlooked by, or omitted to be brought to the notice of the tribunal in question. This provision, when taken in connection with subdivision 3 of section 11, would seem to give an appeal in such cases,

and, if an appeal will lie, it seems clear that a writ of error will not, under the operation of the concluding clause of section 471, there relied on as containing the old practice.

An appeal, being a substitute for the writ of error, brings under the consideration of the appellate court, the same class of questions as were formerly cognizable under the latter proceeding. *Morgan vs. Bruce*, 1 C. R. (N. S.), 364.

(b.) APPELLANTS.

Under section 325, an appeal may be taken "by any party aggrieved."

The former restriction as to writs of error, under which all parties against whom judgment was rendered were obliged to join, a mode of procedure being devised to compel that joinder (see 2 R. S., 592, 593, sections 7 to 18 inclusive), is abolished by the Code, and any party, against whom judgment may have been rendered, may now maintain an appeal, as regards his own interest, whether his co-plaintiffs or co-defendants do or do not join. See *Mattison vs. Jones*, 9 How., 152; *Geraud vs. Stagg*, 4 E. D. Smith, 27; 10 How., 369. The latter case seems to overrule *Farrell vs. Calkins*, 10 Barb., 348 (354), note.

A portion of the provisions of the above statutes above alluded to (article I., title III., chapter IX., part III., 2 R. S., 591 to 602 inclusive), may probably still be referred to, as furnishing a definition as to who may or may not be considered as being a party aggrieved by the judgment. See sections 2 to 5, inclusive of that title; 2 R. S., 591, 592.

Under these provisions a writ of error might be brought:

1. By the party against whom the judgment was rendered. Section 2, subdivision 1.

2. By his executors or administrators, if dead, and the judgment affected personal assets. *Ibid.*, subdivision 2.

3. By his heirs or devisees, where the judgment affected the title to real estate. *Ibid.*, subdivision 3.

4. By a reversioner or remainder-man, in an action relating to real property, brought against a tenant for life or for years. *Ibid.*, subdivision 4.

5. By the party in favor of whom the judgment was rendered, or his personal representatives, heirs, or devisees. Section 3.

6. By the attorney-general, on behalf of the people.

7. By a *feme covert* and her husband jointly, on a judgment recovered against the former, either before or after marriage.

As to the right of representatives to maintain an appeal, or to be substituted as appellants, in one already pending, see *Miller vs. Gunn*, 7 How., 159; *Hastings vs. McKinley*, 8 How., 175; *Beach vs. Gregory*, 2 Abb., 203 (208); 1 Hilt., 261.

But an appeal cannot be taken by a person not standing in the position of a party to the record, or the representative of such a party, in respect of a wholly collateral interest. See *Martin vs. Kanouse*, 2 Abb., 390.

Nor by a person standing merely in the position of *amicus curiæ*. *E. B. vs. E. C. B.*, 28 Barb., 299 ; 8 Abb., 44.

Nor will a party be admitted to prosecute an appeal *in formâ pauperis*. *Ostrander vs. Harper*, 14 How., 16.

Although by assuming the character of an appellant, a defendant becomes the moving party in the further proceedings, his position as a party is not changed, nor can he be compelled to give security for costs under the Revised Statutes. *Johnson vs. Yeomans*, 8 How., 140.

(c.) TITLE OF APPEAL.

Although the nomenclature of appellant and respondent is used, the title of the action is not to be changed. *Same case*, section 326, *supra*. But this only applies to the order of parties, and not to the name or style of the court. All papers subsequent to the notice, should accordingly be entitled in the appellate, and not in the original tribunal. See *Clickman vs. Clickman*, 1 Comst., 611 ; 3 How., 365 ; 1 C. R., 98.

(d). APPEAL, ITS EFFECT AND EXTENT.

An appeal, when taken, will only lie for error in the adjudication itself, and not in respect of mere questions of irregularity in point of form, not affecting the merits. The remedy in such cases is by motion in the court below. *Johnson vs. Carnley*, 6 Seld., 570 (579) ; *Ingersoll vs. Bostwick*, 22 N. Y., 425 ; *Wetherhead vs. Allen*, 28 Barb., 661 ; *Elwell vs. Dodge*, 33 Barb., 336 (338).

An appeal must be brought in good faith. Thus, where one had been taken to the Court of Appeals, in violation of a stipulation that the decision of the general term should be final, it was dismissed on motion. *Townsend vs. Masterson, Smith and Sinclair Stone Dressing Company*, 15 N. Y., 587.

It will only lie from an actual and existent proceeding. Where, therefore, on one appeal, an order allowing a supplemental complaint was reversed, another, taken from an order sustaining a demurrer to that complaint, was held to fall with it, and was dismissed without costs. *Guild vs. Parsons*, 16 How., 382. See also as to no appeal lying, in cross-actions where there was no final judgment entered in one case, and no sufficient exception taken in the other. *Lawrence vs. Fowler*, 20 How., 407.

To maintain an appeal against a judgment, the appellant must waive all benefit which he might derive under it, connected with the subject-matter in question. If he attempts to enforce any provisions in his

favor, of a connected or dependent nature, his appeal will be dismissed. *Bennett vs. Van Syckel*, 18 N. Y., 481. So too, where an order had been made for a new trial, unless the plaintiff would remit a part of his recovery, it was held that he could not appeal, and retain the benefit of the alternative judgment. *Lanman vs. The Lewiston Railroad Company*, 18 N. Y., 493. See also, as to an appeal from an order, *Radway vs. Graham*, 4 Abb., 468; *Peel vs. Elliott*, 16 How., 483.

In *Higbee vs. Westlake*, however, 4 Kern., 281, this principle was restricted to matters directly affecting the interest of the appellant, and a creditor, who had received the amount allowed to him by a decree of distribution, was held competent to maintain an appeal, to review collateral allowances made to other parties.

And the taking of an appeal will not, it has been held, waive the benefit of a previously noticed motion, to set aside the judgment appealed from. *Clumpha vs. Whiting*, 10 Abb., 448.

Payment of a judgment does not preclude an appeal from it, unless such payment was by way of compromise and agreement to settle the controversy. *Wells vs. Danforth*, 1 C. R. (N. S.), 415.

Although relief might be properly extended to the respondent, still the appellate court cannot administer it, where no counter-appeal is made by him. *Rooney vs. Second Avenue Railroad Company*, 18 N. Y., 368 (371); *Bell vs. Holferd*, 1 Duer, 58; *Ward vs. Kalbfleisch*, 21 How., 283.

And, if the appeal as taken be partial, only that portion of the judgment or order appealed from can be reviewed. *Kelsey vs. Western*, 2 Comst., 500; *Robertson vs. Bullions*, 1 Kern., 243.

It will, on the contrary, be error for the appellate court to adjudicate upon any matter, unless the whole question, as regards the rights of all parties interested, is before them. *Matter of Empire City Bank*, 18 N. Y., 199; 8 Abb., 192, note. Nor can any adjudication be made, upon points not raised upon the trial in the court below. See *Mills vs. Van Voorhis*, 20 N. Y., 412 (422); 10 Abb., 152. Or upon objections waived by an omission to demur. *Mosselman vs. Caen*, 34 Barb., 66; 21 How., 248.

But this rule does not hold good, as regards an incurable defect in the complaint, not reached by evidence given upon the trial, so as to warrant an amendment. *Cole vs. Blunt*, 2 Bosw., 116. Nor as regards an objection, substantially raised by the pleadings, but not passed upon in form at the trial. *Lyon vs. Manley*, 18 How., 267; 10 Abb., 337.

On an appeal, when taken, every reasonable presumption will lie to sustain the judgment of the court below, and none will be indulged against it. *Carman vs. Pultz*, 21 N. Y., 547; *Low vs. Payne*, 4 Comst., 247. So also, as to the jurisdiction of such court, unless it

appears from the record to have been legally impossible. *Bidwell vs Astor Mutual Insurance Company*, 16 N. Y., 263.

An appeal from a judgment, only brings up the questions of law connected with it. The denial of a motion for a new trial cannot be brought up upon the same occasion, unless the order denying it be separately appealed from. *Fry vs. Bennett*, 16 How., 385 (391); 7 Abb., 352; 2 Bosw., 684; *Hastings vs. McKinley*, 3 C. R., 10; *Marquhart vs. La Farge*, 5 Duer, 559.

But, though an appeal may be irregular, still, if the whole question has been argued by the parties and passed upon by the court, the defects may be waived and the decision stand. There is no want of jurisdiction. *D'Ivernois vs. Leavitt*, 8 Abb., 59.

Nor will a judgment be reversed, in respect of any matter of mere informality, amendable by the court below, and such amendment may be supplied by the appellate tribunal. *Lake Ontario, Auburn, and New York Railroad Company vs. Marvine*, 18 N. Y., 585. See also, as to an appeal from an intermediate order, informally brought up, but actually passed upon on a general hearing, *State of New York vs. The Mayor, &c., of New York*, 3 Duer, 119 (154, &c.). Such order was in fact an order necessarily affecting the judgment. Section 329.

But an amendment can only be made, for the purpose of upholding, not for that of impeaching the judgment appealed from. See *Williams vs. Birch*, 6 Bosw., 674.

It has been held that an appeal cannot be dismissed, even though no case or exceptions be made, as there may be errors on the record itself, which the appellate court will review. See *Rankin vs. Pine*, 4 Abb., 309; *Robinson vs. Hudson River Railroad Company*, 1 Hilt., 144; 3 Abb., 115; *Brown vs. Heacock*, 9 How., 345; *Mills vs. Thursby* (No. 10), 12 How., 385; 2 Abb., 432. It seems, however, that in the Court of Appeals, errors of this nature cannot be reviewed, unless they have been made the subject of actual determination at a general term of the court below. *Vide Lake vs. Gibson*, 2 Comst., 188; 3 How., 420.

The voluntary dismissal of an appeal, is no bar to the bringing of a fresh one by the appellant, within the original time of limitation.

As to the power of the court to effect a virtual consolidation of several appeals in the same matter, by granting an order that all abide the result of one argument, see *Toll vs. Thomas*, 15 How., 315. But an order to stay proceedings will not be granted. *Same case*.

(e.) PREFERENCE ON.

The following are entitled to be heard in preference, and may be moved out of their order in the calendar :

Appeals taken in actions against a corporation, on a note or other

evidence of debt, for the absolute payment of money, on demand, or at any particular time. 2 R. S., 459, section 11.

So, in actions by the attorney-general for the impeachment of manorial titles, under the resolution of the 10th of April, 1848. Chapter 128 of 1850, p. 200.

Appeals in criminal cases. Rule 13, Court of Appeals; rule 48, Supreme Court.

Appeals in suits to which the people are a party, where notice to such effect shall have been given by the attorney for the state. Chapter 37 of 1858, section 1, p. 65.

Appeals in actions in which executors or administrators are sole plaintiffs or sole defendants, or which prevent the issuing of letters testamentary or of general administration. Chapter 167 of 1860, p. 270.

§ 305. *Judgment on Appeal.*

The powers of the court, on awarding judgment, are defined by section 330, as above cited: "The appellate court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to all or any of the parties; and may, if necessary, order a new trial. And, when a judgment is reversed or modified, it may make complete restitution."

Where the notice of appeal is limited in its nature, the powers of the court in awarding judgment, are limited to the same extent. Only such parts of the judgment as are appealed from, can be reviewed. *Kelsey vs. Western*, 2 Comst., 500. Nor can a judgment be affirmed, as to part of the amount recovered, and reversed as to the residue, as between the same parties, where a new trial is granted, as to the part which is reversed. *Story vs. The New York and Harlem Railroad Company*, 2 Seld., 85.

It is true that an appellate court may, in some cases, modify, or even reverse part of a judgment or decree, not embraced in the appeal, but this proceeding can only be justified, where the modification or reversal is necessary, to render the decree, as finally pronounced, entirely consistent. *Bell vs. Holford*, 1 Duer, 58. But, as a general rule, a respondent cannot obtain relief, even though otherwise proper, where he has omitted to take a counter-appeal on his own part. *Same case. Rooney vs. Second Avenue Railroad Company*, 18 N. Y., 368 (371).

Under the powers conferred by the above section, the court may now reverse a judgment, against an appellant, suffering it to stand as against another party in the same interest, who has omitted to appeal. *Geraud vs. Stagg*, 4 E. D. Smith, 27; 10 How., 369; overruling *Farrell vs. Calkins*, 10 Barb., 348 (354), note.

And, on the reversal of judgment as to one, and affirmance of it as to another appellant, costs will be awarded in favor of the former, in the absence of any special reason to the contrary. *Montgomery County Bank vs. Albany City Bank*, 3 Seld., 459.

The questions as to the mode in which judgment should be entered on appeal have been already considered, and the cases cited above, in book XI.

On the subject of restitution, as above prescribed, it is laid down in *Estus vs. Baldwin*, 9 How., 80, that, when the judgment of the appellate court is given for the appellant, absolutely and finally, no new trial being ordered, it is imperative upon the court to order restitution of all that the appellant has lost, including, as there laid down, all costs which he has incurred since the outset of the action. See likewise, *Sheridan vs. Mann*, 5 How., 201; 3 C. R., 213.

The motion for restitution should be made before the entry of judgment, of which it then becomes a part, and execution may be issued to enforce it. *Kennedy vs. O'Brien*, 2 E. D. Smith, 41.

In the same case, it was held, that no action would lie for an amount proper to be restored, upon the mere decision of the appellate court, before the actual entry of judgment. But, after such judgment, the amount may be recovered, either by proceeding in the suit itself, or by separate action. The remedies are cumulative. *Lott vs. Swezey*, 29 Barb., 87.

§ 306. *Notice of Appeal.*

An appeal is taken, by means of this proceeding, as provided for by section 327. It must state the nature of the appeal, and whether taken from the whole or some part of the judgment or order impeached, and, if from part, must specify what part. It must be served upon the adverse party, and also on the clerk with whom the judgment or order is entered.

When taken from the whole of a judgment or order, no special statement will be necessary; it will be sufficient to give the notice in that form.

Nor need any grounds be assigned, even when the appeal is partial. It is enough, if the notice specify what part of the judgment or order is intended to be reviewed. See *Wilson vs. Allen*, 3 How., 369; 2 C. R., 26; 7 L. O., 288.

But the portion intended to be impeached, must be distinctly specified, and the specification must be sufficiently large, to comprehend all provisions capable of being drawn into question on the argument. Great care should be bestowed on framing the notice, in this respect,

as no part of the judgment or order, not actually appealed from, can be reviewed. See *Kelsey vs. Western*, 2 Comst., 500; *Robertson vs. Bullions*, 1 Kern., 243. See, however, highly liberal doctrine, as to the power of supplying a defect of that nature, by reference to an undertaking served at the same time, *People vs. Tarbell*, 17 How., 120.

Nor, as above noticed, can any relief, however proper, be given to a party who has not appealed in form. See *Rooney vs. Second Avenue Railroad Company*, 18 N. Y., 368 (371), and *Bell vs. Holford*, 1 Duer, 58, cited in last section.

Although power is given, on appeal from a judgment, for the review of collateral orders necessarily affecting it (see section 329), yet such orders must also be appealed from in form, either by the same or by a separate notice, or they cannot be reviewed. See *Fry vs. Bennett*, 16 How., 385 (391); 7 Abb., 352; 2 Bosw., 684; *Hastings vs. McKinney*, 3 C. R., 10, and *Marquhart vs. La Farge*, 5 Duer, 559, also there cited.

When notice of appeal is given, to the Court of Appeals, from an order granting a new trial, under the special power conferred by section 11, subdivision 2, it must, as provided by that section, "contain an assent, on the part of the appellant, that, if the order be affirmed, judgment absolute shall be rendered against the appellant." Such assent cannot be qualified, in any manner, or so as to retain the benefit of any provision in the original order, allowing the appellant to take an alternative judgment for a reduced amount. If attempted, the appeal will be bad. *Lanman vs. Lewiston Railroad Company*, 18 N. Y., 493.

The notice must, as will be seen, be served, both on the adverse party, and on the clerk of the court in which the judgment is entered. If omitted to be served on either, within due time, the defect will be fatal, and is one that cannot be waived. *Westcott vs. Platt*, 1 C. R., 100; *The People vs. Eldridge*, 7 How., 108.

Being a proceeding in the court below, it should be there entitled, and should be served upon the attorney, not upon the party. If served on the latter, and he does not appear, so as to give the court jurisdiction, the appeal will be a nullity. The objection, being jurisdictional, is one, too, that, if not waived, may be taken at any time. See *Tripp vs. De Bow*, 5 How., 114; 3 C. R., 163.

Service on the attorney, may be made by mail, with its usual incidents, where otherwise admissible. *Dorlon vs. Lewis*, 7 How., 132. But not so as to service on the clerk of the court, to render which regular, the notice must have been actually received by him, within the time limited for appealing. *Crittenden vs. Adams*, 5 How., 310; 3 C. R., 145; 1 C. R. (N. S.), 21. The defect was, however, held to be amendable, but, whether the principles there laid down are generally sustainable, to their full extent, is doubtful.

Where an undertaking is requisite, a copy of that undertaking must be simultaneously served. See below, under that head. Where a deposit is made, in lieu of an undertaking, under section 334, notice of that deposit must be similarly given (section 340). Where, under section 337, a conveyance or other instrument has been executed, and deposited with the clerk; or where, under section 336, the subject-matter of the action has been brought into court, or delivered to a receiver or officer, in lieu of an undertaking, as thereby authorized, notice of a compliance with those directions, must also be given at the same time.

On service of notice of appeal, and of a proper undertaking, the appeal is perfected, and the time within which the return of the court below must be filed, commences to run, without regard to any subsequent justification of the sureties. *Thompson vs. Blanchard*, 2 Comst., 561; 4 How., 210.

An admission of due service, waives all objections, even that of a notice not having been given in due time. *Struver vs. Ocean Insurance Company*, 2 Hilt., 475; 9 Abb., 23.

An appeal, taken by service of the notice on the same day on which the judgment was entered, and before the hour when the costs were adjusted and the judgment-roll filed, was decided to be good, in *Blydenburgh vs. Cotheal*, 4 Comst., 418; 5 How., 200; 3 C. R., 216: "As a general rule, the court does not inquire into fractions of a day, except for the purpose of guarding against injustice."

But, if taken in anticipation of such entry, describing the judgment as entered on the day of trial, it will be clearly irregular. *Bradley vs. Van Zandt*, 3 C. R., 217.

Where the appeal is taken to the general term of the same court, a simple notice will be sufficient, though, of course, no stay will be effected. But, where the appeal is from a lower to a higher jurisdiction, it will be ineffectual for any purpose, unless the notice be accompanied by the undertaking provided for in section 334. See also section 345. *Vide Cushman vs. Martine*, 13 How., 402; 6 Duer, 660.

A notice, when served, is amendable, in respect of defects which do not destroy its substantial character. *Fry vs. Bennett*, 16 How., 385 (391); 7 Abb., 352; 2 Bosw., 684. And mere formal errors may be disregarded. *The People vs. Tarbell*, 17 How., 120; *Lake Ontario, Auburn, and New York Railroad Company vs. Marvine*, 18 N. Y., 585 (587).

In *Sherman vs. Wells*, 14 How., 522, it was held that the service of a case and exceptions, might be held as constituting an informal notice of appeal, sufficient to support an amendment, allowing the filing of a formal notice, *nunc pro tunc*, and this is treated as a settled question in

the first district of the Supreme Court; in *Jackson vs. Fassett*, 33 Barb., 645; 21 How., 279; 12 Abb., 281. Similar relief was granted by the Superior Court, but upon strict terms, and as going to the extreme verge of judicial discretion, in *Jellinghaus vs. The New York Insurance Company*, 5 Bosw., 678. In the New York Common Pleas, however, a similar application has been denied, on the general doctrine that the courts have no power to relieve from an omission to appeal, as laid down in *Humphreys vs. Chamberlain*, 1 Kern., 274; *Holmes vs. Woodward*, unreported.

As to the power conferred by the concluding clause of section 327, to allow omissions in perfecting an appeal to be corrected, when notice shall have been given in good faith, see *Aldrich vs. Ketchum*, 12 L. O., 319.

A motion to dismiss an appeal, on the ground of defects in the notice, or on any other technical grounds, cannot be entertained by the court below; it must be made to the appellate tribunal. *Bradley vs. Van Zandt*, 3 C. R., 217; *McMahon vs. Harrison*, 5 How., 360; *Lentillon vs. The Mayor of New York*, 3 Sandf., 721; 1 C. R. (N. S.), 111.

§ 307. *Limitations as to Time.*

These limitations, as imposed by section 331 and 332, must be carefully observed.

They are, as will appear by a reference to those sections, as follows:

1. An appeal to the Court of Appeals from a judgment, or an appeal to the Supreme Court from the judgment of a court of inferior jurisdiction, must be taken within two years.

Those two years commence to run from the time when the judgment appealed from was perfected, by filing the judgment-roll. See, however, condition imposed, as to appeals on action commenced in one of the lower jurisdictions, by subdivision 3 of section 11.

2. An appeal to the Court of Appeals, from an order made before judgment, but in effect determining the action, or from one granting or refusing a new trial (see section 11, subdivision 2), must be taken within sixty days. Those sixty days commence, from the time when written notice of such order has been given to the party appealing.

3. But appeals to that court, from final orders, in a special proceeding, or in an action, after judgment (see section 11, subdivision 3), would seem to be entitled to the full period of two years. There is, however, great awkwardness in the framing of section 331, as to this class of orders. The case seems, in fact, not to be provided for, as to appeals from orders, in special proceedings where no judgment exists, and most imperfectly and unsatisfactorily as to orders after judgment. The

case of such an order, made more than two years after the filing of the judgment-roll, a contingency by no means impossible, may be instanced as an example of this imperfection.

4. Appeals to the general term of the same court, whether from a judgment or from an order, must be taken within thirty days. Those thirty days commence, from the time when written notice of such judgment or order has been given to the party appealing.

No written notice is requisite to set the time running, in the first of the above four classes. The third of them seems unprovided for. The limitation is clearly two years, but the section does not provide from what time those two years are to run. There is no judgment-roll in either case, consequential upon the order appealed from; and to hold that the time for appealing from an order, made in an action, after judgment, runs, not from any date having reference to the making of that order, but from the filing of the original judgment-roll in the action, might possibly involve a total failure of the rights to appeal at all.

A reasonable construction would be that, whether the statute requires it in terms or not, written notice of such an order ought, in all cases, to be given, and that the time of limitation should run from the service of such notice, as in classes 2 and 4 of the above.

To set the time running, in those cases where such a notice is requisite, the giving of such notice must be actual, by due service of it in writing, or it will be wholly ineffectual for that purpose. An omission to make such service will amount, in fact, to an indefinite extension of the adversary's time to appeal.

Such notice cannot be given at all by anticipation, nor unless the judgment, or order, an appeal from which is sought to be limited, has, at the time, been actually perfected, by entry and filing of the judgment-roll in the former, or by entry of the order in the latter case. See *Fry vs. Bennett*, 16 How., 385; 7 Abb., 352; 2 Bosw., 684. See also *Leavy vs. Roberts*, 2 Hilt., 285; 8 Abb., 310; *Sherman vs. Wells*, 14 How., 522 (527); *Bank of Geneva vs. Hotchkiss*, 5 How., 478; 1 C. R. (N. S.), 153; *McMahon vs. Harrison*, 5 How., 360; *Bradley vs. Van Zandt*, 3 C. R., 217. And a stay of proceedings before judgment will prevent such a notice, or will render it irregular, if actually given pending such stay. *Bagley vs. Smith*, 2 Sandf., 650. But a stay after judgment has been held not to have any effect as an extension. *Renouil vs. Harris*, 2 Sandf., 641; 2 C. R., 71.

Unless such notice be regularly served, and regular in itself, no amount of knowledge of the judgment or order, on the part of the intended appellant, will avail to set the time running. The proceeding is in derogation of a right, and the party seeking to limit

that right on the part of his adversary, will be held to strict practice. *Fry vs. Bennett*, 16 How., 385; 7 Abb., 352; 2 Bosw., 684; *Yorks vs. Peck*, 17 How., 192; *Staring vs. Jones*, 13 How., 423. Such notice has been held necessary, even when the appeal is taken from a judgment or order entered by the appellant himself. *Rankin vs. Pine*, 3 Abb., 309.

Even where an order, after entry, has been resettled, a fresh copy must be served, and the time to appeal will not commence to run until such latter service. *Bowman vs. Earle*, 3 Duer, 691.

If any delay take place in the entry of judgment, the party desiring to appeal may compel the other, by motion, to perfect his judgment; and his proper and only course will be to make an application for that purpose. This view is distinctly held in the cases of *The Bank of Geneva vs. Hotchkiss*, and *McMahon vs. Harrison*, above cited; and also in *Lentilhon vs. The Mayor of New York*, 3 Sandf., 721; 1 C. R. (N. S.), 111. See also Code, section 350, as to the power of a party desiring to appeal from an order made at chambers, to require it to be entered with the clerk for that purpose.

The period from which an appeal from a judgment to the higher jurisdiction commences to run, is now clearly fixed by section 331. Before the amendment of 1858, when it stood "within two years after the judgment," there was a good deal of discussion upon the question. The preponderance of decisions was in favor of the doctrine that such time ran from the time that the judgment was pronounced, without regard as to whether it was or was not perfected. See *Bank of Geneva vs. Hotchkiss*, 5 How., 478; 1 C. R. (N. S.), 153; *Wells vs. Danforth*, 7 How., 197; *Woollen Manufacturing Company vs. Townshend*, 1 C. R. (N. S.), 415. By these, *Bentley vs. Jones*, 4 How., 335; 3 C. R., 37; *Childs vs. Geraghty*, 8 L. O., 172; and *Renouil vs. Harris*, 2 Sandf., 641; 2 C. R., 71, were so far overruled. See also *Church vs. Rhodes*, 6 How., 281.

Considerable discussion has arisen upon the point, as to whether it is or is not within the power of the court, as such, to enlarge the time within which an appeal can be taken; a judge at chambers is clearly prohibited from doing so, by the express terms of section 405. That power is strongly asserted, as being conferred by the terms of section 173, in the following cases: *Crittenden vs. Adams*, 5 How., 310; 3 C. R., 145; 1 C. R. (N. S.), 21; *Seeley vs. Pritchard*, 12 L. O., 245; 3 Duer, 669; *Haase vs. New York Central Railroad*, 14 How., 430; *Toll vs. Thomas*, 18 How., 324; *Traver vs. Silvernail*, 2 C. R., 96.

The contrary proposition, *i. e.*, that the limitation is positive, and that the court has no power to relieve from the omission, is maintained in *Enos vs. Thomas*, 5 How., 361 (Parker, J., dissenting, 367); *Humphrey*

vs. *Chamberlain*, 1 Kern., 274; *Wait vs. Van Allen*, 22 N. Y., 319; *Marston vs. Johnson*, 13 How., 93; *Rowell vs. McCormick*, 5 How., 337 (339); *Lindsley vs. Almy*, 1 C. R. (N. S.), 139; *The People vs. Eldridge*, 7 How., 108; *Sherman vs. Wells*, 14 How., 522; *Fry vs. Bennett*, 16 How., 385; 7 Abb., 352; 2 Bosw., 684; Hoffman, J., dissenting. See also, as to appeals in justices' courts, *De la Figanriere vs. Jackson*, 4 E. D. Smith, 477; 2 Abb., 286.

The following cases, holding to the same effect, were decided under the Code of 1848, before the extensive power of amendment, as conferred by section 173, was inserted, and they do not, therefore, touch the doctrine, as laid down in *Crittenden vs. Adams*, and that class of cases: *Westcott vs. Platt*, 1 C. R., 100; *Schermerhorn vs. The Mayor of New York*, 3 How., 254; *Burch vs. Newberry*, 3 How., 271; *Wilson vs. Onderdonk*, 3 How., 319; 1 C. R., 64; *Sheldon vs. Barnard*, 3 How., 423; *Purdy vs. Harrison*, 1 C. R., 54; *Allen vs. Ackley*, 4 How., 5; *Renouil vs. Harris*, 2 Sandf., 641; 2 C. R., 71.

The opinions in *Crittenden vs. Adams*, and the other cases holding the same doctrine, enter very fully into the question, asserting the undiminished power of the court in this respect. They assert also, and such, on examination, will appear to be the case, that *Humphrey vs. Chamberlain*, the leading case to the contrary, is *obiter dictum* on this point, nor was section 173 noticed. See *Fry vs. Bennett*, 16 How., 385 (397, per Hoffman, J.). The same may be said of *Wait vs. Van Allen*; *Rowell vs. McCormick*; and *Sherman vs. Wells*. *Lindsley vs. Alney*, and *The People vs. Eldridge*, are grounded expressly on the decision in *Enos vs. Thomas*; and *Marston vs. Johnson*, and *Fry vs. Bennett*, on that in *Humphrey vs. Chamberlain*.

This conflict of authority seems still to leave the question in some doubt, but the more liberal cases all agree that the power, if existent, as there asserted, is one that should be sparingly and cautiously exercised.

And, where any step has been actually taken, for the purpose of appealing in good faith, or amounting to the service of notice, however informal, the court has the power of supplying the defect, by the allowance of an amendment *nunc pro tunc*, under the authority specially conferred by section 327, and the general powers of section 173. See *Lake Ontario, Auburn, and New York Railroad Company vs. Marvin*, 18 N. Y., 585 (587); *Aldrich vs. Ketchum*, 12 L. O., 319; *Fry vs. Bennett*, 16 How., 385; 7 Abb., 352; 2 Bosw., 684; *Mallory vs. Wood*, 14 How., 67 (69); 3 Abb., 369; 6 Duer, 657; *Haase vs. New York Central Railroad Company*, 14 How., 430; *Sherman vs. Wells*, 14 How., 522; *Enos vs. Thomas*, 5 How., 361 (366); 1 C. R. (N. S.), 67; *Crittenden vs. Adams*, 5 How., 310; 3 C. R., 145; 1 C. R. (N. S.), 21;

Seeley vs. Pritchard, 12 L. O., 245 ; 3 Duer, 669. See likewise *Church vs. Rhodes*, 6 How., 281 ; *Jellinghaus vs. The New York Insurance Company*, 5 Bosw., 678.

But an omission to obtain leave from the general term of the Supreme Court, to appeal further to the Court of Appeals, in an action originating in a justice's court, has been held not to be a defect of the above description, and to be incurable. *Wait vs. Van Allen*, 22 N. Y., 319.

The objection that an appeal has not been taken in due time, is capable of waiver, and cannot be taken, where due service of notice has been admitted. *Struver vs. Ocean Insurance Company*, 2 Hilt., 475 ; 9 Abb., 23.

§ 308. *Security.*

The giving of security is, unless waived, an essential prerequisite to the validity of an appeal to the Court of Appeals, whether from a judgment or an order ; and likewise, on an appeal to the Supreme Court from the judgment of an inferior court.

An appeal, from the decision of a single judge, to the general term of the same court, is, however, maintainable in itself, without any security whatever. See *Parsons vs. Suydam*, 4 Abb., 134 ; *Dorlon vs. Lewis*, 7 How., 132 ; *Ten Broeck vs. Hudson River Railroad Company*, 7 How., 137. Before the amendment of 1851, this was otherwise, as regards appeals from judgments. Under chapter 270 of 1854, p. 592, appeals in special proceedings, are placed on substantially the same footing, in this respect, as those in ordinary actions.

But, in no case, will an appeal, when taken, stay the adversary's proceedings, unless upon security duly given, or special order of the court.

This rule, however, does not necessarily extend to proceedings of a collateral nature. Thus, on application by the judgment-creditor of a testator, to the surrogate, for leave to issue execution, such leave was refused, and proceedings for that purpose stayed, until the decision on an appeal taken by the executor to the Court of Appeals ; although the security given on such appeal was only that prescribed by section 334, which, *per se*, was insufficient to effect a suspension of proceedings. *Curtis vs. Stillwell*, 32 Barb., 354.

So also, an appeal from judgment of ouster, against a public officer, will not stay measures, on the part of his successor, for obtaining the books, &c., appertaining to the office. The latter are original and independent proceedings. *Welch vs. Cook*, 7 How., 282.

The people are, however, exempted from the obligation of giving security, and an appeal by them effects, *per se*, a stay of proceedings. Chapter 37 of 1858, section 2, p. 65. The same is also the case, with

respect to appeals by municipal corporations, unless the court shall otherwise direct. Chapter 262 of 1859, section 1, p. 570. If such security be desired, the appellant should apply for a special order directing it to be given. See same statute, which also prescribes the persons by whom it is to be executed.

If the appellant think fit to pay the judgment, instead of giving security, his right to appeal will not be impaired by such payment, unless it have been made by way of compromise, and agreement to settle the controversy. *Wells vs. Danforth*, 1 C. R. (N. S.), 415.

Where a deceased defendant had made an arrangement with the plaintiff, under which the latter was entitled to possess himself of the amount of the judgment, on giving counter-security to refund, his executors were, it was held, bound to carry that arrangement out, and were debarred from giving the ordinary security, a stay of execution being refused. *Mills vs. Thursby* (No. 6), 11 How., 124.

Where, at the hearing, the respondent verbally agreed to waive security, and, on an appeal being taken, omitted to object at the time, it was considered that he was precluded from taking the objection, at a later stage of the proceeding. *Lentilhon vs. Mayor of New York*, 3 Sandf., 721; 1 C. R. (N. S.), 111.

(a.) UNDERTAKING UNDER SECTION 334.

This security, which is essential to the validity of all appeals from an inferior to a superior jurisdiction, merely provides for payment to the appellant, if successful, of his costs and damages, incident to the appeal itself.

If an appeal be taken from two separate orders, two separate securities must be given. A single undertaking, in the sum of \$250, though in terms embracing both, will be insufficient. *Schermerhorn vs. Anderson*, 1 Comst., 430; 2 C. R., 2. But, where a judgment is single, only one undertaking will be requisite, though it direct the payment of different sums to different defendants. *Smith vs. Lynes*, 2 Comst., 569; 4 How., 209; 2 C. R., 138.

By the terms of the section, a deposit may be made, instead of giving security. But, when so made, the deposit is at the sole risk of the depositor. *Parsons vs. Travis*, 5 Duer, 650. And it must remain in court, to abide the ultimate event of the action, should a further appeal be taken to the Court of Appeals, though full security be given on that appeal. *Parsons vs. Travis*, 2 Duer, 659.

On security being given, either by undertaking or deposit, the appeal will be, *prima facie*, perfected, so far as regards the obtaining of a revision, subject, of course, in the former case, to the contingency of the

undertaking being defeated, by a failure of the sureties to justify, if excepted to.

And, if the undertaking contain all that is required by the section now in question, it will be sufficient for that purpose, though unavailable as a stay of proceedings. *Firemen's Insurance Company of Albany vs. Bay*, 3 How., 424; 2 C. R., 3; *Chemung Canal Bank vs. Judson*, 10 How., 133; *McMahon vs. Allen*, 22 How., 193; 13 Abb., 126; *Valton vs. National Loan Fund Life Association*, 19 How., 515.

As to an undertaking of this nature being insufficient, standing alone, to effect any general stay, on an appeal from an order after judgment, see *Tiers vs. Carnahan*, 3 Abb., 69.

But this is only so, as respects a judgment enforceable by execution. Where, therefore, a decree merely directed certain payments to be made, out of a fund already in court, it was held that security, under section 334, effected a stay of proceedings. *Curtis vs. Leavitt*, 10 How., 481; 1 Abb., 274. See also, as to an appeal from an injunction, *Howe vs. Searing*, 6 Bosw., 684; 11 Abb., 28. And, in cases not falling within the provisions of sections 335 to 338 inclusive, the giving of security, under section 334, effects a general stay. See section 342. See also below, as to sections 336 and 337, when a delivery or deposit is made, and the judgment does not involve any money payment.

The undertaking, when prepared, must be accompanied by the affidavit of the sureties, prescribed by section 341.

As before noticed, the giving of any security may be waived, but only by written consent on the part of the respondent.

(b.) UNDERTAKING TO EFFECT STAY OF PROCEEDINGS.

An undertaking of this nature will be requisite, whenever the appellant desires to obtain a stay of the respondent's proceedings, pending the appeal. Section 335 is applicable to the case of a judgment directing the payment of money; sections 336 to 338, to cases where other special directions have been given. Whenever such an undertaking has been duly given and perfected, it suspends all further proceedings, in the court below, upon the judgment appealed from, or upon the matter embraced therein. Section 339. But, as regards any other matters, not affected by such judgment, the power to proceed is not affected. See *Curtis vs. Stillwell*, and *Welch vs. Cook*, above cited.

Such stay is inchoate, upon the giving of the undertaking, but defeasible, in case the sureties fail to justify, if excepted to. See below. See also *Thompson vs. Blanchard*, 2 Comst., 561; 4 How., 210.

When an undertaking is given for this purpose, security must also be given, under section 334. Both may be contained in the same instrument (see section 340), but both must be executed, if the appellant

would stay proceedings on the judgment. *Wilson vs. Allen*, 3 How., 369; 2 C. R., 26; 7 L. O., 288; *Langley vs. Warner*, 1 Comst., 606; 1 C. R., 111; 3 How., 363.

The amount due on the judgment appealed from, must be distinctly stated in an undertaking of this nature, in order to form a groundwork for the necessary affidavit of justification, under section 341. *Harris vs. Bennett*, 3 C. R., 23. If given prematurely, and before the actual entry of judgment, it will be irregular. *Bradley vs. Van Zandt*, 3 C. R., 217.

Although the judgment appealed from, may direct the payment of different sums of money to different defendants, only one undertaking will be required, and, if of sufficient amount, will stay the proceedings of all. *Smith vs. Lynes*, 2 Comst., 569; 4 How., 209; 2 C. R., 138.

The undertaking, when given, must, in every case, be accompanied by the affidavit of the sureties, that they are each worth double the amount specified therein. Section 341. The amount so specified must include, in all cases, the whole sum due upon the judgment, for principal, interest, and costs, and also the sum of \$250 required by section 334, and the affidavit of justification must be in double the aggregate amount of both. If in less, the security will be insufficient, and no stay effected. *Vide Hoppock vs. Cottrell*, 13 How., 461; *Newton vs. Harris*, 1 C. R. (N. S.), 191; 8 Barb., 306.

And the statement must be in strict conformity with the terms of both sections, or no stay will be obtained. *Chemung Canal Bank vs. Judson*, 10 How., 133. In that case, the undertaking, though otherwise sufficient, omitted to provide in terms for payment of the costs of the appeal. See similar defect held fatal, in *Langley vs. Warner*, 1 Comst., 606; 3 How., 363; 1 C. R., 111.

Where, however, the undertaking is in substantial, though not exact compliance with the requirements of the Code, the adverse party must give notice of the defect, or move to set it aside. If he wholly omit to do so, he may be held bound by the stay, and his proceedings in disregard of it, may be set aside. *Parfitt vs. Warner*, 13 Abb., 471.

There is an awkwardness in the wording of section 335, as last amended (1862), that requires observation. The undertaking is to be "to the effect that if the judgment appealed from, or any part thereof, be affirmed *or dismissed*, the appellant will pay," &c. It is clear that the legislature meant to provide for such payment, if the judgment be affirmed, *or the appeal dismissed*, but have not expressed their meaning; and it will be better to draw the undertaking in this form.

Not merely must the undertaking specify a sufficient sum, but it has also been held, that each of the sureties must justify in double that amount (see section 341); and that a justification by more than two,

in amount sufficient in the aggregate, but less as to each surety than the amount so required, was insufficient. See *Mills vs. Thursby* (No. 8), 11 How., 129 (131). In preparing the security, this should be carefully attended to.

To be available, a copy of the undertaking must be served, simultaneously with the notice of appeal, and not afterwards. If the latter, it will be of no effect. *New York Central Insurance Company vs. National Protection Insurance Company*, 10 How., 344; *Cushman vs. Martine*, 13 How., 402; 6 Duer, 660; *Staring vs. Jones*, 13 How., 423. If the undertaking be under section 334 only, no general stay is effected. *Tiers vs. Carnahan*, 3 Abb., 69. And the mere taking of an appeal effects no stay whatever. *Story vs. Duffy*, 8 How., 488. Nor will the giving of such an undertaking stay the taxation of costs, or the taking of any other proceeding, necessary to perfect the judgment appealed from. *Vide Curtis vs. Leavitt*, 19 Barb., 530; 1 Abb., 118. Nor, although it will prevent the obtaining of a transcript, will it preclude the filing of one already obtained. *Bulkeley vs. Keteltas*, 3 Sandf., 740; 1 C. R. (N. S.), 119.

When security is given, under section 336, it is to be given in such an amount as the court or a judge shall direct. On an application for such direction, a stay was refused, unless the undertaking was given, to an amount sufficient to provide for the deterioration of property sought to be retained by the respondent. *Read vs. Potter*, 11 Abb., 413.

An application to fix such amount seems to be necessary, in all cases where security is sought to be given under this section. The moving papers should show sufficient *data* to enable the judge to fix the amount. The officer applied to will probably insist upon notice being given, in which case, an interim stay of proceedings should be obtained, either by separate order, or by embodiment in an order to show cause.

In the case of security under section 338, a similar application to the court, to fix the amount in which such security is to be given, will also be necessary. Security of this nature is not essential to the validity of the appeal, as such. *Firemen's Insurance Company of Albany vs. Bay*, 3 How., 424; 2 C. R., 3. It merely pertains to the stay of proceedings.

If an instrument, executed and deposited with the clerk as required by section 337, be lost or destroyed, pending the appeal, the appellant, if unsuccessful, will be bound to execute another. *Worrall vs. Munn*, 17 N. Y., 475.

In a case of this nature, the instrument in question must be so executed and so delivered, prior to or simultaneously with the filing of the undertaking. Notice of such execution and delivery should be served upon the respondent's attorney, simultaneously with the service of the copy of the undertaking, as required by section 340.

And, unless an undertaking be given, the mere execution and deposit of the instrument with the clerk will be ineffectual, and will procure no stay whatever. *Waring vs. Ayres*, 12 Abb., 112.

When given, such an undertaking only stays future, and does not affect the validity of any past proceedings, under the judgment appealed from. Thus, where given after levy, it does not operate to discharge the lien already effected, but only suspends its enforcement, and, should the appeal fail or be dismissed, the respondents will be entitled to resume proceedings, and will retain their priority over a subsequent execution. *In re Berry*, 26 Barb., 55; *Cook vs. Dickerson*, 1 Duer, 679; *Rathbone vs. Morris*, 9 Abb., 213; *Waring vs. Ayres*, 12 Abb., 112; *Strecker vs. Wakeman*, 13 Abb., 85. The taking of an appeal does not operate to discharge an attachment. See *Spencer vs. Rogers' Locomotive Works*, 13 Abb., 180.

But, upon motion, it may be proper to supersede an execution and levy, where the appeal is taken in good faith, and the security ample. *Strecker vs. Wakeman*, *supra*.

An appeal from a decree for an injunction, duly perfected, will suspend proceedings to punish its violation, subject to their being resumed, on its determination, unless the judgment be reversed. *Howe vs. Searing*, 6 Bosw., 684; 11 Abb., 28.

Where the appeal itself is irregular, security upon it, however regular upon its face, will effect no stay. *Ford vs. David*, 13 How., 193; 3 Abb., 385; 5 Duer, 684.

But, where the judgment is not enforceable by execution, but simply directs payments to be made out of a fund, already in court, no special undertaking will be requisite, but the ordinary security, under section 334, will effect a stay. *Curtis vs. Leavitt*, 10 How., 481; 1 Abb., 274. See, to same effect, *Howe vs. Searing*, 6 Bosw., 684; 11 Abb., 28, above cited.

On appeals from orders to the general term, no provision is made by the Code, in relation to security, but a stay of enforcement, if required, must be specially applied for. *Hibbard vs. Burwell*, 11 How., 572; and see *Story vs. Duffy*, 8 How., 488; and *Bacon vs. Reading*, 1 Duer, 622; 11 L. O., 122, there referred to. See, also, in subsequent chapter, under the head of appeals of that nature.

In relation to the power of the court below, to order the sale of perishable property, and the deposit or investment of the proceeds, to abide the result of the appeal, notwithstanding a stay in other respects has been effected, see section 342. The operation of that section seems, however, from the terms employed at its commencement, to be extremely limited. When desirable, an order of this description should be applied for by motion, in the usual manner, or on consent. A surrogate's court

has been held to be a court below, within the meaning of this section, in *Anon.*, 3 C. R., 69.

If the case fall under the special provisions of section 336 or 337, the bringing into court, or delivery to an officer or receiver, of the subject-matter of the section, or the execution and deposit of a conveyance, or other instrument, as required by those sections, may be sufficient of itself to effect a stay of proceedings, where the appeal is to the general term, or, when to a superior jurisdiction, to render a simple undertaking, under section 334, sufficient for that purpose. But if, in connection with such a direction, the judgment involve the making of any money-payment, for costs or otherwise, then an undertaking must be given in any event, and must provide for that payment. And, if an undertaking be given, under section 336, it must comprise this, as well as the matters prescribed by that section.

(c.) FORM AND INCIDENTS OF UNDERTAKING.

In the preparation of this document, the utmost care must be taken to draw it, in exact compliance with the statutory requisitions, above cited. The slightest non-compliance in essentials may invalidate it. See *Chemung Canal Bank vs. Judson*, 10 How., 133, above cited.

The amount due on the judgment appealed from must, in all cases, be distinctly shown. The exact nature and extent of the appeal taken, should also be correctly described. In all cases, the requisitions of section 334 must be satisfied, and, where a stay is effected, those also of section 335, or such of the other sections above noticed, as may be applicable to the case in question. Especial care should be taken, in every case, to satisfy the requisitions of the section or sections properly applicable.

Every undertaking must also be accompanied by the affidavits of the sureties, that each of them is worth double the amount specified therein. Without such an affidavit, it will be of none effect. Section 341. See strict view, as to this affidavit, in *Mills vs. Thursby* (No. 8), 11 How., 129 (131), above cited. See likewise, *The People vs. Tarbell*, 17 How., 120; *Sternhaus vs. Schmidt*, 5 Abb., 66. It must, also, be duly proved or acknowledged as a deed of real estate. Rule 6. If omitted, it cannot, under that rule, be received or filed.

The above regulations being complied with, the undertakings may be either in one instrument or several. Section 340. The former is the more usual, as being the more convenient course, where possible.

When executed, a copy of each undertaking must be served upon the adverse party, and such copy must include the names and residences of the proposed sureties. The service must be made, at the time of service

of the notice of appeal. Section 340. See also *Cushman vs. Martine*, 13 How., 402; 6 Duer, 660.

The names and residences of the sureties are usually stated in the body of the undertaking itself, which is the better course. The court will impose costs, for any disregard of this section. *Beach vs. Southworth*, 6 Barb., 173; 1 C. R., 99; *Blood vs. Wilder*, 6 How., 446.

If a conveyance or other instrument, has been executed and deposited, as required by section 337, notice of such execution or deposit, must be served, simultaneously with the undertaking or notice, as the case may be. So likewise, as regards the acts prescribed by section 336, in the event of no undertaking being executed under that section.

And, if a deposit be made, as authorized by section 334, notice of that deposit should be simultaneously given.

When complete, the undertaking must be filed with the clerk, with whom the judgment or order appealed from was entered. Section 343. That filing should be simultaneous with the giving of the notice of appeal to the same officer, as required by section 327. See *Webster vs. Stephens*, 3 Abb., 227; 5 Duer, 682; *Cushman vs. Martine*, 13 How., 402; 6 Duer, 660. And notice of such filing, should be indorsed upon the copy undertaking served upon the adverse party, or given separately, if preferred.

In *Thompson vs. Blanchard*, 4 How., 210; 2 Comst., 561, it was held by the Court of Appeals, that an appeal must be considered as "perfected" within the meaning of rule 2 of the rules of that court, when the notice of appeal, and the undertakings required as above, or such of them as may be applicable, have been given; though possibly that appeal may still fail, for want of subsequent justification by the sureties, if duly excepted to.

An undertaking, given in the form of a penal bond, was held, in *Conklin vs. Dutcher*, 5 How., 386; 1 C. R. (N. S.), 49, to be good under the Code, no particular form being there prescribed, provided that undertaking substantially conform to all the conditions above imposed.

(d.) EXCEPTION AND JUSTIFICATION.

If the respondent be dissatisfied with the sureties, he may except to their sufficiency, in which case, they must justify within ten days thereafter. Unless they do so, the appeal shall be regarded as if no undertaking had been given. Section 341. See *Chamberlain vs. Dempsey*, 22 How., 356; 13 Abb., 421.

The mode of giving notice of exception, and of justification, and the proceedings for that purpose, are substantially the same as those in the case of bail on arrest, under sections 195 and 196, referred to in sec-

tion 341. This subject has been already considered, in book V., chapter I., section 87.

It will, therefore, be unnecessary to reconsider the same matter, in a general point of view. A notice of those points peculiar to an undertaking on appeal, appears to be all that is requisite, on the present occasion.

Under section 341, the notice of exception to the sureties must, in these cases, be given within ten days after the notice of appeal. The notice must be, of exceptions to the sufficiency of the sureties, not to that of the undertaking. See *Young vs. Colby*, 2 C. R., 68.

The time for giving it, has been held to run from the filing, without regard to the time of service of a copy of the undertaking (*Webster vs. Stephens*, 3 Abb., 227; 5 Duer, 682), but a formal order of extension of the time to justify, was there entered. The sureties must justify within ten days thereafter; and such justification must be upon a notice of five days. These provisions, taken conjointly, seem to render service by mail of such a notice, next to impossible. See *Dresser vs. Brooks*, 5 How., 75. Where, therefore, there exists any difficulty of this nature, an extension of the time should always be obtained. For, if the notice be irregular, the justification will be a nullity. *Same case*.

The justification may, under the terms of the section, be by the original, or by other sureties. But, if it fail, then the appeal is to be regarded, as if no undertaking had been given. It will, in that case, be a nullity, and a fresh notice and undertaking must be served, unless the court grant permission to serve a proper security, *nunc pro tunc*.

Where, however, a *bond fide* justification was intended, but the sureties failed to attend at the precise hour named, leave to give a fresh notice of justification was given; the adverse party to be entitled to dismiss the appeal, in default of such notice, and of a justification under it. *Hees vs. Snell*, 8 How., 185.

On justification, each surety should justify in double the amount specified in the undertaking (section 341), and the affidavit of justification must be so framed. See, as to this condition being strictly enforced, *Mills vs. Thursby* (No. 8), 11 How., 129 (131), above referred to. See also *The People vs. Tarbell*, 17 How., 120; *Sternhaus vs. Schmidt*, 5 Abb., 66. But possibly, under the power to allow other sureties to justify, the court, on a special application, might allow the liability to be then divided amongst a larger number, as on bail on arrest. *Vide* section 194. If there be any difficulty, such an application might be attempted, though there is no decision upon the subject. As to the necessity of the justification being for the full amount prescribed by both sections 334 and 335, see *Newton vs. Harris*, 8 Barb., 306; 1 C. R. (N. S.), 191. *Rich vs. Beekman*, 2 C. R., 63, holding that

a justification under section 335 alone, will be sufficient for all purposes, seems clearly erroneous.

The party excepting to the sureties, is an actor in the proceeding, and, if he fail to attend, at the time and place appointed for justification, the benefit of his exception will be waived, though the sureties may also fail in their attendance. *Ballard vs. Ballard*, 18 N. Y., 491.

On justification of the sureties, the original undertaking should be procured from the clerk, and produced before the judge. In case of a failure to justify, a certificate of the latter should be procured and annexed. Should the justification be sufficient, the examination should be annexed to the undertaking, and the judge's approval indorsed thereon. The undertaking must then be restored to the files of the court. Should any other disposition be made of the matter, as in the event of a failure of attendance by the excepting party, a memorandum had better be made, signed by the judge, and annexed to, or indorsed upon the undertaking, before refiling.

Of course, if the sureties fail entirely in their justification, the appeal becomes a nullity. See *Thompson vs. Blanchard*, 2 Comst., 561; 4 How., 210. A partial failure may, however, only affect it, as regards the stay of proceedings. Attention must be paid to the periods above prescribed, within which the notices are to be given; as, if omitted, the right to except, on the one hand, or to justify, on the other, will be gone, unless extended by special order. If the sureties fail to justify, and the appeal fails in consequence, it would seem, from *Ward vs. Syme*, 4 Comst., 171; 1 C. R. (N. S.), 266, that they are discharged from all liability.

The liability of the sureties under the undertaking continues, although the appeal may be abandoned by some of the appellants. *Burrall vs. Vanderbilt*, 1 Bosw., 637; 6 Abb., 70. But it ceases, on the appeal being dismissed, on motion, without a hearing on the merits. *Drummond vs. Husson*, 4 Kern., 60. See also *Watson vs. Husson*, 1 Duer, 242. See *Mills vs. Forbes* (No. 12), 12 How., 446, as to the liability of the sureties, being probably limited to a compliance with the manner and form of the judgment.

Since the amendment of 1859, the respondent has his remedy, in case of the subsequent insolvency of the appellant's sureties. Before that amendment he had none. *Willett vs. Stringham*, 15 How., 310; 6 Duer, 686.

The application for an order of this last description, must, under the terms of the section, be made to the court. It should be grounded on an affidavit, showing clearly, that, since the execution of the undertaking, the sureties have become insolvent. The motion should be at special term, and the order drawn in conformity with the terms of the section. It must, if granted, be duly served, in order to ulterior pro-

ceedings. Within twenty days from such service, the appellant must file and serve a new undertaking. If he neglect to do so, the respondent will then be entitled to move, that the appeal be dismissed with costs. This motion should be grounded on proof of the first order, and its due service.

There is, as yet, no reported case on the subject of this provision. It is, therefore, uncertain, whether the first order can ever be obtained *ex parte*. Probably, it cannot be so; and certainly it would be the duty of a judge to require notice to be given, should the insolvency of the sureties be in the slightest degree doubtful. The case of the insolvency of one only of the sureties, is not provided for. In this case it may probably be held, that the appellant is without remedy.

(e.) LIMITATION OF SECURITY.

Under section 339, the court possesses the power of dispensing with or limiting the security, to be given for the purpose of affecting a stay, under sections 335, 336, or 338, when the appellant is an executor, administrator, trustee, or other person acting in another's right.

Under the same section, it also possesses power to limit such security, to an amount of not less than \$50,000, in the cases mentioned in sections 336, 337 and 338, where it would otherwise, according to those sections, exceed that sum. It will be observed, however, that this last power of special limitation, is not made to extend to a stay upon an ordinary money judgment, under section 335.

Either application must be grounded upon affidavit, proving the existence of the conditions required by the section, good reason for the relief being shown by substantial allegations of fact. If the application be made for limitation, the affidavit should show, in the same manner, proper cause for limitation, and give proper *data* for fixing the amount to be specified in the order. Notice will, of course, be requisite, and the respondent may submit any counter-considerations, tending to defeat the appellant's motion, or to show the propriety of imposing more stringent terms than those sought for. The application, being to the court, must be made at special term.

As to the limitation of security to be given by executors, see *Mills vs. Forbes* (No. 12), 12 How., 466, where it is laid down, that a statement of want of assets sufficient to pay the judgment, would probably be considered as a good reason, why the security should be limited to the amount of assets actually applicable.

A similar, and still more extensive power, is, in fact, vested in the court, or in a judge, under section 348, on appeals from judgments to the general term. On such application, the order may be made on any terms, as to security or otherwise, which may be just, the only limita-

tion being, that the security imposed must not exceed that required as above.

Such an order can only be applied for upon notice. See *Steam Navigation Company vs. Weed*, 8 How., 49. And a county judge has no power to make any order in the matter (except, of course, in a proceeding in the county court). *Otis vs. Spencer*, 8 How., 171.

As a general rule, the court may probably impose the giving of the ordinary security, as on an appeal to a higher jurisdiction; and, where such is the case, the easier mode may be to give such security, as of course, in the first instance. But, where circumstances exist, tending to show, either that the appellant is unable to procure full security, having, at the same time, good grounds for an appeal on the merits, or that the respondent is already adequately protected, or that security to a less amount will insure to such respondent substantial justice in the premises, those circumstances should be shown, either in the usual manner, by affidavit, or, possibly, by reference to the prior proceedings in the cause, if apparent on those proceedings, and the motion should be grounded on such statement. Pending the application, an interim suspension may be applied for, and a further stay embodied in the order carrying out the judge's decision, to give time for the preparation of such security as he may prescribe.

(f.) AMENDMENT OF UNDERTAKING.

There can be no doubt, whatever, as to the power of the court to allow relief of this description, both generally, under section 173, and also under the special power conferred by section 327. In *Langley vs. Warner*, 1 Comst., 606; 3 How., 363; 1 C. R., 111, the existence of this power was doubted, under the Code of 1848, but the actual decision was upon other grounds. In *Schermerhorn vs. Anderson*, however, 1 Comst., 430; 2 C. R., 2, it was exercised by the same court, in the same state of the law; and likewise by the Supreme Court, in *Beach vs. Southworth*, 6 Barb., 173; 1 C. R., 99, where a number of technical irregularities were held amendable. As to the practice, after the amendment of 1849, see *Wilson vs. Allen*, 3 How., 369.

See also, as to granting an amendment of technical defects, in an undertaking or its incidents, *Conklin vs. Dutcher*, 5 How., 386; 1 C. R. (N. S.), 49; *Rich vs. Beekman*, 2 C. R., 63; *The People vs. Tarbell*, 17 How., 120.

Or such defects may be supplied, by allowing the filing and service of a new undertaking, *nunc pro tunc*. *Mills vs. Thursby* (No. 8), 11 How., 129; *Tiers vs. Carnahan*, 3 Abb., 69; *Staring vs. Jones*, 13 How., 423; *Sternhaus vs. Schmidt*, 5 Abb., 66.

And defects in justification may, by leave of the court, be similarly obviated. *Hees vs. Snell*, 8 How., 185.

But, where the defect was of an essential, and not of a technical nature, and there was no allegation of mistake, the application was denied by the Court of Appeals, but without prejudice to another motion. *New York Central Insurance Company vs. National Protection Insurance Company*, 10 How., 344. See likewise *Cushman vs. Martines*, 13 How., 402; 6 Duer, 660.

Nor can an undertaking be amended, in matter of substance, varying the liability of the sureties, without their consent. *Langley vs. Warner*, 1 Comst., 606; 3 How., 363; 1 C. R., 111. See also *Cobb vs. Lackey*, 6 Duer, 649.

§ 309. *Return.*

When the appeal is to the Supreme Court, from the judgment of a court of inferior jurisdiction; or to the Court of Appeals, from a judgment, or from an order, in the cases in which such an appeal is allowed by section 11; a return, from the clerk of the court below, must be procured and transmitted to the appellate court, at the expense of the appellant. Section 328.

Where the appeal is from a judgment, such return must consist of a certified copy of the notice of appeal, and of the judgment-roll. When the judgment has been entered upon a verdict subject to the opinion of the court, care must be taken to see that the judgment-roll comprises the statement called for by section 333.

When the appeal is from an order, the section prescribes that it should consist of a certified copy of such order, and of the papers upon which the order was granted. The first rule of the Court of Appeals is, however, more specific; it requires certified copies of the notice of appeal, the order appealed from, and the papers, on which the court below acted in making the order.

This latter direction must be followed, as it is clear that the omission to refer to the notice of appeal, in section 328, is an oversight. It is essential, for the information of the court above, as, without it, that court cannot know whether the appeal is total or partial, and, if partial, from what parts of the order drawn into question.

This return must be made to the Court of Appeals, within twenty days after the appeal is perfected. In appeals to the Supreme Court, no time is specially prescribed, but the section requires it to be done "forthwith." As a copy of it must be served upon the adverse party, at least eight days before the matter may be noticed for argument (see rule 42), it is clear that it must be done before that time.

An appeal is “perfected,” within the meaning of rules 2 and 7 of the Court of Appeals, so soon as the notice of appeal, and a copy of the requisite undertaking, have been duly served; and the time to file the return, and to serve the case, runs from that date, without reference to the subsequent justification, or failure to justify, on the part of the sureties, if excepted to. *Thompson vs. Blanchard*, 2 Comst., 561; 4 How., 210.

The appellant must apply, in due season, to the clerk of the court below, bespeak the copies, pay for them at the usual rate of disbursements, see that they are properly certified under the seal of the court, and also see that they are transmitted, or transmit them himself, to the clerk of the appellate tribunal, either by hand, or by mail, postage paid. On an appeal to the Supreme Court, the proper clerk is the clerk of the county in which the judgment-roll is filed.

The appellant is bound to see to the return being duly made, and if he neglect or omit to do so, it is at his own peril. *Spoore vs. Fannan*, 16 N. Y., 620.

But the mere objection of the return not being filed in time, will be waived, unless the respondent moves, on his part, on the default occurring, or if he notice the cause for argument, without making such a motion. *Beecher vs. Conradt*, 11 How., 181. See also rule 2 of the Court of Appeals.

If an order appealed from, be granted on more than one application, the return, when made, should comprise the papers on all of them, as, otherwise, the appellate court will not have before it, the full materials for a proper review of the decision. *In re Empire City Bank*, 18 N. Y., 199; 8 Abb., 192, note.

When made, a return may be corrected, by striking out matter improperly inserted in the judgment-roll. See *Brown vs. Saratoga Railroad Company*, 18 N. Y., 495. Or defects in it may be supplied, by ordering a further return. See rule 3 of Court of Appeals. See also *Ferguson vs. Ferguson*, 7 How., 217. Or, by directing an amendment. See below, under the heads of appeals from the different jurisdictions. See also *Lansing vs. Russell*, 2 Comst., 563; 4 How., 213; *Livingston vs. Miller*, 7 How., 219; *Witbeck vs. Waine*, 8 How., 433.

On an appeal from the special to the general term of the same court, no formal return or certificate by the clerk is necessary.

In the Court of Appeals, the date of filing the return, regulates the place of the appeal upon its calendar. Rule 8. In other appeals, the time of service of the notice governs. Rule 41, Supreme Court.

The mode in which the appeal, when thus taken, is to be brought on, and the incidents to the hearing, will be considered in the succeeding chapters, with reference to each of the different modes of review there considered.

CHAPTER II

APPEALS FROM JUDGMENTS TO THE GENERAL TERM

General Remarks.

THERE are two classes of these appeals, one to the general term of the Supreme Court, from the judgment of one of inferior jurisdiction, the other to the general term of any court, possessing that branch of organization, from judgment entered by direction of a single judge of the same court.

In essentials, there are some distinctions to be drawn between these two classes; in the mode in which they are brought on for hearing, and in the incidents of that hearing, they are substantially alike. It is proposed therefore to consider in the present chapter—

1. Those matters common to both, and
2. Such as are distinctive as to each :

Premising the whole with a citation of the statutory and other provisions applicable.

§ 310. *Statutory and Other Provisions.* 3.

Appeals from an inferior jurisdiction to the general term of the Supreme Court, are regulated by chapter III., title XI. of the Code, running thus :

§ 344. (293.) An appeal may be taken to the Supreme Court, from the judgment rendered by a county court, or by the mayors' courts, or the recorders' courts of cities.

In 1858, the section was settled thus by amendment. In 1860, a clause was added to it by giving an appeal from orders of the county court or a county judge, which will be cited hereafter in that connection.

In the original Code, the section was substantially the same. In 1849, the approval of a judge was made a prerequisite to an appeal, in cases originating in a justice's court.

On the amendment of 1858, this restriction was stricken out.

§ 345. (294.) Security must be given upon such appeal, in the same manner, and to the same extent, as upon an appeal to the Court of Appeals.

§ 346. (295.) Appeals in the Supreme Court shall be heard at a general term, either in the district embracing the county where the judgment or order appealed from was entered, or in a county adjoining that county,

except that, where the judgment or order was entered in the city and county of New York, the appeal shall be heard in the first district.

§ 347. (296.) Judgment upon the appeal shall be entered and docketed with the clerk in whose office the judgment-roll is filed. When the appeal is heard in a county, other than that where the judgment-roll is filed, or is not from a judgment of a county court, the judgment upon the appeal shall be certified to the clerk with whom the roll is filed, to be there entered and docketed.

Dates, as it stands, from 1849. In 1848, the phraseology was a little less comprehensive.

Under chapter 102 of 1850, p. 148, section 1, amending section 6, of chapter 125 of 1849, p. 170, it is provided thus, as to the decisions of the City Court of Brooklyn :

An appeal may be taken from any judgment or final determination of said City Court, and from any intermediate order, involving the merits and necessarily affecting the judgment, to the Supreme Court, at a general term thereof; and all provisions of law relative to appeals from courts of inferior jurisdiction to the Supreme Court, shall apply to appeals from said City Court.

In 1849, the provisions of law on appeals to the Court of Appeals, were applicable to this tribunal. Under section 329, the power to review intermediate orders, is inherent to all appeals from judgments.

Appeals to the general term of the same court, are thus provided for in section 348 of the Code :

§ 348. (297.) In the Supreme Court, the Superior Court of the city of New York, and the Court of Common Pleas for the city and county of New York, an appeal upon the law may be taken to the general term, from a judgment entered upon the report of referees or the direction of a single judge of the same court, in all cases, and upon the fact, when the trial is by the court or referees. Such an appeal, however, does not stay the proceedings, unless security be given as upon an appeal to the Court of Appeals, and such security be renewed as in cases required by section 335 on motion to the court at special term, or unless the court, or a judge thereof, so order, which order may be made upon such terms, as to security, or otherwise, as may be just, such security not to exceed the amount required on an appeal to the Court of Appeals. In the Supreme Court, the appeal must be heard in the same manner as if it were an appeal from an inferior court.

No action shall be commenced upon any undertaking, given or to be given in pursuance of the provisions of this section, until ten days after the service of notice on the adverse party of the entry of the order or judgment affirming the judgment appealed from. And in case an appeal has been or shall be taken to the Court of Appeals from such order or judgment of affirmance, and security given according to law, so as to stay the issuing of execution, no action shall be commenced or recovery had upon any undertaking, given or to be given in pursuance of the provisions of this section, until after the final determination of such appeal.

The concluding clause was inserted on the amendment of 1862. The prior portion of the section dates from that of 1859. In that year the provision as to renewal of security was inserted; otherwise, that clause is the same as in 1852. In 1851, the right of appeal was general; in 1849, it lay only upon the law; in 1848, upon either the law or the fact.

A similar appeal is provided for by section 3 of chapter 361, of 1857, vol. I., p. 752, amending chapter 96 of 1854, section 19, as to the judgments of the Superior Court of Buffalo. The provision runs thus:

Appeals may be taken to the general term of said Superior Court, in all cases where an appeal could be taken to the general term of the Supreme Court if the action or proceeding were pending therein.

The City Court of Brooklyn has also "power to review all of its decisions" (see chapter 125 of 1849, p. 170, section 4); but this review is rather in the nature of a rehearing, than an appeal strictly considered.

The following provisions of the rules bear also upon the subject:

Appeals of both descriptions are enumerated motions. Rule 40 (27).

Rule 41 (34) provides thus, with regard to the filing of notes of issue, and the making up of the calendar:

Notes of issue for the general term, shall be filed eight days before the commencement of the court at which the causes may be noticed. The clerk shall prepare a calendar for the general term, and cause the same to be printed for each of the justices holding the court. Appeals shall be placed on the calendar, according to the date of the service of the notice of appeal; and other cases, as of the time when the question to be reviewed arose.

N. B. In Kings county the clerk is bound to print one hundred and fifty copies of the calendar. See chapter 212 of 1859.

Rule 42 (28) provides thus, as to noticing and service of papers:

Enumerated motions shall be noticed for the first day of term by either party.

The papers to be furnished on such motions, shall be a copy of the pleadings, when the question arises on the pleadings, or any part thereof, or of such parts only as relate to the question raised by the demurrer; a copy of the special verdict, return, or other papers on which the question arises; and the party whose duty it is to furnish the papers, shall serve a copy on the opposite party, except upon trial of issues of law, at least eight days before the time the matter may be noticed for argument. If the party whose duty it is to furnish the papers, shall neglect to do so, the opposite party shall be entitled to move, on affidavit and notice of motion, that the cause be struck from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor; provided, however, that in mortgage and partition cases, where the plaintiff's rights are not contested, no copies of pleadings need be furnished to the court.

The papers shall be furnished by the plaintiff, when the question arises on

special verdict, and by the party demurring, in cases of demurrer, and in all other cases by the party making the motion.

Rule 43 (29) provides thus, as to the papers on the hearing:

When an appeal is noticed for a general term, in cases embraced in chapter III. of title XI. of the Code, and of section 348 of the Code, the appellant shall furnish the papers for the court, which consist of a copy of the judgment-roll, together with a case, stating the time of the commencement of the suit, and of the service of the respective pleadings, the names of the original parties in full, the change of parties, if any has taken place, pending the suit, to which shall be added the opinion of the court below; or an affidavit that no opinion in writing was given, or, if given, that a copy could not be procured. At the commencement of the argument, the appellant shall furnish a printed copy of the papers to each of the judges, together with a printed copy of the points on which he intends to rely, with a reference to the authorities which he intends to cite; and he shall also deliver to the attorney of the adverse party, at least eight days before the first day of the term, three printed copies of the said papers. And, at the commencement of the argument, each party shall serve upon his adversary, a printed copy of his points and authorities on which he intends to rely. In case the appellant neglects so to furnish to the adverse party the said number of copies of the papers, the latter shall be entitled to move, on affidavit and notice of motion, for the earliest practicable day in term for hearing non-enumerated motions, that the cause be stricken from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor.

When a case is agreed upon by the parties according to section 372 of the Code, the plaintiff shall furnish the necessary papers for argument, duly printed, as in cases of appeal.

N. B. Under the rule, as it stood before the revision of 1858, a brief history of the cause and an abstract of the pleadings were also required, but these are now dispensed with.

Rule 44, provides very fully, in relation to the practice on appeals from surrogates' courts, but, being in the nature of a special proceeding, and not of one in an ordinary action, they fall out of the scope of the present work. The same remark may be made as to rule 47, providing as to the preferential hearing of cases on *certiorari*.

Rules 45 and 46 provide thus, as to the printing and preparation of cases and points:

Rule 45. (31.) In all enumerated motions, each party shall briefly state upon his printed points, the leading facts which he deems established, with a reference to the folios, where the evidence of such facts may be found; and the court will not hear an extended discussion on a mere question of fact.

Rule 46. (30.) The cases and points, and all other papers furnished to this court at a general term in calendar causes, shall be printed on white writing paper, with a margin on the outer edge of the leaf, not less than one and a

half inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long, and three and a half inches wide. The folio, numbering from the commencement to the end of the papers, shall be printed on the outer margin of the page.

Rule 54 provides thus, as to the hearing of counsel:

At the hearing of causes at a general or special term, not more than one counsel shall be heard, on each side, and then not more than one hour each, except when the court shall otherwise order.

§ 311. *General Course of Proceedings.*

(a.) CASE.

The appeal being perfected, as shown in the last chapter; and, where the appeal is from an inferior jurisdiction to the Supreme Court, the return having been duly made by the clerk of the court below; the next proceeding on the part of the appellant, is the printing and service of the case made by him on that occasion.

This case must consist of a copy of the judgment-roll. To this, the notice of appeal must either be prefixed or added; and, where the appeal is from another court, the return of the clerk of that court. A case must likewise be prepared, stating the particulars called for by rule 43; and, in all cases, the opinion of the court below must be subjoined, or an affidavit that none was given, or, if given, that a copy cannot be procured. See same rule. This rule extends to the opinion of a referee, which, if given, must be printed, or the argument may be postponed. *Warren vs. Warren*, 22 How., 142.

All these requisitions must be strictly complied with, but, beyond this, nothing is necessary, and the insertion of any extraneous matter may even be held improper. Where, however, the case is long and voluminous, an index of the principal matters, such as is called for by rule 5 of the Court of Appeals, will be found convenient, and may be added.

The appellant, before printing the case, must of course be careful to see that the judgment-roll, as filed, contains all necessary matters, including such case or exceptions as may have been made on his part, so as to present fully, all questions, whether of fact or of law, which he seeks to raise upon his appeal; and, if not, to see that those matters are duly supplied, or annexed by means of a motion to the court, if requisite, or otherwise. If the necessary papers are not before the court, his appeal may be dismissed. *Sun Mutual Insurance Company vs. Dwight*, 1 Hilt., 50. See likewise *Fish vs. Wood*, 4 E. D. Smith, 327, as to the effect of an insufficient statement.

(b.) PRINTING OF CASE.

When prepared, the case should be printed, the directions of rule 46 being strictly observed. A sufficient number should in all cases be stricken off. Three copies are necessary for service on the adverse party. Each judge who sits at the general term must have one; another may be requisite, for the purposes of the judgment-roll, should the decision be favorable, besides such as will be wanted for use on the hearing. And, where an ulterior review is anticipated, the case below, or portions of it, may possibly be made use of, so as, to some extent, to save a reprinting, on going up to the Court of Appeals. Where this is likely, it will be prudent to order at least thirty copies; if not so, twenty, or even fifteen may suffice. The additional expense is trifling, and it will be inexpedient to run the matter too close.

(c.) SERVICE.

Under rule 43, three copies of the case so printed, must be served upon the attorney for the adverse party, at least eight days before the first day of the term. It is usual to make such service at an earlier period, as soon as the case is printed. One service will of course be sufficient, should the appeal not be heard at the term for which it was originally noticed.

Should he neglect to make this service, the appellant entitles his adversary to move, under the same rule, that the cause be stricken from the calendar, and that judgment be rendered in his favor.

It would seem that, where a case has been actually made, a motion of this nature is the only proper mode of disposing of the cause, in the event of delay in its filing or service, and that an affirmance cannot properly be taken by default. *Warren vs. Eddy*, 13 Abb., 28.

Under this rule, the respondent may force the case on, in the event of any neglect on the part of the appellant, as under rule 42. The appeal may be noticed by either party. That motion must be brought on, on notice and affidavits, showing the existence and noticing of the appeal, and the default complained of. It may be noticed, under rule 48, for the first day, or the Thursday of the first or Friday of the second week of the term for which the appeal is noticed.

Should the appellant be really unable to get the printing through in time, an extension, obtained in the usual manner, will relieve him from liability to such a motion.

When so in default, the appellant, on the hearing of the motion, will usually be allowed the privilege of completing and serving his papers, on proper terms, on his showing some excuse for his default, and that the appeal has been taken and is intended to be prosecuted in good

faith. Such excuse should be presented in the usual manner. But where this latter element is wanting on the part of such appellant, or where he is chargeable with gross *laches* in bringing on the case, the motion may probably be granted.

(d.) FORMAL PROCEEDINGS.

The appeal, when prepared, must be noticed for the first day of the general term. Being brought on as an enumerated motion, it would seem that eight days' notice of argument is all that is required; the fourteen days' notice, prescribed by section 256, being applicable to notice, not of argument, but of trial.

In the event of abatement, by death of one of the parties, service of notice on his attorney will be ineffectual. An administrator must be appointed, and the suit regularly revived against him. *Warren vs. Eddy*, 13 Abb., 28.

A note of issue must be filed with the clerk of the court, and the case placed upon the general term calendar in the usual manner. This proceeding must be taken, at least eight days before the first day of the term. See rule 41. Before the amendment of 1858, the period was four days only.

A calendar is usually made out for each general term. In the first district, however, a practice has recently been introduced, of continuing the calendar from one term into another, and dispensing with the filing of a fresh note of issue, or the giving a fresh notice of argument, in cases already on that calendar.

In cases to which the people are parties, it will be necessary for the attorney for the state, in case he desires to avail himself of the preference granted by chapter 37 of 1858, p. 65, and to move the case out of its order on the calendar, to give notice of such motion, at the time of the service of notice of argument.

The following proceedings are also entitled to precedence, and may be moved, out of their order in the calendar:

Proceedings against corporations (2 R. S., 459, section 11);

Proceedings in actions brought by the attorney-general, in manorial cases (chapter 128 of 1850, p. 200);

Certain proceedings between the people and the corporation of Trinity Church (chapter 280 of 1854, p. 606);

Actions, in which executors and administrators are sole plaintiffs, or sole defendants; or which prevent the issuing of letters testamentary or of administration (chapter 167 of 1860, p. 270);

Criminal cases.

A party intending to apply to have an appeal heard out of its order, as above, should serve notice of such intention, together with his notice

of argument, specifying the day on which the cause is intended to be moved. This is expressly provided by the statute of 1858, as above noticed, and the same reason applies in other instances.

There is no power of bringing on an appeal out of its order, on the ground that it is frivolous. *Wilder vs. Lane*, 34 Barb., 54; 12 Abb., 351.

(e.) POINTS.

Each party must, in anticipation of the hearing, make out a set of points, containing the substance of his proposed argument, and a statement of the authorities which he intends to cite; to which, under rule 45, must be added, a statement of the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found; and, when so made out, such points must be printed. Rule 46. Three copies must be served upon the attorney for the adverse party, at the commencement of the argument. Rule 43. And a copy must be delivered to each of the judges, at the same time. Same rule. A sufficient number should be stricken off, usually the same as the number of cases.

The heads of an argument, together with the authorities cited, but not the argument, at length, are embraced under the term points. *Gray vs. Schenck*, 3 How., 231. This case was decided under the old practice, but the same rule should be observed now.

Corrections may be made, in writing, before the points are served; but afterwards they will not, in strictness, be regular.

Material corrections, when they do not involve a surprise upon the adversary, are, however, occasionally allowed; but, as a general rule, each party will be strictly confined to the matter stated on his points, so far as regards his original argument. In answering or replying to the adverse argument, any new propositions may be stated, or any further authorities may be cited, by the appellant's counsel, in opposition to that argument, but he must confine himself strictly to matter of this description, and to the support of the propositions stated upon his own points. He cannot legitimately depart from these limits, though the matter is one that necessarily rests entirely in the discretion of the court. Within those limits, he may enforce the propositions he contends for, by any legitimate detail of argument, pertinent to those propositions, subject to regulation by the court, as to the time occupied for that purpose, under the authority conferred by rule 54.

(f.) SIMILAR PROCEEDINGS.

A controversy, submitted without action, under section 372 of the Code, is brought on, in precisely the same manner as an ordinary

appeal. It must be noticed, and placed upon the calendar, and the same papers must be printed, and furnished. See rule 43.

, And the same is the usual practice, with reference to a verdict, subject to the opinion of the court. Rule 43 does not provide specially upon the subject; but, taking the provisions of rules 42, 45, and 46 in connection, there can be no doubt of this being the proper course.

And the same may be stated, with reference to exceptions, directed to be heard, in the first instance, at the general term. Section 265.

(g.) INCIDENTAL POINTS AS TO HEARING.

As to the power of the courts to direct a virtual consolidation of several appeals, presenting the same question, when actually pending, by means of an order that all abide the decision of one, and that one argument only be allowed, see *Toll vs. Thomas*, 15 How., 315.

An appeal cannot be brought on, out of its order, on the ground that it is frivolous. There is, at present, no rule or order of the court, authorizing a motion for that purpose. *Wilder vs. Lane*, 34 Barb., 54; 12 Abb., 351.

Counsel are bound to be prepared, when the appeal is called on, nor will a rehearing be granted, on any allegation that the case was not sufficiently presented to the court. *Drucker vs. Patterson*, 2 Hilt., 135.

On the calling of the appeal, either party will be entitled to take the default of his adversary, in the usual manner. As a general rule, however, that default will be opened, upon proper terms, unless it clearly appears that the appeal has no merits, and that there is, in fact, no question to be argued. See *Bradford vs. Greenwich Mutual Insurance Company*, 8 Abb., 261. A motion to open a default taken, may be made at special term. See *Ayres vs. Covell*, 9 How., 573; *Corning vs. Powers*, 9 How., 54.

It may be remarked, lastly, that, in all cases, it is competent for an appellant to dismiss his own appeal, if thought advisable. In order to do so, he must enter an order to that effect, and must pay the respondent's costs. *Vide Warren vs. Eddy*, 13 Abb., 28. A mere notice, or the entry of an order, without such payment, is a nullity, and may be so treated by the respondent. *Burnett vs. Harkness*, 4 How., 158; 2 C. R., 100. Nor can a party, whose appeal has been dismissed, commence a fresh one, until the costs of the former have been paid. *Dresser vs. Brooks*, 5 How., 75.

In *Warren vs. Eddy*, 13 Abb., 28, judgment of affirmance, taken by default, after actual abatement of the suit, by death of the appellant, was held irregular, and set aside. It was also considered doubtful whether the appeal could be disposed of, by taking such affirmance, on the call of the calendar, when a care had been made, but not filed or

served; and the court held that a motion to dismiss, on that ground, was the proper practice under these circumstances.

In the first district, fifteen causes a day, and no more, will be called, at a general term. See general rules, as to terms and calendars. The same arrangement prevails in the second district, unless the court shall otherwise order. See rules of the 24th of October, 1856, No. 2. By that rule, it is further provided, "they will be called and heard, in the order in which they stand on the calendar, and no cause will be reserved, or set down for hearing, out of the order herein prescribed."

§ 312. *Appeals from Inferior Court.*

Since the amendment of 1858, there is no restriction upon this class of appeals. Prior to that amendment, they were not allowable, in cases originating in a justice's court, unless the sanction of a judge of the Supreme Court was first obtained, and this rule was strictly enforced. See *Seymour vs. Judd*, 2 Comst., 464.

In this class of cases, it has been held that a judgment taken by default, in the county court, cannot be reviewed on appeal. The only relief obtainable by the appellant, is by motion, in the court below. *Dorr vs. Birge*, 5 How., 323; 1 C. R. (N. S.), 74. See likewise *Jones vs. Kip*, 1 C. R., 119, as to general principle. Nor can the decision of that court be reviewed, when it has granted a new trial. *Burnett vs. Harkness*, 4 How., 158; 2 C. R., 100.

It will be sufficient to sustain the judgment of an inferior court, if the facts conferring jurisdiction appear in any part of the record. *Clyde and Rose Plank Road Company vs. Baker*, 22 Barb., 323. But, in an appeal under the Code, no presumption will be indulged as to the existence of testimony, not shown upon the face of the return. *Vide Calligan vs. Mix*, 12 How., 495. (N. B.—Case, not head-note.) See, however, as to presumption in favor of the jurisdiction of a subordinate tribunal, having cognizance of the general subject, as in the case of a surrogate's court. *Morrell vs. Dennison*, 8 Abb., 401.

When an appeal from a justice's judgment is transferred from the county court to the Supreme Court, under subdivision 13 of section 30 of the Code, by reason of the disqualification of the county judge, it cannot be brought to the general term. The case must be heard, in the first instance, by a single judge at special term, and his decision appealed from, if erroneous. See *Sheldon vs. Albro*, 8 How., 305; *Davis vs. Stone*, 16 How., 538. And such original hearing should be had in the same county, and on the original papers. *Wiles vs. Peck*, 16 How., 541; *Davis vs. Stone*, *supra*. See, as to the costs on such a hearing, *O'Callaghan vs. Carroll*, 16 How., 327.

As to an intermediate order, conducing to a judgment, being reviewable on the appeal from that judgment, as, for instance, an order striking out a part of a defence, see *Cowles vs. Cowles*, 9 How., 361. But, in these cases, such an order cannot be brought up for separate review, whilst questions of fact remain undecided, even by stipulation between the parties. *Perkins vs. Farnham*, 10 How., 120.

The City Court of Brooklyn stands, however, in an exceptional position in this respect, and does not fall within the scope of section 329. Under the terms of the statutes, under which the jurisdiction of that court is derived, its orders, when they involve the merits, and necessarily affect the judgment, may be brought up for separate review. See *Moore vs. Wood*, 19 How., 405; *Bennett vs. City of Brooklyn*, 19 How., 310.

And, where a case had been heard by a referee, appointed by the court in question, it was held that no appeal would lie to the court above, until a rehearing of the matter was had, before the judge who made the appointment. *Goulard vs. Castillon*, 12 Barb., 126.

In appeals of this nature, the Supreme Court possesses no greater powers than those which it exercised under the former practice, on writ of error. It can only review errors committed by the court. The correction of any on the part of the jury, as, for instance, an award of excessive damages, is beyond its powers, and can only be remedied by application to the court below. *Thurber vs. Townsend*, 22 N. Y., 517.

Where want of jurisdiction in the court below is presented by way of plea or demurrer, and has been made the subject of adjudication, the appellate tribunal may, on a reversal, award to the appellant the costs of the court below. Where, however, such want of jurisdiction is patent upon the face of the summons and complaint, such power does not exist. All that the court above can do, is to dismiss the suit, as it was the duty of the court below to have dismissed it, without costs of that court. *Gormly vs. McIntosh*, 22 Barb., 271.

(a.) SPECIAL PROCEEDINGS.

Although, by chapter 270 of 1854, p. 592, a right of appeal, as under the Code, is given in the case of any judgment or order in a special proceeding, that right is confined to a review of the decision of the special term, by the general term of the same court. It does not extend to cases, where the action of a court of inferior, is sought to be revised in one of superior jurisdiction. *In re Smith*, 16 How., 567. In this class of cases, resort must be had to the remedies antecedent to the Code. *Bedell vs. Steckels*, 4 How., 432; 3 C. R., 105, contains a *dictum* that the right of review in this class of remedies, is confined to those

proceedings which fell under the jurisdiction of the former Court of Chancery, or where power for that purpose was conferred by statute, or existent under the former practice. The subject lies, however, beyond the scope of the present work.

(b.) SURROGATES' DECISION.

Such also is the case with regard to appeals of this nature. They are strictly and exclusively special proceedings in their nature, not merely as regards the original adjudication, but also with respect to the mode of review itself. They are expressly exempted from the operation of the Code, by section 471, save only on the question of costs, and the practice is wholly different, and regulated by special rule No. 44 (77). The provisions of the Revised Statutes upon the subject, will be found as follows, viz.:

Those relative to such appeals generally, in article III., title III., chapter IX., part III., sections 90 to 118. 2 R. S., 608 to 611.

Those relative to proceedings for admeasurement of dower, at 2 R. S., 491 (492); those as to cases respecting guardian and ward, at 2 R. S., 152 (153); and those as to the final settlement of an executor's account, at 2 R. S., 95.

Beyond this notice, the subject will not be entered into, lying as it does wholly out of the province of the present work. As to the entire exemption of this class of appeals from the provisions of the Code, under section 471, as before referred to, *vide Brockway vs. Jewett*, 16 Barb., 590; *Sherman vs. Youngs*, 6 How., 318.

§ 313. *Appeal to General Term of same Court.*

This class of appeals is regulated by section 348, as above cited, and is applicable to the courts enumerated in that section, and, by special statute, to the Superior Court of Buffalo, as there noticed. The proceeding by which the action of the City Court of Brooklyn is capable of revision, is, as abovestated, in the nature of a motion for rehearing, and not of a regular appeal. When adopted, it must be brought on in that form, by ordinary notice, and, if a stay be desired, that stay must be specially applied for. In *Barnum vs. The Seneca County Bank*, 6 How., 82; 1 C. R. (N. S.), 405, the relative powers of the general and special terms in these matters are thus defined: "A general term, and a special term, or circuit, stand to each other, in the same relation which has ordinarily subsisted, between courts of appellate, and courts of original jurisdiction. It is the province of the appellate court, to determine for itself, of what causes and questions it has jurisdiction, and how and when jurisdiction was obtained." See also *Harris vs. Clark*, 10 How., 415.

(a.) EXTENT OF REVIEW OBTAINABLE.

Prior to the amendment of 1851, the Code contained no provision, in relation to the review of judgment entered upon a referee's report. This omission gave rise to considerable discussion, but the right to appeal upon the law was maintained, in a preponderating series of decisions. The question being now set at rest by that amendment, it seems needless, at this distance of time, to enter into any specific citation of those cases, but, if desirable, they will be found collected in the former editions of this work.

Where the case has been tried by a jury, the appeal from the judgment, if taken alone, brings up the questions of law, raised by way of exception to the ruling or charge of the judge, and such questions only. Such appeal is only given upon the law (section 348). If the unsuccessful party seeks to draw in question the action of the jury, on questions of fact, he must move for a new trial upon a case. If his motion be denied, he may bring up that branch of the case for review, by appeal from the order on that motion. The two appeals are thus brought on together, and a review of the combined action of the court and jury can thus be obtained.

The proposition that questions of fact, or as to the weight of evidence, cannot be made the subject of review, on a simple appeal from the judgment, but must be brought up, if at all, by means of appeal from an order denying a new trial, and that, if not so brought up, the objections will be held to be waived, is laid down in the following cases: *Brown vs. Richardson*, 1 Bosw., 402; *Bedell vs. Commercial Mutual Insurance Company*, 3 Bosw., 147; *Rider vs. Union India Rubber Company*, 4 Bosw., 169; *Anthony vs. Smith*, 4 Bosw., 503; *Ogden vs. Coddington*, 2 E. D. Smith, 317; *Fry vs. Bennett*, 16 How., 385; 7 Abb., 352; 2 Bosw., 684; *Hastings vs. McKinley*, 3 C. R., 10; *Marquhart vs. La Farge*, 5 Duer, 559; *Morange vs. Morris*, 20 How., 257; 12 Abb., 164. See also, as to a motion on arrest of judgment, *Snell vs. Snell*, 3 Abb., 426.

And the bringing up of such appeals in combination, will work no prejudice to either. *Vide Jackson vs. Fassitt*, 33 Barb., 645; 21 How., 279; 12 Abb., 281.

But, when the case is decided by the judge at circuit, on a pure question of law, the review may be had on a mere appeal from the judgment, without any necessity of going through the form of a motion for new trial. *Morange vs. Morris*, 32 Barb., 650.

Nor can any interlocutory order or action of the court, be reviewed on simple appeal from the judgment, unless brought under the consider-

ation of the court in due form. *Ross vs. West*, 2 Bosw., 360; *Ehlen vs. Rutgers Fire Insurance Company*, 2 Bosw., 482; 6 Abb., 68.

On an appeal taken purely on the law, the amount of a defendant's liability cannot be reviewed. *Witherhead vs. Allen*, 28 Barb., 661.

Nor can questions of fact or exceptions on the evidence, be brought up on a verdict subject to the opinion of the court. That course is only appropriate, where the facts are undisputed. *Cobb vs. Cornish*, 16 N. Y., 602; 15 How., 407; 6 Abb., 129; *Gilbert vs. Beach*, 16 N. Y., 606; *Brower vs. Orser*, 2 Bosw., 365; *Purvis vs. Coleman*, 1 Bosw., 321; *Bangs vs. Palmer*, 16 How., 542; *Morange vs. Morris*, 20 How., 257; 12 Abb., 164; *Eiseman vs. Swan*, 6 Bosw., 668. The course taken in *Geffcken vs. Slingerland*, 1 Bosw., 449, was clearly exceptional, and contrary to the above rule.

If the findings of fact on such a verdict, are sought to be impeached, it can only be by means of a motion for a new trial, and appeal from the order. *Purvis vs. Coleman*, *supra*.

So also, where the complaint contained two causes of action, as to one of which it was dismissed, and a verdict of the above nature directed as to the other, it was held that the former adjudication could not be reviewed, on a case made, for the latter purpose, by the plaintiff. He should have appealed, or obtained special leave to bring up the question, and adapted his case accordingly. *Dickerson vs. Cook*, 3 Duer, 324.

When an appeal from an order, refusing a new trial, is brought up separately, an affirmance of the judgment cannot be taken. This course is only proper, when the judgment itself is the subject of appeal. *Miller vs. Eagle Life and Health Insurance Company*, 3 E. D. Smith, 184. But though, in such cases, a second appeal will be necessary, in order to put the question into a proper shape to be carried up to the Court of Appeals, the general term will not, as a general rule, allow the same questions to be reargued, but will only hear the appellant, as to such as were not raised on the first occasion. *Keteltas vs. Myers*, 1 Abb., 403. N. B.—The general reversal, reported 19 N. Y., 231, does not affect this decision.

The review of the verdict of a jury under a feigned issue, is not obtainable by means of an appeal. The course to pursue, is a motion to the general term, upon a case, analogous to the former practice. *Snell vs. Loucks*, 12 Barb., 385.

Where a cause has been tried by the court, or by a referee, there is not the same difficulty as to the mode of review, as, in such cases, an appeal lies to the general term, both upon the fact, and the law. Code, sections 268, 272.

An appeal from a judgment of this nature, cannot properly be taken till such judgment is perfected. Where therefore the main questions in

the cause were decided, but an accounting was directed, an appeal from the judgment was dismissed, as premature. *Lawrence vs. Farmers' Loan and Trust Company*, 6 Duer, 689; 15 How., 57; *McMahon vs. Allen*, 27 Barb., 335; 7 Abb., 1; *Griffin vs. Cranston*, 5 Bosw., 658; *The People vs. Haws*, 34 Barb., 69.

But though the appeal thus taken, will be irregular, and dismissable on motion, still, if the parties go to an argument, the irregularity may be held as waived, and the action of the court on such appeal will not be void for want of jurisdiction (*D'Ivernois vs. Leavitt*, 8 Abb., 59; *Griffin vs. Cranston*, *supra*); and, in the last case, it was considered, that the action of the court on a partial trial, by which the whole of the issues in the case are not disposed of, may be appealable.

Where the provisions of a judgment are connected and dependent, a party cannot take the benefit of part, and appeal from the residue of those provisions. His right to appeal will be waived by the enforcement of any portion. *Bennett vs. Van Syckel*, 18 N. Y., 481.

An error to the prejudice of the respondent, will not form ground for reversal, on the appellant's proceeding. *Robbins vs. Codman*, 4 E. D. Smith, 315. See also *Ward vs. Kalbfleisch*, 21 How., 283.

A judgment by default, entered by the clerk under section 246, cannot be appealed from. There is, in such case, no direction of the judge to be reviewed, and the only remedy of the party, is by motion. *Jones vs. Kip*, 1 C. R., 119; *Stewart vs. Morton*, 8 Abb., 429, note.

And the same rule has been applied to a judgment, taken by default to appear on the trial. *Pope vs. Dinsmore*, 29 Barb., 367; 8 Abb., 429. See also *Dorr vs. Birge*, 5 How., 323; 1 C. R. (N. S.), 74.

And, in the former of these cases, it was held that the decision involved in fact the point that a party has no right, under the Code, to appeal upon the record alone, unless he lays ground for a review, by means of exceptions, taken in due form. See also *Hunt vs. Bloomer*, and *Johnson vs. Whitlock*, 3 Kern., 341 (344), there cited, and *Brewer vs. Isish*, 12 How., 481. A less strict view is held, and the power of appeal on the record alone maintained, in the following: *Brown vs. Harris*, 9 How., 345; *Mills vs. Thursby* (No. 10), 12 How., 385; 2 Abb., 432; *Robinson vs. Hudson River Railroad Company*, 1 Hilt., 144; 3 Abb., 115; *Rankin vs. Pine*, 4 Abb., 309.

A judgment entered by consent, would seem not to be properly reviewable, on appeal. *Viele vs. Troy and Boston Railroad Company*, 21 Barb., 381 (397). See also, as to a judgment entered on stipulation, *Boyd vs. Bigelow*, 14 How., 511.

Judgment on an inquest is however reviewable, if error of law have been committed, though the more usual and advisable course will be to apply by motion. See *Burger vs. Baker*, 4 Abb., 11 (12).

And when there has been any action of the court, preliminary and conducive to the judgment, an appeal may be taken, though the immediate entry may be in the nature of a judgment by default. So held, on appeal from a judgment, consequent on an order striking out or granting judgment on a frivolous pleading. *Raynor vs. Clark*, 7 Barb., 581; 3 C. R., 230; *King vs. Stafford*, 5 How., 30; *Witherhead vs. Allen*, 28 Barb., 661. And, for the purposes of an ulterior review in the Court of Appeals, it will not be sufficient to appeal from such a decision, as an order only, though such appeal is allowable. The decision must, for that purpose be appealed from, as a judgment, after actual entry. *Vide Hollister Bank of Buffalo vs. Vail*, 15 N. Y., 593.

In this class of cases, however, the appellant can only obtain a simple reversal, on which, if granted, the respondent will, as of course, be remitted to his former position in the cause.

Mere matters of irregularity in practice, not amounting to absolute error or mistrial, or directions or orders, involving the interlocutory exercise of discretion on the part of the presiding judge, are not reviewable on appeal from the judgment. The remedy of the party is by motion to correct those proceedings, and by appeal from the order on that motion, if denied. *Dart vs. McAdam*, 27 Barb., 187; *Witherhead vs. Allen*, 28 Barb., 661; *Miller vs. Porter*, 17 How., 526; *Ingraham vs. Gilbert*, 20 Barb., 151; *Elwell vs. Dodge*, 33 Barb., 336 (338); *Sharp vs. Wright*, 35 Barb., 236; *Hendricks vs. Decker*, 35 Barb., 298; *Van Ness vs. Bush*, 22 How., 481; 14 Abb., 33.

But, where the irregularity is essential, amounting to a mistrial, the point may be raised on appeal. *Chamberlain vs. Dempsey*, 14 Abb., 241.

(b.) COURSE ON HEARING.

The truth of statements, agreed upon at the hearing below, cannot be questioned on the hearing on appeal. *Munson vs. Hegeman*, 10 Barb., 112; 5 How., 223; *Ogden vs. Coddington*, 2 E. D. Smith, 317.

And, if all the necessary papers are not before the court, or the case is incomplete, the appeal may be dismissed. *Vide Sun Mutual Insurance Company vs. Dwight*, 1 Hilt., 50; *Matthews vs. Mayor of New York*, 14 Abb., 209. See also, as to the presumption in favor of a referee's finding, in the absence of proper information, *Fish vs. Wood*, 4 E. D. Smith, 327; *Sinclair vs. Tallmadge*, 35 Barb., 602.

The rule is clear and express, that objections, not directly urged upon the hearing below, or brought up upon exceptions, duly raised, cannot be taken into consideration by the appellate tribunal, on appeal from the judgment, though they may be brought up, on appeal from an order denying a new trial. The practice, in this respect, is the same as on

the former writ of error. *Keyes vs. Devlin*, 3 E. D. Smith, 518; *Tyler vs. Willis*, 33 Barb., 327; 12 Abb., 465; *New York Central Insurance Company vs. National Protection Insurance Company*, 4 Kern., 85; *Belknap vs. Seeley*, 4 Kern., 143; *Cheesbrough vs. Agate*, 26 Barb., 603; 7 Abb., 32; *Codd vs. Rathbone*, 19 N. Y., 37; *Crooke vs. Mali*, 11 Barb., 205; *Sheldon vs. Wood*, 2 Bosw., 267; *Kennedy vs. Cotton*, 28 Barb. 59; *Mosselman vs. Caen*, 34 Barb., 66; 21 How., 248; *Bank of Louisville vs. Ellery*, 34 Barb., 630. See heretofore, under the head of *Exceptions*.

It seems, however, that an objection may be raised for the first time on appeal, if it be fatal in its nature, and such as, if taken on the trial below, could not then have been obviated. *Pepper vs. Haight*, 20 Barb., 429 (437), and cases cited; *Cole vs. Blunt*, 2 Bosw., 116; *Sandford vs. Granger*, 12 Barb., 403.

And it has been held, that even where points, not properly raised, had been actually discussed on the hearing, the objection that no notice of appeal had been given, so as to bring up that part of the case, might still be raised. *Fry vs. Bennett*, 7 Abb., 352; 16 How., 385; 2 Bosw., 684.

Objections, omitted to be urged upon the argument, will be deemed abandoned, and may be disregarded by the court in examining the appeal. *Mazetti vs. New York and Harlem Railroad Company*, 3 E. D. Smith, 98 (99); *Cummings vs. Morris*, 3 Bosw., 560.

Where there is legal ground for a reversal, the court is not authorized to sustain the judgment, because an equivalent error has been committed against the respondent. *Ward vs. Kalbfleisch*, 21 How., 283.

The power to disregard immaterial variances, or to order an amendment, to conform the pleadings to the facts proved, is available at any stage of the suit, and may, in a proper case, be exercised by the general term, on the hearing of the appeal, and is not necessarily confined to the original hearing. See *White vs. Spencer*, 4 Kern., 247; *Parsons vs. Suydam*, 3 E. D. Smith, 276; *Bowdoin vs. Colman*, 6 Duer, 182; 3 Abb., 431; *Raynor vs. Clarke*, 7 Barb., 581; 3 C. R., 230; *Clark vs. Dales*, 20 Barb., 42 (67); *Gunter vs. Catlin*, 11 L. O., 201 (209); *Bate vs. Graham*, 1 Kern., 237; *Cady vs. Allen*, 22 Barb., 388. So also, as to an irregularity in the entry of the judgment itself. *O'Shea vs. Kirker*, 4 Bosw., 120; 8 Abb., 69.

But this power does not extend to the disregard or immediate amendment, of omissions or errors, affecting a substantial right, or to the changing of the issues originally joined between the parties, or the curing an essential defect in the proceeding. See *Fry vs. Bennett*, *supra*; *Slack vs. Heath*, 4 E. D. Smith, 95 (106); 1 Abb., 331; *Brown vs. Colie*, 1 E. D. Smith, 265; *Ketchum vs. Zerega*, 1 E. D. Smith, 553;

Salters vs. Genin, 3 Bosw., 250; 7 Abb., 193. Nor will the court, on appeal, restore to the appellant the benefit of an objection, which he has lost by his neglect or *laches*. *Ford vs. David*, 1 Bosw., 569.

In the absence of proper details in the case, the presumption will lie in favor of the adjudication sought to be reviewed. *Fish vs. Wood*, 4 E. D. Smith, 327.

An award of costs, resting in the discretion of the court, will not be reviewed on appeal. *Vide Ireland vs. Litchfield*, 22 How., 178 (183).

(c.) JUDGMENT AND ITS INCIDENTS.

When the decision is brought up for review, on allegation of error on the trial, in the process of ascertaining the facts, the only proper judgment, on reversal, will be one ordering a new trial. *Marquat vs. Marquat*, 2 Kern., 336; *Astor vs. L'Amoureux*, 4 Seld., 107; *Edmonston vs. McLoud*, 16 N. Y., 543 (545); *Griffin vs. Marquhardt*, 17 N. Y., 28; *Meyer vs. City of Louisville*, 26 Barb., 609; 7 Abb., 6; *Cobb vs. Cornish*, 16 N. Y., 602 (603); 15 How., 407; 6 Abb., 129; *Irwin vs. Lawrence*, 1 Hilt., 352. See also *Moffatt vs. Sackett*, 18 N. Y., 522.

But, where the facts are ascertained upon the trial, either by special verdict, or any other form of finding allowed by law, the general question, which party is entitled to judgment, arises upon appeal; and, in such cases, a judgment, disposing of the whole cause, may be given at the general, notwithstanding such judgment be adverse to that of the special term, or to the verdict of the jury. *Marquat vs. Marquat*, 2 Kern., 336 (340); *Hannay vs. Pell*, 3 E. D. Smith, 432; *Crittenden vs. Empire Stone Dressing Company*, 3 Abb., 71; *Kelley vs. Upton*, 12 How., 140; *O'Shea vs. Kirker*, 4 Bosw., 120; 8 Abb., 69. See also *Corning vs. Troy Iron and Nail Factory*, 34 Barb., 485 (493); 22 How., 217.

And, where the appellate court can see that no possible state of proof, applicable to the issues in the case, will entitle a party to a recovery, it is not necessary or even proper that a new trial should be awarded. *Edmonston vs. McLoud*, 17 N. Y., 543. See also *Griffin vs. Marquhardt*, 17 N. Y., 28 (33); *Irwin vs. Lawrence*, 1 Hilt., 352; *Sayre vs. New York and Harlem Railroad Company*, 3 Duer, 54.

Where the case is of this nature, and the error is formal or partial, the court may carry out the same object, by means of a modification. *Fitzhugh vs. Wiman*, 5 Seld., 559; or, by an election to modify. *Bartlett vs. Judd*, 23 Barb., 262 (272); *O'Shea vs. Kirker*, *supra*. Or, where proper, an absolute reversal may be ordered, as to some, and a new trial awarded, in relation to others of the appellants. *Williams vs. Christie*, 4 Duer, 29.

If, on reversing a judgment, a new trial be awarded, the court has no

power to direct that the evidence given on the former trial be again received, unless by consent of the parties. *Bissell vs. Hamlin*, 13 Abb., 22.

Or, on the reversal of a judgment, the general term has power to send back the case to the special term, to be there properly disposed of. *Minister, &c., of Dutch Reformed Church of Canajoharie vs. Wood*, 8 Barb., 421. A certified copy of the judgment of the general term seems all that is requisite for this purpose, on which, a motion may be made to the special term, if necessary, requiring them to make a disposition, according to the view taken by the court above. No formal *remittitur* need, it seems, be made in these cases, beyond the docketing of such certified copy, as above directed. When both judgments are entered in the same county, of course proceedings of this description will not be essential.

The judgment on the appeal, when pronounced in a different county from that of the original trial, should be certified to the clerk, with whom the original judgment-roll has been filed, to be duly entered and docketed in his office. *Andrews vs. Durant*, 6 How., 191.

As to the propriety of sending the case to a new referee for retrial on reversal of judgment on a report, see *Schermerhorn vs. Van Alen*, 13 How., 82.

If, after adjudication, the action of the court is sought to be corrected, in respect of matters which have come under their deliberation, the application must be made to the general term. See, as to such an application, *Adams vs. Bush*, 23 How., 262. The special term has, however, power to entertain motions, in respect of matters of irregularity or discretion, not affecting the merits, or the control of the general term over the proceedings before them. See *Corning vs. Powers*, 9 How., 54; *Ayres vs. Covell*, 9 How., 573; *Harris vs. Clark*, 10 How., 415.

When an ulterior appeal is intended to be taken from the judgment of the general term, reversing that of the special term, in a case tried by the court without a jury, or from judgment entered upon the report of a referee, the appellant should bear in mind the provisions in sections 268 and 272, inserted on the amendment of 1860; and, if such judgment has, in either case, been reversed on questions of fact, should procure a statement to that effect to be inserted in the judgment of reversal. If he omit this precaution, he will be precluded from raising questions of this description in the court above.

It seems clear that this statement should be made on the face of the judgment-roll itself, and not merely in the opinion of the court. If the prevailing party omit to insert such a statement, the intended appellant should move at once to have the necessary correction made.

(d.) SPECIAL PROCEEDINGS.

By chapter 270 of the Laws of 1854, p. 592, the same right of appeal has been given in special proceedings, as then already existent in ordinary cases, so far as regards the review by the general term, of the decisions of the special term of the same court in such cases, whether pronounced by way of judgment or of order. The provisions of sections 327, 329, 330, and 332, are declared specially applicable. The only distinction is with regard to a stay of proceedings, to effect which, if desired, special application must be made. See section 1 of such statute.

Where such an appeal lies, the court, in deciding it, will be bound by the provisions of any special statute regulating the proceeding, and cannot exercise a more extensive power of review. *Ketcham vs. Woodruff*, 24 Barb., 147. See also *Pryor's Appeal*, 5 Abb., 272 (275).

The act in question has been held retrospective, as in fact provided by section 3. *Rochester and Genesee Railroad Company vs. Beckwith*, 10 How., 168.

Also, that it is sufficiently broad to include proceedings under the statutory executor's reference, when brought up on motion to set aside the report, but not if on appeal from a judgment entered by stipulation. *Boyd vs. Bigelow*, 14 How., 511. See, as to such an appeal, *Coe vs. Coe*, 14 Abb., 86.

CHAPTER III.

APPEALS FROM ORDERS TO THE GENERAL TERM.

GENERAL REMARKS.

THE interlocutory decisions of a single judge, are subjected to revision by the full bench of the same court, or by the general term of the Supreme Court, in certain cases, by means of this proceeding.

The vacating or modification of orders under section 324, has already been considered, in book IV., section 79, last subdivision.

§ 314. *Statutory and Other Provisions.*

The following are the provisions of the Code which give an appeal in such cases :

§ 349. (299.) An appeal may in like manner, and within the same time, be taken from an order made at a special term, by a single judge of the same court, or county, or a special county judge, or by a recorder, or by any recorder's court of any city, in any stage of the action, including proceedings supplementary to the execution, and may be thereupon reviewed in the following cases:

1. When the order grants or refuses, continues or modifies, a provisional remedy;
2. When it grants or refuses a new trial, or when it sustains or overrules a demurrer;
3. When it involves the merits of the action, or some part thereof, or affects a substantial right;
4. When the order, in effect, determines the action, and prevents a judgment from which an appeal may be taken;
5. When the order is made upon a summary application in an action after judgment, and affects a substantial right.

N. B.—The time referred to is within thirty days after receipt of written notice of the order appealed from, as fixed by section 332.

The introductory clause of this section was remodelled in 1862, somewhat unfortunately, perhaps. The expunging, on that occasion, of the word "or," between those "made at a special term," and those, "by a single judge of the same court," seems to take away the previous power of appeal from an order made out of court. It may, or may not be, that the legislature intended to deprive parties of their previous rights in this respect. The striking out of the word "a," before "county," in the part immediately succeeding, seems equally unfortunate. What is legally intended by the words as they now stand, "by a single judge of the same court, or county, or a special county judge," is hard to discover; before the change, the provision was clear.

With the exception of the introduction, that provision, as it now stands, dates from the amendment of 1852.

In 1851, the wording of subdivisions 1 and 3 was slightly different.

In 1849, subdivision 2 was wanting, and the phraseology of the other portions was less extensive.

In the original Code, the section only contained the substance of subdivisions 1 and 3, and the certificate of a judge, to the effect that it was proper for the question to be decided before judgment was imposed as a prerequisite.

§ 350. (300.) The last section shall include an order made out of court upon notice; but in such case the order must be first entered with the clerk; and, for the purpose of an appeal, any party affected by such order may require it to be entered with the clerk, and it shall be entered accordingly.

As regards the City Court of Brooklyn, provision is made for the review of the more important class of orders under section 6 of chapter 125 of 1849, p. 170, as amended by section 1 of chapter 102 of 1850, p. 148, which runs as follows:

An appeal may be taken from any judgment or final determination of said City Court, and from any intermediate order, involving the merits,

and necessarily affecting the judgment, to the Supreme Court, at a general term thereof; and all provisions of law relative to appeals from courts of inferior jurisdiction to the Supreme Court, shall apply to appeals from said City Court.

In the original statute, this appeal was to be conducted as an appeal to the Court of Appeals, an evident error, corrected in 1850. It has been decided, by the general term of the second district, that the appeal thus given may be taken separately, and independently, from any order falling under the above classification, without waiting for, and bringing it up for review, in connection with the judgment in the action. See *Moore vs. Wood*, 19 How., 405; *Bennett vs. City of Brooklyn*, 19 How., 310. See also above, under section 311, and cases there cited.

The same power of reviewing its own orders, at general term, as is possessed by the Supreme Court, is given to the Superior Court of Buffalo, by section 3, of chapter 361 of 1857, vol. I., p. 752, amending section 19 of the previous statute, organizing that tribunal.

On the amendment of 1860, the following clause was added to section 344, already cited in the last chapter, as giving an appeal from the judgments of the county courts, by which the power to appeal was also extended to their orders:

An appeal may also be taken to the Supreme Court, from any order affecting a substantial right, made by a county court or a county judge, in any action or proceeding, and such appeal shall be heard on a copy of the papers on which the order appealed from was made.

In the Marine Court, an appeal lies also from the order of the single judge to the general term of that tribunal. The consideration of that remedy lies beyond the province of this work, though it may be necessary to advert to it again, in connection with the review of its decisions by the Court of Common Pleas, as there considered.

The following provisions in the rules, on the subject of these appeals, require notice:

Though all cognizable at general term, appeals of this nature fall, with some exceptions, under the class of non-enumerated motions. Those exceptions would seem to comprise all those taken under subdivision 2 of section 349, and also those taken from the order of an inferior court. See rule 40.

In these, the practice is the same as on the appeal from a judgment, and is regulated by rule 42. In the non-enumerated class, all that is strictly necessary, is to serve copies of the papers on which the appeal is brought up, together with the notice of motion. See rule 49.

Rule 54, limiting the argument of counsel to one hour, is, of course, applicable to these cases.

In the second district, special provision is made in relation to them, by rule 2, of the 24th of October, 1856, as follows :

2. A calendar of non-enumerated motions, and of appeals made pursuant to the 349th section of the Code, excepting such of said appeals as are enumerated motions, shall hereafter be made at each general term of this court. Notes of issue for such calendar, specifying that they are to be placed on the calendar of non-enumerated cases, shall be furnished to the clerk, who shall arrange the same on such calendar, according to the time when such notes of issue shall be received by him.

The Superior Court regulates its practice in these cases, by rule 7, as thus amended, October, 1858 :

Appeals from all orders made on non-enumerated motions, will be heard on each Saturday during the general term, at 11 o'clock, A. M. Such appeals may be noticed for that time. Appeals from orders sustaining or overruling demurrers, will also then be heard, and will be heard in their order on the general term calendar.

In the Common Pleas, appeals from motions that may be made out of court, and chamber business, are to be submitted at the Saturday of the general term. Rule 4.

The following special rule was adopted by that court, on the 22d of March, 1851, in relation to questions of practice, which do not fall within the class of orders in respect of which an appeal is given, as above :

For the purpose of regulating the review of questions of practice decided by a single judge, the court adopt the following rule :

Upon the decision of motions made before a single judge, at chambers, or at special term, in cases in which no appeal is allowed by section 349 of the Code, the judge may, if he deem the question of such importance and doubt as to render a review by the general term proper, give a certificate thereof; and the party desiring such review shall, within six days after the decision of such motion, procure such certificate, and serve a copy thereof, with a notice of hearing, for the next general term for which the same can be noticed; and thereupon such motion shall be brought on and submitted for review, on written points, to be shown to the opposite counsel, and then handed to the court.

Such certificate shall not operate as a stay of proceedings, unless such stay of proceedings be expressly ordered.

Under a further rule of the same court, adopted the 2d of May, 1857, all appeals from orders on motions, must now be submitted as follows :

Ordered—That appeals to the general term, from orders made on motions at special terms and chambers, be submitted upon certified copies of the papers used on the motion, instead of the original papers.

§ 315. *What Orders Appealable.*

It is proposed to consider this question, first, in its more general aspect; and second, with reference to the specific cases in which an appeal is given in terms by section 349.

(a.) GENERAL REMARKS.

To be appealable at all, the order must first be entered with the clerk, provision for which is expressly made by section 350, as to orders made out of court, upon notice. As to a chamber order being appealable, if otherwise proper to be reviewed, *vide Nicholson vs. Dunham*, 1 C. R., 119. See, however, question before adverted to, as to whether the right is not taken away, by the recent change in the wording of the section.

To be appealable, an order must be actually entered, and the motion papers filed with the clerk. *Marshall vs. Francisco*, 10 How., 147; *Smith vs. Dodd*, 3 E. D. Smith, 215. And this may be done by the defeated party, if omitted by his adversary. See *Peet vs. Cowenhoven*, 14 Abb., 56 (61).

Where no papers are used, and the order is made on mere verbal statements, it seems that an appeal will not be entertained. *Smith vs. Dodd, supra*; *Pierret vs. Moller*, 3 E. D. Smith, 574.

And, to be reviewable, the action taken by the court must assume the shape of an actual order. A mere opinion, though entered with the clerk as such, will not have that effect. Something must be directed by the court, or adjudged to one of the parties; till then, there is no operative determination, to be affirmed or reversed. *Snyder vs. Beyer*, 3 E. D. Smith, 235. Nor is it proper for a judge to direct a question of practice to be heard first at general term, instead of making a specific order, capable of being reviewed. *Pierret vs. Moller, supra*.

And, before an appeal lies, the order must be finally entered. Where, therefore, after being entered *ex parte*, the order was resettled, by direction of the judge who made it, it was held that the time to appeal did not commence to run, until its re-entry after such resettlement, and service of a copy as resettled. *Bowman vs. Earle*, 3 Duer, 691.

An *ex parte* order, made out of court without notice, is not appealable. *Savage vs. Relyea*, 3 How., 276; 1 C. R., 42; *Lindsay vs. Sherman*, 5 How., 308; 1 C. R. (N. S.), 25. The course under these circumstances is a motion to vacate or modify, under section 324. It may, however, if the question be of sufficient importance, be ultimately brought up for review, on appeal from the order on that motion, if

refused. *Vide Savage vs. Relyea, supra; Conway vs. Hitchins*, 9 Barb., 378. See also recent amendment of section 349.

As a general rule, an order obtained by default is not appealable. The course is by way of motion to open that default. In an extreme case, involving a substantial right, an order, refusing that relief, might possibly be reviewed, though, usually, an appeal will be ineffectual, the matter being one that rests in discretion. Where, however, the judge, in granting an order by default, had exceeded the power conferred on him by statute, it was held that an appeal would lie originally. *Wilkinson vs. Tiffany*, 4 Abb., 98. See also generally, *Raynor vs. Clark*, 7 Barb., 581; 3 C. R., 230, there referred to, as to a case where the complaint showed no cause of action.

A party cannot at the same time appeal from, and avail himself of the benefit of an order, or any portion of that benefit. If he do so, it will be a waiver of his right to appeal, or of the appeal itself, if previously taken. *Radway vs. Graham*, 4 Abb., 468; *Peel vs. Elliott*, 16 How., 483; *Noble vs. Prescott*, 4 E. D. Smith, 139. See also *Lanman vs. Lewiston Railroad Company*, 18 N. Y., 493; *Bennett vs. Van Syckel*, 18 N. Y., 481; *Wood vs. Kelly*, 2 Hilt., 334 (337). Nor can he appeal from an order, under which he has taken any proceeding. *Ubsdell vs. Root*, 1 Hilt., 173; 3 Abb., 142.

Where, after entry of an order against him, the defendant had been heard a second time on the same question, and the previous order confirmed, his appeal was dismissed. *Vide Tyrone and Lock Haven Railroad Company vs. Schenck*, 18 How., 275, text.

If the aggrieved party neglect to appeal from, or to move to vacate an order granted against him, that order will be held conclusive, as respects all subsequent proceedings. *Vide Underhill vs. Crawford*, 29 Barb., 664; 18 How., 112.

Proceeding to consider the appealability or non-appealability of orders, in the serial arrangement laid down in section 349, as above cited, the first criterion of appealability is—

(b.) SUBDIVISION 1.—PROVISIONAL REMEDY.

“When the order grants or refuses, continues or modifies, a provisional remedy.”

So far as regards a review upon the merits, in this class of cases, the subject has been in effect anticipated in book V., treating of the remedies in question.

In *Conklin vs. Dutcher*, 5 How., 386; 1 C. R. (N. S.), 49, an order of one judge, refusing to set aside an attachment granted by another, was decided not to be appealable. It neither granted nor refused a provisional remedy. It was a mere refusal to interfere, in a matter in

which it was doubtful whether it was in the power of the court to interfere at all, at special term. The order, originally granting an attachment, was, of course, appealable, and the proper remedy was an appeal therefrom. See likewise, *Bank of Lansingburgh vs. McKie*, 7 How., 360.

An order, denying a motion that an undertaking given on arrest be delivered up, and an *exoneretur* entered, is appealable, because it substantially continues a provisional remedy. *Columbus Insurance Company vs. Force*, 8 How., 353.

On appeal from an order of this nature, the court should not, it has been held, review the discretion exercised at special term, in respect to the terms or conditions upon which the order has been granted, where no right of the appellant and no rule of law have been violated. *Merritt vs. Thompson*, 3 E. D. Smith, 599 ; 10 How., 428 ; 1 Abb., 223.

In *Morro vs. Martens*, 29 Barb., 361 ; 17 How., 280 ; 8 Abb., 257, it is laid down, that appeals from orders denying motions to vacate orders of arrest, when made after the party is out on bail, are not to be encouraged.

(c.) SUBDIVISION 2.—NEW TRIAL, DEMURRER.

The second subdivision renders an order appealable, when it grants or refuses a new trial, or when it sustains or overrules a demurrer.

(d.) NEW TRIAL.

Prior to the act of 1854, below referred to, it was held that an order granting a new trial in a special proceeding was not appealable, as not being made in an action. *In re Fort Plain and Cooperstown Plank Road Company*, 3 C. R., 148.

Where a review is sought at general term, of the verdict of a jury on questions of fact, an appeal of this nature will be necessary from the decision of the special term, or that class of objections cannot be brought up, and the appellant will be confined to such questions of law, as he may have raised by exceptions. If the appellant neglect to take this step, he will be deemed to have acquiesced in the propriety of the decision below, so far as that class of questions is concerned. *Rider vs. Union India Rubber Company*, 4 Bosw., 169 ; *Anthony vs. Smith*, 4 Bosw., 503 ; *Ogden vs. Coddington*, 2 E. D. Smith, 317.

When taken, the appeal from an order denying a new trial, on whatever ground, may properly be brought up, in connection with the appeal from the judgment on exceptions, if taken, and by these means a complete review will be obtained on the hearing. *Clarke vs. Ward*, 4 Dner, 206.

On an appeal from an order of this nature, the court may review the whole of the proceeding, and may even consider points properly the

subject of exception, though not actually excepted to, without being bound by the same strict rules, as on an appeal from the judgment as such. See *Keyes vs. Devlin*, 3 E. D. Smith, 518.

In *Pumpelly vs. Village of Owego*, 22 How., 385 ; 13 Abb., 387, it was held that an appeal of this nature might be taken, notwithstanding the intermediate entry of judgment. In *Soverhill vs. Post*, however, 22 How., 386, it was considered that the question could not be brought up under such circumstances, unless in connection with an appeal from the judgment itself, when unconditionally entered.

The refusing of a new trial, on reversing a judgment on appeal upon a case, is, with the exception there referred to, error reviewable by the Court of Appeals. See *Griffin vs. Marquhardt*, 17 N. Y., 28 (34); decision, not head-note.

As to the power of the Supreme Court to entertain appeals of this nature, from the decisions of the City Court of Brooklyn, see *Moore vs. Wood*, 19 How., 405 ; *Bennett vs. City of Brooklyn*, 19 How., 310.

(e.) DEMURRER.

The conflicting decisions, as to whether the decision of the court, sustaining or overruling a demurrer, is or is not a judgment, have been already cited and fully considered, in book X., chapter I., section 249, subdivision, *Decision on Issue of Law*.

It is now clearly settled that, when leave to amend or plead over is granted, the decision on a demurrer, covering the whole ground of the adverse pleading, retains, whilst that leave is pending, the character of an order, and is appealable from as such: but, if the party decline or neglect to avail himself of the privilege so accorded, and suffers his adversary to enter up judgment, before appeal taken; or, if no such leave be granted, so as to entitle the adverse party to immediate judgment, the appeal lies only from that judgment, and not from the decision as an order.

But where the demurrer is only partial, and does not go to the whole of the adverse pleading, the appeal is clearly from the order, and from that only.

(f.) SUBDIVISION 3. ORDERS INVOLVING MERITS, OR AFFECTING SUBSTANTIAL RIGHTS.

The third criterion, *i. e.*, that an order is reviewable "when it involves the merits of the action, or some part thereof, or affects a substantial right," is of wider scope, and is that portion of the section on which the most discussion has arisen. The addition of the concluding words, by the amendment of 1851, has given greater perspicuity to the provision itself, but, in substance, the same idea is included in the expression, "in-

volving the merits or some part thereof," which stood alone, previous to that amendment. The latter term tends to give construction to the former.

The subject is very fully considered in the early case of *St. John vs. West*, 4 How., 329 ; noticed, 3 C. R., 85, arising under the supplementary statute of 1849, for facilitating the determination of existing suits, in which the same phraseology is employed. After an interesting discussion on the force of the terms employed, the learned judge (Selden, J.) defined the term "merits," "as meaning the strict legal rights of the parties, as contradistinguished from those mere questions of practice, which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court." "This," the learned judge continues, "would give an appeal from every order which involved, that is, passed upon and determined any positive legal right of either party, and deny it in all other cases."

This definition is cited with approbation, and adopted by the Superior Court, as applicable to an appeal taken under the Code itself, in *Megrath vs. Van Wyck*, 3 Sandf., 750 ; 1 C. R. (N. S.), 157. See also *Tallman vs. Hinman*, 10 How., 89, a decision in the Supreme Court, and *Tracy vs. New York Steam Faucet Company*, 1 E. D. Smith, 349 (357), in the New York Common Pleas.

In *Cruger vs. Douglass*, 8 Barb., 81 ; 2 C. R., 123 (a case likewise arising under the supplementary act), the subject is again fully considered, and illustrated by reference to decisions under the former practice, by Edmunds, J. His conclusion is thus stated (8 Barb., 86): "From all these cases I gather this as the established rule, that, as all orders in the progress of a cause necessarily in some degree affect the merits, so all are the subject of an appeal, unless they relate merely to matters of practice and procedure, or rest in that discretion which is not and cannot be governed by any fixed principles and rules ; and that such rule was in the view of the legislature, when it enacted the statute now under consideration." In a later part of the opinion, the learned judge expressly refers to section 349 as it then stood, as "in harmony" with the view so taken.

The principles thus early laid down, have been fully carried out in the subsequent decisions under the section in question. It may be convenient to notice those decisions, as applicable—

1. To orders not appealable ;
2. To orders appealable, under the subdivision in question.

(g.) FIRST HEAD.

An order involving a pure question of practice, which does not involve any legal right of either of the parties, is not appealable.

Of this nature, is that class of orders which regulate the mode or course of the trial of an action.

Thus, an order granting a reference, in a case properly referable under section 271, and in which a trial by jury is not claimable of right, is not appealable. *Bryan vs. Brennan*, 7 How., 359; *Dean vs. Empire State Mutual Insurance Company*, 9 How., 69; *Gray vs. Fox*, 1 C. R. (N. S.), 334; *Smith vs. Dodd*, 3 E. D. Smith, 348; *Ubsdell vs. Root*, 1 Hilt., 173; 3 Abb., 142; *Kennedy vs. Shilton*, 1 Hilt., 546; *People vs. Haacs*, 34 Barb., 69.

On similar grounds, an order denying an application to remove a referee, whose nomination was originally assented to by the moving party, and against whom no fault was charged, was held not appealable, in *Perry vs. Moore*, 2 E. D. Smith, 32; 3 C. R., 221.

An order, refusing to set aside a judgment on the ground of mere irregularity, not involving the merits, was held not appealable, in *Tallman vs. Hinman*, 10 How., 89. See also *Hammond vs. Tillotson*, 18 Barb., 332; *Catlin vs. Billings*, 16 N. Y., 622. Nor will an appeal lie from an order, setting aside a judgment on that ground only, and in effect leaving the action to proceed. *Jones vs. Derby*, 16 N. Y., 242. See, however, as to an order, refusing to set aside a judgment improperly entered, being appealable, *Johnson vs. Farrell*, 10 Abb., 384; *Marquat vs. Mulvey*, 9 How., 460; and *Tracy vs. New York Steam Faucet Manufacturing Company*, 1 E. D. Smith, 349 (357), below cited.

Nor is an order appealable, when it merely carries out a legislative direction, as, for instance, one granting the statutory new trial in ejectment (*Evans vs. Millard*, 16 N. Y., 619); or an order for removal of a case into the Federal courts. *Illius vs. New York and New Haven Railroad Company*, 3 Kern., 597.

Again, an order granting or refusing an application for relief, not claimable as matter of right, but simply as matter of favor, and which it rests in the discretion of the court to grant or to refuse, is not appealable. See, however, as to the limits of this rule, *Union Bank vs. Mott*, 19 How., 267; 11 Abb., 42.

To this head belong that class of motions, in which a party, admittedly in default, seeks to be relieved from a judgment or order so taken against him, or to be allowed to take some proceeding, to which he was once entitled, but his right to which is gone by *laches* or otherwise.

Thus an order opening a judgment taken by default, and letting in a party to defend, is not appealable. *Bollen vs. Depeyster*, 3 C. R., 141; *Foshay vs. Drost*, 4 Bosw., 664; *Mead vs. Mead*, 2 E. D. Smith, 223; *Churchill vs. Mattison*, 2 Hilt., 70; *Sherman vs. Felt*, 2 Comst., 186; 3 How., 425.

The same holds good, as to a refusal to open a default regularly

taken. *Fort vs. Bard*, 1 Comst., 43; *Muldenor vs. McDonogh*, 2 Hilt., 46.

An order, refusing leave to put in a reply, was held not to be appealable, in *Thompson vs. Starkweather*, 2 C. R., 41.

So, also, as to the refusal, at the trial, of leave to put in an answer, where the party had neglected to do so under leave previously given. *Ford vs. David*, 1 Bosw., 569. See, however, *Quinn vs. Case*, 2 Hilt., 467; 9 Abb., 160, where a review was granted of an order, refusing leave to answer, where the application was made before judgment, and a defence on the merits was shown, it being held that the case came within subdivision 4.

For similar reasons to the above, an order, refusing leave to file exceptions to a referee's report, after the usual time had expired, was held not to be appealable, in *King vs. Merchants' Exchange Company*, 1 Seld., 547.

The granting of leave to amend before judgment, either at or before the trial, is an exercise of discretion which will not be reviewed on appeal. *Van Duzer vs. Howe*, 21 N. Y., 531; *St. John vs. Northrup*, 23 Barb., 25; *Gould vs. Rumsey*, 21 How., 97; *Macqueen vs. Babcock*, 22 How., 229; 13 Abb., 268. Nor, it would seem, is an order reviewable, when it grants relief of this nature after judgment. *Vide New York Ice Company vs. North Western Insurance Company*, 21 How., 296; 12 Abb., 414.

And the same principle holds good, as to the refusal of leave to amend, for the purpose of setting up a new cause of action or ground of defence. See *Roth vs. Schloss*, 6 Barb., 308; *Brown vs. McCune*, 5 Sandf., 224; *Hunt vs. Hudson River Fire Insurance Company*, 2 Duer, 481; *Watson vs. Bailey*, 2 Duer, 509; *Travis vs. Barger*, 24 Barb., 614; *New York Marbled Iron Works vs. Smith*, 4 Duer, 362 (377); *Robbins vs. Richardson*, 2 Bosw., 248; *Woodruff vs. Husson*, 32 Barb., 557; *Hatfield vs. Secor*, 1 Hilt., 535. See also, as to an application for leave to amend after judgment, *Salters vs. Genin*, 10 Abb., 478. But, where a motion of this nature is refused, on the ground of a supposed want of power, the order will then be reviewable. See *McElwain vs. Corning*, 12 Abb., 16, below cited.

An order, denying leave to continue an action under section 121, to parties who had not shown a *prima facie* title to sue, was held not appealable, in *St. John vs. West*, 4 How., 329, before referred to.

When an order is made, opening a default, or granting any other matter of relief, not claimable as of right, but resting in the favor of the court, the imposition of terms, as a condition of granting such favor, rests purely in discretion, and the exercise of that discretion will not be reviewed, where no right of the party or rule of law is violated.

Gale vs. *Vernon*, 4 Sandf., 709; *Merritt* vs. *Thompson*, 3 E. D. Smith, 599; 10 How., 428; 1 Abb., 223; *Quinn* vs. *Case*, 2 Hilt., 467; 9 Abb., 160; *Burger* vs. *White*, 2 Bosw., 92; *Foshay* vs. *Drost*, 4 Bosw., 664; *Jacobs* vs. *Marshall*, 6 Duer, 689; *Smith* vs. *Dodd*, 4 E. D. Smith, 643; *Edgerton* vs. *Ford*, 11 Abb., 415. But it has been held that this principle only applies to the party to whom the power is granted. The party, whose legal rights are interfered with, may review the whole proceeding. *Vide Union Bank* vs. *Mott*, 19 How., 267; 11 Abb., 42.

The granting or refusal of costs upon a motion, rests entirely in the discretion of the judge, and his decision cannot be reviewed. *Joyce* vs. *Mayor of New York*, 20 How., 439; 12 Abb., 309; *Perry* vs. *Moore*, 2 E. D. Smith, 32; 3 C. R., 221; *Dennison* vs. *Dennison*, 9 How., 246; *Merchants' Bank* vs. *Mills*, 3 E. D. Smith, 213; *Hammond* vs. *Tillotson*, 18 Barb., 332 (335); *Niles* vs. *Griswold*, 3 C. R., 164. See also, as to an award of costs on judgment, *Ireland* vs. *Litchfield*, 22 How., 178 (183).

The same is the case, as to the granting or refusal of an extra allowance, where the power of the court or judge has not been exceeded. *Dresser* vs. *Jennings*, 3 Abb., 240; *Dickson* vs. *McElwain*, 7 How., 138; *Cook* vs. *Dickerson*, 5 Sandf., 663; *People* vs. *Clarke*, 5 Seld., 349; *Decker* vs. *Gardiner*, 4 Seld., 29. See likewise, *Dana* vs. *Fiedler*, 1 C. R. (N. S.), 224; *Union Bank* vs. *Mott*, 13 Abb., 247.

An order, requiring the receiver of an insolvent corporation to give security for costs, was held not to be appealable, in *Briggs* vs. *Vandenburg*, 22 N. Y., 467. So also, as to the denial of a motion to dismiss, on the ground that the plaintiffs, being a foreign corporation, had omitted to file security for costs. *Tyrone and Lock Haven Railroad Company* vs. *Schenck*, 18 How., 275. See likewise *Merchants' Bank* vs. *Mills*, 3 E. D. Smith, 213.

An order, granting leave to a plaintiff to discontinue without costs, has also been held not to be reviewable. *Waterbury Leather Manufacturing Company* vs. *Krause*, 1 Hilt., 560; 9 Abb., 175, note.

The following have also been held to be orders resting in the discretion of the court, and therefore not appealable:

An order for the production or discovery of books or papers. *White* vs. *Munroe*, 33 Barb., 650; 12 Abb., 357.

An order giving time to make a motion, with an *interim* stay of proceedings. *Hunt* vs. *Bennett*, 2 E. D. Smith, 53.

An order, enlarging the time of defendants, sued as bail, to surrender their principal. *Bank of Geneva* vs. *Reynolds*, 20 How., 18; 12 Abb., 81.

A surrogate's order, refusing authority to sell the real estate of a testator, whose personal property had not been exhausted. *Moore* vs. *Moore*, 14 Barb., 27.

An order appointing a receiver. *McMahon* vs. *Allen*, 14 Abb., 220.

An order granting alimony, *pendente lite*. *Abbey* vs. *Abbey*, 6 How., 340, note; *Moncrief* vs. *Moncrief*, 10 Abb., 315. Or an order, denying such alimony. *Griffin* vs. *Griffin*, 23 How., 189.

An order opening, or refusing to open, a judicial sale, when no irregularity has been committed. *Kingsland* vs. *Bartlett*, 28 Barb., 480; 8 Abb., 42; *Young* vs. *Bloomer*, 22 How., 383.

An order refusing to strike out immaterial, impertinent, or scandalous matter. *Bedell* vs. *Steckels*, 4 How., 432; 3 C. R., 105; *Whitney* vs. *Waterman*, 4 How., 313.

An order striking out such matter may, however, be appealable, if shown that the matter stricken out was material. See last case. See also *Otis* vs. *Ross*, 8 How., 193; 11 L. O., 343; *Trustees of Penn Yan* vs. *Forbes*, 8 How., 285; *Cowles* vs. *Cowles*, 9 How., 361.

The following have also been held to be non-appealable, as resting purely in discretion.

An order, denying a motion to stay the trial of one cause, until the decision of another. *James* vs. *Chalmers*, 2 Seld., 209.

An order, directing a board of trustees to be prosecuted. *In re White*, 3 C. R., 141.

An order, denying a motion to enter the words "secured by appeal," on the docket of a judgment. *Fitch* vs. *Livingston*, 4 Sandf., 712.

The appealability of an order, discharging a defendant from an attachment for contempt, was also doubted, in *The People* vs. *King*, 9 How., 97. See however, *per contra*, *Livingston* vs. *Swift*, 23 How., 1.

(h.) SECOND HEAD.

The following have been held to be cases, in which the merits of the action are involved, or some substantial right of the appellant has been affected:

A surrogate's determination, in respect to the competency of an administrator. *McMahon* vs. *Harrison*, 10 Barb., 659; 10 L. O., 289; affirmed, 2 Seld., 443.

The granting, or the denial of costs, when claimed or claimable, as a matter of right, and not of favor. *Megrath* vs. *Van Wyck*, 3 Sandf., 750; 1 C. R. (N. S.), 157; *Burhaus* vs. *Tibbits*, 7 How., 21; *Decker* vs. *Gardiner*, 4 Seld., 29; *The People* vs. *Clarke*, 5 Seld., 349.

Or the granting of an allowance, to an amount exceeding the statutory limit. *Wilkinson* vs. *Tiffany*, 4 Abb., 98.

Or a refusal to correct the adjustment of costs, allowed to the plaintiff on taxation, but to which he has no legal right. *Sluyter* vs. *Smith*, 2 Bosw., 673.

The denial of leave to put in an answer, after default, when merits

were shown, and the application was made before judgment. *Quinn vs. Case*, 2 Hilt., 467; 9 Abb., 160.

The denial of a motion to set aside a judgment, claimed to be improperly entered. *Johnson vs. Farrell*, 10 Abb., 384; *Marquat vs. Mulvey*, 9 How., 460; *Tracy vs. New York Steam Faucet Manufacturing Company*, 1 E. D. Smith, 349 (357). Or that of a motion to set aside an irregular service. *Van Rensselaer vs. Chadwick*, 7 How., 297.

The denial of a motion to vacate the satisfaction of a judgment, entered by the party, in fraud of the attorney's lien. *Ward vs. Wordsworth*, 1 E. D. Smith, 598; 9 How., 16.

The denial of a motion to set aside an irregular report. *Mathews vs. Jones*, 1 E. D. Smith, 429.

An order directing a reference, in a manner, or to an extent not authorized by the Code. *Cram vs. Bradford*, 4 Abb., 193. See also *Emerson vs. Burney*, 6 How., 32; 1 C. R. (N. S.), 189. Or an order directing a reference, to apportion the debts of an insolvent bank amongst its stockholders. *Matter of Hollister Bank*, 23 N. Y., 508.

An order, refusing to grant an amendment, on the express ground of a supposed want of power in the court, and not in the mere exercise of discretion. *McElwain vs. Corning*, 12 Abb., 16. Or an order, refusing a stay of proceedings under similar circumstances. *McMahon vs. Mutual Benefit Life Assurance Company*, 12 Abb., 28.

An order refusing, on the ground of *laches*, to set aside a proceeding, void for want of jurisdiction. *Titus vs. Relyea*, 16 How., 371; 8 Abb., 177.

An order granting an amendment after trial, by adding a new cause of action to the complaint, without provision for leave for the defendant to answer. *Allaben vs. Wakeman*, 10 Abb., 162; *Union Bank vs. Mott*, 19 How., 267; 11 Abb., 42.

The denial of an attachment, against a witness disobeying a *subpoena duces tecum*. *La Farge vs. La Farge Insurance Company*, 6 Duer, 680; 14 How., 26. Or an order discharging a defendant from process of contempt. *Livingston vs. Swift*, 23 How., 1.

The refusal of an examination of the adverse party before trial, when claimed to be had under section 391. *Green vs. Wood*, 6 Duer, 702; 15 How., 338; 6 Abb., 277.

An order, granting leave to put in a supplemental answer, setting up new matter, which, if established, will be fatal to the action. *Harrington vs. Slade*, 22 Barb., 161. Or an order, refusing leave of the same nature. *Hoyt vs. Sheldon*, 6 Duer, 661; 4 Abb., 59; *Bowen vs. Irish Presbyterian Congregation of the City of New York*, 6 Bosw., 245.

An order under section 122, substituting an adverse claimant to the fund as defendant. *Wilson vs. Duncan*, 11 Abb., 3. Or an order,

allowing the continuance of an action partially abated, and admitting other parties in the place of a deceased plaintiff. *St. John vs. Croel*, 10 How., 253.

As to an order, striking out part of a pleading, shown to be in fact materials being appealable, see *Whitney vs. Waterman*, 4 How., 313; *Otis vs. Ross*, 8 How., 193; 11 L. O., 343; *Trustees of Pen Yan vs. Forbes*, 8 How., 285; *Cowles vs. Cowles*, 9 How., 361, before cited.

An appeal lies from the order of a county judge, vacating his previous order for an arrest, though granted *ex parte*. *Lancaster vs. Boorman*, 20 How., 421. See also, as to such a *vacatur*, granted by the same officer on notice, *Rogers vs. McElhone*, 20 How., 441; 12 Abb., 292.

It likewise lies from an order, granting a *supersedeas* of execution against the person, under the powers of the Revised Statutes. *Wells vs. Jones*, 2 Abb., 20.

Also from an order, awarding process to enforce a judgment. *Cruger vs. Douglass*, 8 Barb., 81; 2 C. R., 123.

Also from an order, denying a motion that an undertaking given on the arrest of a defendant be delivered up, and an *exoneretur* entered. *Columbus Insurance Company vs. Force*, 8 How., 353.

It is clear, therefore, from the above series of decisions that, although the mere exercise of discretion on the part of the single judge is not, as a general rule, reviewable; still, whenever in the exercise of that discretion, any rule of law has been violated, or any existent or acquired legal right of the adverse party interfered with, the order interfering with that right will, in all cases, be appealable; and that the grounds on which the court below has acted, in making the decision sought to be reviewed, will, in many cases, be material to the question of appealability.

(i.) SUBDIVISION 4.—ORDER DETERMINING ACTION.

This provision is in close analogy to subdivision 2 of section 11, giving to the Court of Appeals cognizance of appeals of a similar nature.

This class of orders are comparatively infrequent, and have not been made the subject of such controversy.

In *Quinn vs. Case*, 2 Hilt., 467; 9 Abb., 160, an order, denying a motion for leave to serve an answer after default suffered, was held to belong to this class, and to be reviewable as of right.

An order, removing a cause into the Federal courts, was held not to fall within the cognate provision of section 11, above referred to, in *Illius vs. New York and New Haven Railroad Company*, 3 Kern., 597.

Under the same provision, it has been held that an order, vacating judgment on a sham answer, on the ground that, by reason of matter

occurring between answer and judgment, the plaintiff's cause of action had ceased to exist, decided the merits, and prevented the entry of a reviewable judgment, and was, as such, appealable. *Edson vs. Dillaye*, 17 N. Y., 158.

But an order setting aside a judgment for irregularity, and substantially allowing the action to proceed, is not thus reviewable. *Jones vs. Derby*, 16 N. Y., 242. See also, as to an order granting the statutory new trial in ejectment, *Evans vs. Millard*, 16 N. Y., 619.

(j.) SUBDIVISION 5.—APPLICATIONS AFTER JUDGMENT.

This provision is, again, in analogy with that contained in section 11, subdivision 3, in relation to the jurisdiction of the Court of Appeals in such cases, with the addition of a formal declaration, implied in the other provision, that the order appealed from must affect a substantial right.

In *Heinemann vs. Waterbury*, 5 Bosw., 686, an order, requiring the prevailing party to cause a judgment-roll to be filed, was held appealable.

So likewise, as to an order, opening a judgment against the corporation of New York, on application of the comptroller, under the statutory provisions for that purpose. *Joyce vs. Mayor of New York*, 20 How., 439; 12 Abb., 309.

So also, as to an order, denying an application to vacate the satisfaction of a judgment. *Ward vs. Wordsworth*, 1 E. D. Smith, 598.

But the cases under this subdivision, have chiefly arisen, in relation to orders made in supplementary proceedings. As to the appealability of this class of orders, see *Hatch vs. Weyburn*, 8 How., 163. See also, as to the practice, before the amendment of 1851, *Conway vs. Hitchins*, 9 Barb., 378.

In *O'Neil vs. Martin*, 1 E. D. Smith, 404, an order, dismissing supplementary proceedings, was held appealable, and reversed, on the ground that, on an application of this nature, it was erroneous to inquire into the merits of the judgment, under which they were taken.

So far as an order, made in these proceedings, rests in discretion, as, for instance, the denial of a motion for application of property, and to punish for contempt, the exercise of that discretion will not be reviewed. *Vide Joyce vs. Holbrook*, 2 Hilt., 94; 7 Abb., 338.

The appeal will only lie at the instance of the party actually aggrieved. Thus, the judgment-debtor himself, cannot review the order of the court, directing the application of moneys by a third party. *Foster vs. Prince*, 18 How., 258; 8 Abb., 407.

The appeal, in these cases, lies properly in the county of venue of the action, and, when the order is made by a judge of another district, his

order should be entered, and the appeal therefrom heard in the original district. *Gould vs. Torrance*, 19 How., 560.

In *Smith vs. Hart*, 11 How., 203, it was held that the order of a county judge, in proceedings originating in a justice's or county court, was not reviewable, on appeal to the Supreme Court, under this section, as it then stood, but this difficulty seems now to be provided for, by the clause added in section 344, on the amendment of 1860, above noticed.

(k.) SPECIAL PROCEEDINGS.

Under chapter 270 of 1854, p. 592, orders in special proceedings, are reviewable on appeal, as if made in an ordinary action. Before the passage of that statute, they could not, it seems, be reviewed. *In re Fort Plain and Cooperstown Railway Company*, 3 C. R., 148.

The detailed consideration of these cases lies out of the province of the present work, but the same general principles hold good, as to the practice upon such appeals, when taken, and the extent to which the action of the special term will be reviewed.

As to the action of the general term, in street-opening cases, not being further reviewable, see *Matter of Canal and Walker Streets*, 2 Kern., 406. See likewise, generally, *New York Central Railroad Company vs. Marvin*, 1 Kern., 276.

An order, granting leave to sue the estate of a lunatic, was held appealable, and was modified, in *Williams vs. Estate of Cameron*, 26 Barb., 172.

(l.) NEW YORK COMMON PLEAS.—PRACTICE AS TO REHEARING.

The orders of the single judge may, in this tribunal, be reviewed, by means of a certificate for rehearing, though not, in strictness, appealable. See rule of the 22d of March, 1851, above cited in section 313. The same practice had been before decided to be admissible, in *Perry vs. Moore*, 2 E. D. Smith, 32; 3 C. R., 221. But its adoption has hitherto been confined to the court in question, and, even in that tribunal, it is treated strictly as a matter of favor.

Where, on the contrary, an order is appealable, under any of the subdivisions of 1849, the review is a matter of right, and the rule is wholly inapplicable; nor need any certificate be obtained, as there prescribed. See *Matthews vs. Jones*, 1 E. D. Smith, 429; *Quinn vs. Case*, 2 Hilt., 467; 9 Abb., 160.

Where the order of the single judge rests, in any manner, in the exercise of pure discretion, not involving any strict legal right, it may be reviewed in this tribunal, on such a certificate, but, without one, an appeal will be unavailable.

See, as to an order opening a judgment by default, as matter of favor, *Mead vs. Mead*, 2 E. D. Smith, 223; *Churchill vs. Mallison*, 2 Hilt., 70; or, opening an inquest, *Muldenor vs. McDonogh*, 2 Hilt., 46.

See also, as to an order extending the time to make a motion, *Hunt vs. Bennett*, 2 E. D. Smith, 53. As to the refusal of leave to amend, *Hatfield vs. Secor*, 1 Hilt., 535. As to the imposition of costs, on granting such leave, *Smith vs. Dodd*, 4 E. D. Smith, 643. As to an order of reference, in a case, referable in its nature, *Ubsdell vs. Root*, 1 Hilt., 173; 3 Abb., 142.

In cases of this description, the certificate is usually applied for, and obtained from the judge, at the time of the decision of the motion, or immediately afterwards, whilst the subject is fresh in his mind. The application is, of course, strictly *ex parte*, and founded upon the papers already before him, nor is any special form of certificate prescribed. The course of practice on that certificate, if obtained, is plainly prescribed by the rule.

§ 316. *Course of Practice on Appeal from Order.*

(a.) ENTRY OF ORDER.

Before it can be properly appealed from, an order must be entered with the clerk, as to which special provision is made by section 350, as regards *ex parte* orders, giving the aggrieved party the right to compel that entry. See also *Savage vs. Relyea*, 3 How., 276; 1 C. R., 42; *Nicholson vs. Dunham*, 1 C. R., 119. See also, as to the power of the unsuccessful party to enter the order himself, *Peet vs. Cowenhoven*, 14 Abb., 56 (61).

As to the propriety of entering an order in supplementary proceedings, in the county of venue of the action, when made by a judge of another district, see *Gould vs. Torrance*, 19 How., 560.

(b.) NOTICE, &c.

An appeal from an order is brought on, upon notice, analogous, in all respects, to that on appeal from a judgment (Code, section 327), and it must be brought, within thirty days after written notice of the order appealed from (Code, section 332). See these subjects above considered, in sections 305 and 306. No formal return or certificate by the clerk is necessary.

(c.) SECURITY NOT ESSENTIAL.—STAY OF PROCEEDINGS, HOW OBTAINED.

The Code makes no provision, and, at first, considerable discussion arose, upon this subject. The proposition that, where no stay is asked for, security need not be given, on an appeal from an order, is now,

however, conclusively established. See *Nicholson vs. Dunham*, 1 C. R., 119; *Beach vs. Southworth*, 6 Barb., 173; 1 C. R., 99; *Allen vs. Johnson*, 2 Sandf., 629; *Stone vs. Carlan*, 2 Sandf., 738; 3 C. R., 103; *Emerson vs. Burney*, 6 How., 32; 1 C. R. (N. S.), 189; *Dorlon vs. Lewis*, 7 How., 132; *Ten Broeck vs. Hudson River Railroad Company*, 7 How., 137; *Reynolds vs. Freeman*, 4 Sandf., 702; *Bacon vs. Reading*, 1 Duer, 622; 11 L. O., 122. See also, as to appeals in special proceedings, under the statute of 1854, *Boyd vs. Bigelow*, 14 How., 511.

It has been laid down, in several cases, that the mere taking of such an appeal operates, *per se*, as a stay of proceedings under the order appealed from. See *Emerson vs. Burney*, 6 How., 32; 1 C. R. (N. S.), 189; *Trustees of Penn Yan vs. Forbes*, 8 How., 285; *Cook vs. Pomeroy*, 10 How., 103; *Stewart vs. Saratoga and Whitehall Railroad Company*, 12 How., 435. See, however, *Valton vs. National Loan Fund Life Assurance Society*, 19 How., 515.

This conclusion has, however, been combated, and may be considered as completely overruled, by the following series of decisions, holding to the contrary, and that, if a stay of proceedings be desired, it will be necessary to apply to the court for a special order upon the subject: *Dorlon vs. Lewis*, 7 How., 132; *Ten Broeck vs. Hudson River Railroad Company*, 7 How., 137; *Story vs. Duffy*, 8 How., 488; *Winterhoff vs. Lugat*, 13 Abb., 182; *Bacon vs. Reading*, 1 Duer, 622; 11 L. O., 122; *Hibbard vs. Burwell*, 11 How., 572; *Johnson vs. Scriven*, 3 Abb., 208; *Hicks vs. Smith*, 4 Abb., 285; *Ferry vs. Bank of Central New York*, 9 Abb., 100; *Genin vs. Chadsey*, 12 Abb., 69; *O'Neil vs. Martin*, 1 E. D. Smith, 404.

Such an order cannot, it would seem, be made *ex parte* by a judge at chambers, as, being for an indefinite period, it would fall under the prohibition in section 401, subdivision 6. *Vide Lottimer vs. Lord*, 4 E. D. Smith, 183; *Bank of Genesee vs. Spencer*, 15 How., 14. But, where made by the court, it has been held to be valid. *Vide Harris vs. Clark*, 10 How., 415.

When applied for in the usual manner, on motion, the court has full power to grant a stay of this description, and will, as a general rule, exercise that power, in all proper cases, upon proper terms, which will be imposed according to the requirements of the case, and will, as a general rule, involve the giving of adequate security, where that requirement can properly be insisted on. *Vide Mathews vs. Jones*, 1 E. D. Smith, 429 (431); *Johnson vs. Scriven*, 3 Abb., 208; *Genin vs. Chadsey*, 12 Abb., 69. Or the motion may be partly granted, and partly denied. See *Rogers vs. McLean*, 10 Abb., 458; *Tiers vs. Carnahan*, 3 Abb., 69.

But the mere giving of security will not effect a stay, on appeals

under this section, without a special order. *Vide Cook vs. Dickerson*, 1 Duer, 679; *Forbes vs. Oaks*, 2 Abb., 120; *Ford vs. David*, *infra*.

Where the order is clearly unappealable, or there exists any other good reason for that course, the application may be denied. *Vide Forbes vs. Oaks*, *supra*; *Ford vs. David*, 5 Duer, 684; 13 How., 193; 3 Abb., 385.

Or, if improvidently granted, such a stay will be vacated, on motion. *Moncrief vs. Moncrief*, 10 Abb., 315.

And, if granted, such stay has only a direct, and not a collateral operation, beyond the actual terms of the order. *Vide Ferry vs. Bank of Central New York*, 9 Abb., 100; *Weeks vs. Smith*, 3 Abb., 211.

Whether, on the appeal from the order of a county judge, provided for, in 1860, by amendment of section 344, security is not still requisite, as upon an "appeal to the Court of Appeals," under the combined operation of that section and section 345, as it stands, seems more than questionable. As yet, the point does not appear to have been made the subject of decision.

(d.) COURSE ON BRINGING TO HEARING.

Appeals from orders, sustaining or overruling a demurrer, are, by rule 40, classed among enumerated motions, and therefore the same course must be pursued, as to the printing and service of cases and points, noticing, placing on the calendar, &c., as in the case of an appeal from a judgment. See last chapter, section 310. See, as to the same practice, before express provision was made by the rule in question, *Reynolds vs. Freeman*, 4 Sandf., 702.

And, where an appeal from an order refusing a new trial, is brought up, in connection with an appeal from the judgment, on exceptions, it will generally be the more convenient course to print and serve the papers and points on both, in connection with each other.

But, as regards appeals from orders in general, the preparation of a printed case and printed points is not necessary, though, where the point involved is of importance, it may sometimes be found a convenient practice.

The appeal, when brought, must, in the Supreme Court, be noticed for the first day of the general term, or sitting of the court, as a non-enumerated motion, and that notice should be accompanied with copies of the affidavits and papers, on which the same is made, as provided for by rule 42. In relation to the precedence which may be claimed in certain classes of cases, see above, section 310, and statutes there cited.

Appeals from orders, allowing a provisional remedy, are also entitled to a special precedence, under section 401, subdivision 5.

The papers on which the appeal is to be heard, consist of the notice of appeal, the order appealed from, and the papers on which the court below acted in making that order. If any opinion has been given by the court below, it will be proper to add it. As to the necessity of all papers being before the appellate tribunal, on which the court below acted, in making the order appealed from, *vide Case of Empire City Bank*, 18 N. Y., 199; 8 Abb., 192, note.

On the appeal from a county judge's order, given by section 344, on the amendment of 1860, all that is strictly required is "a copy of the papers on which the order was made," but it is obvious that the order itself, and the notice of appeal, must necessarily be subjoined, in order to bring the question properly before the court.

When not printed, a sufficient number of copies of these papers should be prepared, for the use of the judges upon the hearing.

A note of issue should be filed with the clerk, in the usual manner, specifying the nature of the appeal, in order to its being properly placed on the non-enumerated branch of the general term calendar. Special provision is made on this subject, in the second district, by No. 2 of the rules of the 24th of October, 1856, above cited in section 313.

In the Superior Court, the practice is different, appeals of this nature being heard on each Saturday during the general term, for which time they may be noticed, and brought on as motions, no calendar being made. And the same course may be adopted, as regards orders sustaining or overruling a demurrer; they may be brought on in that manner, or placed on the general calendar, as enumerated motions, at the option of the moving party. See rule 7 of that court, above cited in section 313.

In the New York Common Pleas, this class of appeals must be submitted, at the Saturday of the general term. See rule 4 of that court, and supplementary rule of the 2d of May, 1857, also cited above. This tribunal requires certified copies of the papers used on the motion, to be provided, instead of the originals. One copy will be sufficient for the use of the court. A note of issue should be filed, in the usual manner, stating the nature of the appeal.

(e.) INCIDENTS TO HEARING.

Where the order complained of is appealable, the appellant can claim a hearing at general term, as a matter of right. *Gracie vs. Freeland*, 1 Comst., 228; 3 How., 218. See also *Dillaye vs. Blair*, 2 Comst., 189; 3 How., 422. But, in a case where an ulterior appeal would not lie, the Court of Appeals refused to interfere. *Vide Marvin vs. Seymour*, 1 Comst., 535; 3 How., 340; 1 C. R., 111.

An appeal of this nature is subject to dismissal, for want of due

prosecution, in the same manner as other proceedings in a cause. *Hogan vs. Brophy*, 2 C. R., 77.

As to an appeal in supplementary proceedings, being properly cognizable, in the county of venue of the action, *vide Gould vs. Torrance*, 19 How., 560.

The party who appeals from an order, will be considered as admitting the truth of uncontradicted allegations of his adversary. *Vide Union Bank vs. Mott*, 17 How., 353; 9 Abb., 106.

Where all the papers, on which the court below acted, are not before the appellate tribunal, it will be error to reverse the order appealed from, for want of jurisdiction. *Case of Empire City Bank*, 18 N. Y., 199; 8 Abb., 192.

Where the question raised upon an appeal, has been disposed of by means of another proceeding, it will be proper to dismiss it. *Lambert vs. Snow*, 2 Hilt., 501; 17 How., 517; 9 Abb., 91.

So also, a party, who has availed himself of any privilege granted by an order, cannot bring, or if, after appeal taken, he so avail himself, cannot maintain his appeal, and it will properly be dismissed. *Vide Lanman vs. The Lewiston Railroad Company*, 18 N. Y., 493; *Radway vs. Graham*, 4 Abb., 468; *Peel vs. Elliott*, 16 How., 483.

Formal and preliminary objections, not involving the merits, will not be considered on appeal, unless it affirmatively appears that they were taken, and overruled on the hearing below. *Merritt vs. Thompson*, 1 Hilt., 550. Nor, on the hearing, will the court go behind the order appealed from, but leave the party to his application below. *Ehle vs. Haller*, 6 Bosw., 661; 10 Abb., 287.

As to the power of the general term, to grant additional relief, on modifying an order appealed from, *vide Martin vs. Kanouse*, 2 Abb., 390.

And, even where an order was not properly appealable, a rehearing has, where the circumstances called for it, been granted. *Vide Bank of Geneva vs. Reynolds*, 20 How., 18; 12 Abb., 81.

On the decision being pronounced, the prevailing party will of course enter and serve the order of affirmance or reversal, as the case may be, in the usual manner.

Where, on affirmance of an order denying a new trial, the respondent also took a direction for affirmance of his judgment, it was held erroneous, and that portion of it vacated, on motion. *Miller vs. Eagle Life and Health Insurance Company*, 3 E. D. Smith, 184.

As to the incidents of an injunction, obtained or continued pending an appeal, and its being in effect a new proceeding, *vide Hoyt vs. Carter*, 7 How., 140; *Town of Guilford vs. Cornell*, 4 Abb., 220.

CHAPTER IV.

APPEALS TO COURT OF APPEALS.

§ 317. *Statutory and Other Provisions.*

THE provisions of the Code, on the subject of the jurisdiction of this tribunal, have been already cited, and the changes made from time to time by the legislature, noticed above, in book I., chapter II., section 9.

Its jurisdiction, as there defined, is supervisory in its nature, and controls the action of all other courts within the state. Its decisions are, therefore, of paramount authority, whilst unimpeached or unreversed by its own action, which occasionally, though rarely occurs. It stands, in this respect, upon the same footing as the Court of Errors, under the former system, for which it was substituted, by the Constitution of 1846.

It may, however, be convenient to reprint the citation of that part of the provisions in question which more immediately relates to the subject of the present chapter, as those provisions stand now.

The jurisdiction and powers of this tribunal are thus defined by the Code, sections 11 and 12:

§ 11. The Court of Appeals shall have exclusive jurisdiction to review upon appeal, every actual determination hereafter made at a general term, by the Supreme Court, or by the Superior Court of the city of New York, or the Court of Common Pleas for the city and county of New York, or the Superior Court of the city of Buffalo, in the following cases, and no other:

1. In a judgment, in an action commenced therein or brought there from another court; and upon the appeal from such judgment, to review any intermediate order, involving the merits, and necessarily affecting the judgment.

2. In an order affecting a substantial right, made in such an action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken, and when such order grants or refuses a new trial; but no appeal to the Court of Appeals, from an order granting a new trial, shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant. Upon every appeal from an order granting a new trial, if the Court of Appeals shall deter-

mine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant; and, after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages, or other proceedings to render the judgment effectual, may be there had, in cases where such subsequent proceedings are requisite.

3. In a final order affecting a substantial right, made in a special proceeding, or upon a summary application, in an action, after judgment.

But such appeal shall not be allowed, in an action originally commenced in a court of a justice of the peace, or in the Marine Court of the city of New York, or in an assistant justice's court of that city, or in a justice's court of any of the cities of this state, unless any such general term shall, by order duly entered, allow such appeal, before the end of the next term after which such judgment was entered. The foregoing prohibition shall not extend to actions, discontinued before a justice of the peace, and prosecuted in another court, pursuant to sections 60 and 68 of the Code.

§ 12. The Court of Appeals may reverse, affirm, or modify the judgment or order appealed from, in whole or in part, and as to any or all of the parties; and its judgment shall be remitted to the court below, to be enforced according to law.

By the 13th section, the regular terms of the court are prescribed to be held at Albany, on the first Tuesday of January; fourth Tuesday of March; third Tuesday of June, and last Tuesday of September, with power to appoint one of such terms, to be held in the city of New York.

The same section gives power to appoint additional terms. It concludes thus:

The court may, by general rules, provide what causes shall have a preference on the calendar. On a second and each subsequent appeal to the Court of Appeals, or when an appeal has once been dismissed for defect or irregularity, the cause shall be placed upon the calendar, as of the time of filing the first appeal.

Section 14 provides thus, as to rehearings:

§ 14. The concurrence of five judges is necessary to pronounce a judgment. If five do not concur, the case must be reheard.

But no more than two rehearings shall be had; and if, on the second rehearing, five judges do not concur, the judgment shall be affirmed.

The following provision was inserted in section 460, on the amendment of 1858:

In all cases of appeal to the Court of Appeals, in actions which were originally commenced in the late Court of Chancery of this state, the Court of Appeals shall review the cause, upon the facts and the law, without any statement or specification of facts found, or any exception taken, at the trial of any or either of them. And it shall be, and is hereby declared to be the

duty of the Court of Appeals, in any and all such cases, to review the whole matter, upon the evidence as well as the law.

The following provision was added to section 268 by the amendment of 1860. That section relates to causes tried by the court, without a jury.

No finding of facts by the general term shall be required, for the purpose of review in the Court of Appeals; and, if the judgment be reversed at the general term, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal; and, in that case, the question whether the judgment should have been reversed, either upon questions of fact or of law, shall be open to review in the Court of Appeals.

The provisions of this section, and also of section 272, as they are hereby amended, shall apply to appeals now pending, as well as to those hereafter brought.

N. B.—The effect of this amendment is virtually to abrogate rule 38 of the Supreme Court, providing, in detail, for the preparation and settlement of a finding of facts upon which the decision of the general term was based, and a mere reference to that rule will therefore be sufficient.

In the same year, 1860, the following clause was added, by amendment, to section 272, relating to trial by referees:

When the case, on appeal, shall have been heard and decided at the general term, upon the report of the referee and exceptions, without a case containing the evidence, the decision may be reviewed, in like manner, on appeal to the Court of Appeals. If the judgment be reversed at the general term, and a new trial ordered, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal; and, in that case, the question whether the judgment should have been reversed, either upon questions of fact or of law, shall be open to review in the Court of Appeals.

The following section, being the first of chapter II., title XI., part II. of the Code, has especial reference to appeals to this court:

§ 333. (282.) An appeal may be taken to the Court of Appeals in the cases mentioned in section 11. When any of the courts mentioned therein shall, at general term, render judgment upon a verdict taken subject to the opinion of the court, the questions or conclusions of law, together with a concise statement of the facts upon which they arose, shall be prepared by and under the direction of the court, and shall be filed with the judgment-roll, and be deemed a part thereof, for the purposes of a review in the Court of Appeals.

The provisions of the last preceding section shall apply to any judgment therein mentioned, that has been heretofore rendered, and upon which an

appeal has been brought, and is now pending, or upon which an appeal shall hereafter be brought. When the return has already been filed with the clerk of the Court of Appeals, such statement shall be filed with him, and be deemed a part of such return.

The first sentence constituted the whole of this section, prior to the amendment of 1857, when the rest was added.

The remainder of the chapter from which this section is extracted, though in terms relative to the Court of Appeals, is, in fact, of general application, and has, accordingly, been cited before, in the first chapter of this division of the work. Section 302.

The provisions of the Code, as to appeals, are extended to proceedings in *mandamus*, by chapter 174 of 1859, p. 421, the procedure by writ of error being virtually abolished, and that by appeal substituted, under its provisions.

A statutory preference over all actions, except criminal cases, is given to the following causes, by chapter 167 of 1860, p. 270 :

1. Actions in which executors or administrators are sole plaintiffs or sole defendants.

2. Appeals which prevent the issuing of letters testamentary, or of general administration.

See likewise chapter 280 of 1854, p. 606, giving precedence to certain proceedings between The People and the Corporation of Trinity Church.

See also other cases, in which proceedings are entitled to a general statutory preference, above cited, in chapter II. of the present division, section 310, subdivision, *Formal Proceedings*.

(a.) RULES.

The practice of this court is regulated by special rules, which run as follows. They were originally adopted on the 25th of May, 1849, and have since been made the subject of various amendments, especially in April, 1852, January, 1858, and January, 1862.

They now run as follows :

Rule 1. When the appeal is from a judgment, the return of the clerk of the court below shall consist of certified copies of the notice of appeal, and the judgment-roll. When the appeal is from such an order as is mentioned in the eleventh section of the Code of Procedure, the return shall consist of certified copies of the notice of appeal, the order appealed from, and the papers on which the court below acted in making the order.

Rule 2. The appellant shall cause the proper return to be made and filed with the clerk of this court, within twenty days after the appeal shall be perfected. If he fail to do so, the respondent may, by notice in writing, require such return to be filed within ten days after service of the notice;

and if the return be not filed in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and on an affidavit, proving when the appeal was perfected, and the service of such notice, and a certificate of the clerk that no return has been filed, the respondent may enter an order with the clerk, dismissing the appeal for want of prosecution, with costs; and the court below may thereupon proceed as though there had been no appeal.

N. B.—Prior to the amendment of 1858, the respondent was entitled to enter this order on the mere proof of default, and without previous notice to the appellant.

Rule 3. If the return made by the clerk of the court below shall be defective, either party may, on an affidavit specifying the defect, apply to one of the judges of this court, for an order that the clerk make a further return without delay.

Rule 4. The attorneys and guardians *ad litem*, of the respective parties in the court below, shall be deemed the attorneys and guardians of the same parties respectively in this court, until others shall be retained or appointed, and notice thereof shall be served on the adverse party.

Rule 5. In all calendar causes, a case shall be made by the appellant, which shall consist of a copy of the return of the clerk, and the reasons of the court below for its judgment, or an affidavit that the same cannot be procured. If the case is voluminous, an index to the pleadings, exhibits, depositions, and other principal matters, shall be added.

Every opinion in the cause, at special term as well as at general term, relating to the questions involved in the appeal, is included by the foregoing provision.

Prior to the amendment of 1858, this rule was less stringent as to including the reasons of the court below, nor was any affidavit then required, if they were not procurable.

Rule 6. All cases and points, and all other papers furnished to the court in calendar causes, shall be printed on white writing-paper, with a margin on the outer edge of the leaf, not less than one-and-a-half inch wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long, and three-and-a-half inches wide. The folio, numbering from the commencement to the end of the case, shall be printed on the outer margin of the page. Small pica, solid, is the smallest letter and most compact mode of composition which is allowed. No charge for printing the papers mentioned in this rule shall be allowed as a disbursement in a cause, unless the requirements of the preceding sentence shall be shown, by affidavit, to have been complied with, in all papers printed after August 1st, 1857.

The two concluding sentences were added to the previous text, on the amendment of 1858.

Rule 7. Within forty days after the appeal is perfected, the appellant shall serve three printed copies of the case on the attorney of the adverse party. If he fail to do so, the respondent may, by notice in writing, require

the service of such copies, within ten days after the service of the notice, and, if the copies be not served in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and, on an affidavit proving the default, and the service of such notice, the respondent may enter an order with the clerk, dismissing the appeal for want of prosecution, with costs; and the court below may thereupon proceed as though there had been no appeal.

Prior to the amendment of 1858, the respondent was entitled to enter this order on mere proof of default, without notice to the appellant.

Rule 8. Either party may bring on the argument, on a notice of eight days; which notice, except in criminal cases, shall be for the first day of the term.

A copy of the notice, specifying the judicial district in which the cause originated, shall be furnished to the clerk eight days before the first day of the term.

The clerk shall make a calendar of the causes thus noticed, arranging them in the order in which the returns were filed, specifying the judicial district in which the causes originated respectively.

Copies of the calendar, for the use of the judges, and five other copies to be delivered to the clerk, shall be printed, in like manner as cases and points are directed to be printed.

See below, rule 24, as to the calendar from time to time. Also additional rule of the 30th of September, 1862, as to filing proof of service of the notice with the clerk.

Rule 9. At the commencement of the argument, the appellant shall furnish a printed copy of the case to each of the judges, and shall deliver six other copies to the clerk. Each party shall, at the same time, furnish to each of the judges a printed copy of the points on which he intends to rely, with a reference to the authorities which he intends to cite; and shall deliver six other copies to the clerk, and three copies to the counsel of the adverse party.

The cases, points, and calendars delivered to the clerk shall be disposed of as follows: one copy of each shall be kept by the clerk with the records of the court, one copy shall be deposited in the State Library, one copy shall be deposited in each branch of the library of the Court of Appeals, one copy shall be deposited in the library of the New York Law Institute, and one copy shall be delivered to the reporter.

Rule 10. In all cases, each party shall briefly state upon his printed points the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found. And the court will not hear an extended discussion, upon any mere question of fact.

Rule 11. The party who has noticed and placed the cause on the calendar for argument, may take judgment of affirmance or reversal, as the case may be, if the other party shall neglect to appear and argue the cause, or shall neglect to furnish and deliver cases or points as required by the ninth and tenth rules.

This rule is now abrogated, and rule 25 substituted for it, by the amendment of January, 1862. See that rule, below cited. It only governs the previous practice.

Rule 12. In the argument of calendar causes and motions, only one counsel will be heard on each side, unless the court shall otherwise direct.

Rule 13. Criminal cases shall have a preference, and may be moved, on behalf of the people, out of their order on the calendar.

Rule 14. Causes which have not been exchanged, may be submitted, at any time in term, on printed arguments. Exchanged causes cannot be submitted, until reached upon the calendar.

That portion of the above rule which refers to exchanged causes, was added on the amendment of 1858.

Rule 15. Motions will be heard on the morning of the first day, and the morning of each following Tuesday and Friday, during the term, before taking up the calendar.

Where notice has been given of a motion, if no one shall appear to oppose, it will be granted as of course.

If a motion be not made on the day for which it has been noticed, the opposing party will be entitled, on applying to the court at the close of the motions for that day, to a rule, denying the motion, with costs.

The last sentence was added on the amendment of 1858.

Rule 16. The *remittitur* shall contain a copy of the judgment of this court, and the return made by the clerk of the court below; and shall be sealed with the seal, and signed by the clerk of this court.

Rule 17. When a decree or order shall be affirmed or reversed by the default of either party, the *remittitur* shall not be sent to the court below, unless this court shall otherwise direct, until ten days after notice of the affirmance or reversal shall have been served on the attorney of the party in default. Service of the notice shall be proved to the clerk by affidavit, or by the written admission of the attorney on whom it was served.

This rule is also virtually abrogated by rule 25.

Rule 18. The time prescribed by these rules for doing any act, may be enlarged by the court or by either of the judges thereof; and either of the judges may make orders to stay proceedings, which, when served with papers and notice of motion, shall stay the proceedings, according to the terms of the order. Any order may be revoked or modified by the judge who made it; or, in case of his absence or inability to act, by either of the other judges.

Rule 19. These rules shall take effect on the first of July next (1849); from which time all former rules are abrogated, except so far as it may be necessary to follow them, upon appeals and writs of error which shall be then pending.

The original rules of 1849 closed here.

Rule 20. Ten causes only will be called on any day; but, after such call, causes ready on both sides will be heard in their order. Any cause which is regularly called and passed, without postponement by the court for good cause shown, at the time of the call, will be placed on all subsequent calendars, as if the return had been filed on the day when it was so passed.

Causes upon the calendar may be exchanged one for another, of course, on filing with the clerk in court a notice of the proposed exchange, with the numbers of the causes, signed by the respective attorneys or counsel. Upon all subsequent calendars, each of said causes will take the place due to the date of the filing of the return in the other.

Any cause, except the first ten upon the calendar, may be struck therefrom before it is reached, of course, and without prejudice, by the clerk in court, on consent of the parties who placed the same upon the calendar, at any time during the first week of the term.

This rule was adopted January, 1853. *Vide* 1 Seld., 580. The concluding sentence of the first clause is now abrogated by rule 26. The last clause was amended, and its operation extended, in 1858. It may probably fall into disuse, as there seems to be no object to be answered by striking a cause from the calendar, under the present system.

Rule 21. The clerk must keep a memorandum of such exchanged and passed causes, and place them, upon all subsequent calendars, in accordance with the foregoing provisions.

Rules 6, 10, 20, and 12, with a notice that "14 copies of cases and points are required," must be printed on the first leaf of the calendar.

Added in January, 1853. *Vide* 1 Seld., 580. The last clause subjoined, on the amendment of 1858. Abrogated, so far as regards passed causes, by rule 26.

Rule 22. In the argument of a cause, not more than two hours shall be occupied by each counsel, except by the express permission of the court.

Added upon the amendment of 1858.

The rule adopted on the 24th of January, 1854, and amended June term, 1859, 18 N. Y., 601, empowering a reservation of any case, except, originally, the first ten, and subsequently the first thirty on the calendar, is now wholly abrogated, and the former practice, in this respect, annulled by the present rule 25. An exception is, it is true, made as to extraordinary cases, but it is clear that these must now be made the subject of a special application.

The following rule was adopted in June term, 1860. *Vide* 21 N. Y., 601. It may be considered as bearing the number 23:

According to existing laws, causes which are preferred take their preference in the following order:

1st. Criminal actions.

2d. Cases of probate, in which the appeal prevents the issuing of letters testamentary or of general administration.

3d. Appeals, in actions in which the sole plaintiffs or defendants are executors or administrators.

4th. All other preferred causes.

Any party claiming a preference, must so state in his notice of argument to the opposite party, and to the clerk, and he must also state the ground of such preference, so as to show to which of the above classes the case belongs. In making up the calendar, the clerk will place the preferred causes at the head, in the order above prescribed. A preferred cause, being once passed without reservation, will take its place in subsequent calendars without preference.

The following were added by amendment, at the January term, 1862. See 23 N. Y., 1. No. 25 abolishes No. 11 of those above cited. Rules 20 and 21 are also modified by rule 26 :

Rule 24. The printed calendar for the present January term, and for each succeeding January term, shall stand as the calendar for the entire year. Causes noticed and placed upon the calendar for the January term of any year, shall be considered as noticed for all the subsequent terms. Additional causes may be noticed for the March term, 1862, which shall be printed with their appropriate numbers, and annexed to the calendar. After the January term in each year hereafter, no causes, except such as are by law entitled to a preference, will be permitted to be placed upon the calendar without the direction of the court.

Rule 25. Judgments by default will not be allowed ; nor will causes be reserved, or set down for hearing upon a particular day, except in extraordinary cases. When a cause is called in its order upon the calendar, it must be either argued, submitted, or passed. If either party appear alone, he may, at his option, be heard orally, or submit the case upon his printed brief. If the appellant only appears, he shall furnish the court with the usual number of printed copies of the case, and of his points ; if the respondent, he shall hand to the court the copies of the case served upon him, and fourteen printed copies of his points. The party thus appearing, and arguing, or submitting his case, shall hand to the clerk a printed copy of his brief, to be delivered, whenever called for, to the opposite party, who may, at any time within twenty days after the hearing, furnish to each member of the court, and serve upon the opposite party a printed answer to such brief, which may be replied to in like manner, at any time within fifteen days after such service.

Rule 26. The call of the calendar at the second, and each subsequent term in the year, will commence at the point where it terminated at the previous term ; except that causes placed upon the calendar at the next March term, if entitled by their date or otherwise to priority over the causes remaining upon the calendar, will be first called. Causes which are passed, and which of consequence go to the foot of the calendar, will resume their original places upon the calendar for the ensuing year.

The following additional rule was made by the court, on the 30th of September, 1862 :

Rule 27. In all cases, where the notice of argument is filed with the clerk of this court, there shall be filed with the same, due proof or admission of the service of notice of argument upon the adverse party, and the clerk is directed not to enter on the calendar, any cause, in which proof of the service of said notice is not filed with him.

The following memorandum of miscellaneous practice at the terms of this court, not included in the rules, appears at 7 How., 240 :

All the terms are held at the Capitol at the city of Albany. Four argument terms in a year.

N. B.—One term may now be held in the city of New York.

The court opens at 10 o'clock, A. M., on the first Tuesday of January, fourth Tuesday of March, third Tuesday of June, and the last Tuesday of September.—N. B. More usually at nine thirty, A. M.

A term for consultation and decisions, to finish up the year's business, is held in the latter part of December in each year.

The chief judge has control of the calendar. All propositions, in reference to the arrangement or disposition of causes, should be addressed to him. (The other members of the court are usually consulted.)

Causes struck off, under the rule, are not included in the ten called each day, under the rule.

The clerk publishes in the newspapers, at Albany, all the proceedings of the court each day, during the term.

A cause, when ready on both sides, may be submitted upon printed arguments and points, on any day during the term.

N. B.—Except exchanged causes. *Vide* rule 14.

When causes are decided at the close of the term, the opinions are delivered to the reporter, not to the clerk. In cases of motion, the opinions are usually left with the clerk, among the motion papers.

Tuesdays and Fridays of each week are motion days.

The court usually adjourn, for the term, on Friday of the fourth week.

Causes argued or submitted, are usually decided at the close of the next succeeding term.

See new Rule, No. 28, adopted January, 1863. *Infra*, p. 829.

§ 318. *Questions as to Jurisdiction, arising under Section 11.*

The nature and extent of the jurisdiction of this court has been already considered, in a general point of view, and sundry decisions cited, in chapter II., book I. of the present work. See especially, section 10.

It now becomes necessary to consider, in greater detail, that class of cases which bears rather upon the exercise, than upon the nature of the jurisdiction thus conferred.

The more convenient order for this consideration would appear to be, to take the different subdivisions of section 11, *seriatim*, and then to add one or two subdivisional heads, of general, rather than of special application.

It will be seen, by reference to that section, that the jurisdiction thus conferred is exclusive, and that it is confined to the cases there prescribed, and cannot be extended to any other. These provisions cannot, of course, be construed, so as to abrogate the right of ulterior review in the Federal tribunals, in those few cases in which that right exists, by the Constitution and statutes of the United States.

(a.) DECISION OF GENERAL TERM ONLY REVIEWABLE.

The first condition imposed by the section is, that an appeal, when taken, must be from "an actual determination made at a general term" of one of the different courts of superior jurisdiction there enumerated.

To be reviewable in this court, therefore, the question must have been passed upon in that branch of the court below. In no other cases will the appeal lie. The objection, if taken, goes to the jurisdiction, and the rule is inflexible. See *Gracie vs. Freeland*, 1 Comst., 228; 3 How., 218; *The Mayor of New York vs. Schermerhorn*, 1 Comst., 423; 3 How., 334; 1 C. R., 109; *Lake vs. Gibson*, 2 Comst., 188; 3 How., 420; *Kanouse vs. Martin*, 6 How., 240; 1 C. R. (N. S.), 385.

And there must, for such purpose, be an actual determination of the case, upon a hearing duly had. A judgment, entered upon stipulation only, cannot be reviewed, even although both parties desire that the appeal from it be heard upon the merits. *Gridley vs. Daggett*, 6 How., 280; 1 C. R. (N. S.), 386. Nor is a judgment or order taken by default appealable to this tribunal. *Swarthout vs. Curtis*, 4 Comst., 415; 5 How., 198; 3 C. R., 215.

But this rule does not preclude the review of a proceeding, submitted on the papers, and in which the questions involved have been actually examined and decided by the court, even though such submission be made by one party only, without opposition by the other. *Seneca Nation of Indians vs. Knight*, 19 N. Y., 587.

In *Cook vs. New York Floating Dry Dock Company*, 18 N. Y., 229, it was held, that the decision of the general term, reversing an order granting a new trial on a case and exceptions, was a final determination, appealable to this court, without going through the ceremony of an appeal from the judgment entered up in favor of the plaintiff, in consequence of that decision.

But although, as a general rule, every actual determination of the general term is reviewable, in cases falling within the purview of the section, still, where it had been stipulated between the parties that such

determination should be final, the court above executed the stipulation, and dismissed the appeal, as brought in violation of the agreement. *Townsend vs. Masterson, &c., Stone Dressing Company*, 15 N. Y., 587.

And the same course will be pursued in special cases, where such determination of the court below is declared by statute to be final and conclusive. *McAllister vs. Albion Plank Road Company*, 6 Seld., 353; *Matter of Canal and Walker Streets*, 2 Kern., 406; *New York Central Railroad vs. Marvin*, 1 Kern., 276; *Commissioners of Gaines vs. Albion Plank Road Company*, 7 How., 301.

(b.) SUBDIVISION 1.—PRIOR PROCEEDINGS REVIEWABLE WITH JUDGMENT.

Under this provision, the action of the special term of the court below on the original hearing, comes up for general review, in connection with that of the general term, on the ulterior decision actually appealed from; and, on a reversal of the latter, the former may be approved and affirmed. See, as an instance of this mode of action, *Marquat vs. Marquat*, 2 Kern., 336.

Where, in a suit for an accounting, the case came up for review on the final decree, it was held that, on such appeal, the original order of reference was reviewable, and the decree was reversed for a defect in such order. *Wing vs. Huntington*, Seld. Notes, December 31st, 1853, p. 38. See also generally, as to principle, that an interlocutory decree or order is not properly reviewable, until after the entry of final judgment, but then comes up in due course for revision, if erroneous, on the appeal from that judgment, *infra*, section 318, second subdivision, and decisions there cited.

Although an order, conducing to the judgment, may not in itself be reviewable, if taken by default, still, in the general review, it will be proper to have that order before the court, to show that the proceedings actually reviewed were properly taken. *Swarthout vs. Curtis*, 4 Comst., 415; 5 How., 198; 3 C. R., 215.

In *Cook vs. New York Floating Dry Dock Company*, 18 N. Y., 229, an order, granting an extra allowance, was brought up for review, in connection with the judgment, and a motion to dismiss the appeal was denied. See, however, dissenting opinion of Strong, J., p. 232, holding that such an order is not appealable. The prevailing opinion does not, in fact, touch upon this branch of the motion, but proceeds on grounds applicable to the judgment only.

In *James vs. Chalmers*, 2 Seld., 209; 1 C. R. (N. S.), 413, an order, denying a motion to stay the trial of one cause, till the decision of another, was held not to be an order involving the merits, or necessarily affecting the judgment, and, therefore, not to be reviewable, on the appeal from that judgment.

To be reviewable, on the appeal from the judgment, an order complained of must have been appealed from, and its validity passed upon by the court below. *Vide Jones vs. Derby*, 16 N. Y., 242.

(c.) SUBDIVISION 2.—ORDER DETERMINING ACTION.

To be appealable under the first branch of this subdivision, the order to be reviewed must affect a substantial right; must, in effect, determine the action; and must, in so doing, prevent a judgment from which an appeal might be taken.

An order, vacating judgment on a sham answer, on the ground that, between the time of striking out the answer, and the actual entry of judgment, matter had occurred, by reason of which the plaintiff's cause of action had ceased to exist, was held virtually to determine the action and prevent a judgment, and, as such, to be appealable under this subdivision, in *Edson vs. Dillaye*, 17 N. Y., 158.

An order dismissing an appeal, on the ground that it was taken too late, was held to be appealable on similar grounds, in *Bates vs. Voorhees*, 20 N. Y., 525.

A final determination on an order of interpleader, awarding the fund, was held to be equivalent to a judgment, and to be appealable to this court, in *Kirby vs. Fitzpatrick*, 18 N. Y., 484.

An order which does not, in fact, determine the controversy, but leaves it to proceed, is not appealable, whatever may be its formal purport.

So held, as to an order removing a cause into the Federal courts. *Illius vs. New York and New Haven Railroad Company*, 3 Kern., 597. See also, as to an order denying such a motion, *Kanouse vs. Martin*, 6 How., 240; 1 C. R. (N. S.), 385.

So, likewise, as to an order setting aside a judgment and execution for irregularity, but omitting any directions as to the previous proceedings. *Jones vs. Derby*, 16 N. Y., 242.

So, also, as to an order, reversing one granting leave to amend a judgment. *New York Ice Company vs. North Western Insurance Company*, 21 How., 296; 12 Abb., 414.

An order for judgment on a demurrer is not of this nature. The only mode of review in this court, is on appeal from the judgment. *Hollister Bank of Buffalo vs. Vail*, 15 N. Y., 593. See also *Paddock vs. Springfield Fire and Marine Insurance Company*, 2 Kern., 591; *Ford vs. David*, 12 How., 193; 3 Abb., 385; 5 Duer, 684.

(d.) APPEAL FROM ORDER GRANTING OR REFUSING A NEW TRIAL.

As above noticed, in book I., chapter II., section 9, when treating of the general jurisdiction of this tribunal, this portion of the powers conferred by the legislature, has been subject to continual fluctuation.

In the original Code, and down to 1851, these orders were not reviewable. In the latter year, the power was conferred in general terms. In 1852, it was again taken away, and so remained till 1857, when it was restored, with the restrictions now imposed. In the same section, the statute of 1854, under which power was given to this court to hear appeals actually taken under the amendment of 1851, before the passage of that of 1852, has been already noticed; and likewise the course pursued by it, in dismissing such appeals as untenable, when brought to the notice of the court, in the period which elapsed between the latter amendment and the passage of the enabling statute. *Vide Gale vs. Wells*, 7 How., 191; and *Porter vs. Jones*, 7 How., 192, there referred to.

Prior to the amendment of 1851, the question had been brought up, as to whether this class of orders could not be reviewed, under the general powers of the court, and the proposition had been decided in the negative. See *Duane vs. The Northern Railroad Company*, 3 Comst., 545; 4 How., 364; 3 C. R., 72; *Lansing vs. Russell*, 2 Comst., 563; 4 How., 213; *Tilley vs. Phillips*, 1 Comst., 610; 3 How., 364; 1 C. R., 111.

Pending the amendment of 1851, its operation was restricted to that class of cases, in which questions of law were involved in the order, to the exclusion of those, involving questions of fact only. *Vide Moore vs. Westervelt*, 1 C. R. (N. S.), 415.

And the same rule has been applied, since the amendment of 1857. The appeal now allowed, does not bring up for review questions of fact. If no error of law is found in the decision, it will be affirmed, and final judgment given against the appellant, according to the stipulation, required to accompany the notice of appeal in such cases. *Hoyt vs. Thompson's Executors*, 19 N. Y., 207; *Miller vs. Schuyler*, 20 N. Y., 522. See, likewise, *Lanman vs. Lewiston Railroad Company*, 18 N. Y., 493.

In the two former of these last cases, the inconvenience of this mode of bringing up the case for review, where any question of fact has or may have influenced the determination of the court below, is clearly pointed out, and insisted upon. "It necessarily results, that a party, who appeals from an order granting a new trial, and stipulates for judgment, in case the order be affirmed, concedes to his adversary every conclusion of fact, which is supported, however slightly, by the evidence. If he is unwilling to make such a concession, and to rest his appeal wholly upon the law of the case, then he should be advised, instead of appealing, to acquiesce in the reversal of his judgment, and to go down to another trial." *Hoyt vs. Thompson's Executors*, 19 N. Y., 212, per Comstock, J. Again: "Before taking such an appeal, he [the appellant] necessarily determines for himself, that no further or

better conclusions of fact can be found in his favor, and that, on a new trial, judgment must be given against him." *Ibid.*, 211.

And in *Miller vs. Schuyler* the principle is carried still further: "If we find that there was a question of fact involved in the decision at special term, and that the order for a new trial, may have proceeded upon the ground that such question was wrongly determined, then we cannot say that an error in law has been committed, in granting a new trial." 20 N. Y., 524, per Johnson, Ch. J. Again: "The true course for the plaintiffs to have followed, would have been to have submitted to the new trial, and then, if unsuccessful, to have appealed. Having chosen to stipulate, in accordance with the statute, they must abide the consequences." *Ibid.*, p. 525. See, to the same effect, *Sanford vs. Eighth Avenue Railroad Company*, 23 N. Y., 343.

An order, granting the statutory new trial in ejectment, was held not to be appealable, in *Evans vs. Millard*, 16 N. Y., 619. Though the decision is dated in 1858, it seems clear, from the opinion, that the question arose, before the amendment of 1857. But, inasmuch as a new trial of this description is a matter of right, on compliance with the conditions imposed by the statute, it is probable that the same conclusion would be come to, should such an order be appealed from.

The amendment of 1857, was held not to be retrospective in its effect, and that no appeal would lie, under it, from an order, made prior to its passage, in *Ely vs. Holton*, 15 N. Y., 595.

The appellant, in such a case, must not retain any benefit granted to him by the order appealed from. If he attempt to do so, his appeal may be dismissed. *Lanman vs. Lewiston Railroad Company*, 18 N. Y., 493.

All question as to an order denying a new trial being appealable, is now removed, by the amendment of section 11 (1862), specially allowing such an appeal. It had been previously held to be reviewable, as involving a final determination of the cause, equivalent to a judgment. See *Cook vs. New York Floating Dry Dock Company*, 18 N. Y., 229; and *Seneca Nation of Indians vs. Knight*, 19 N. Y., 587, before referred to. Or the appeal may be brought up, in connection with that from the judgment, if taken.

(e.) SUBDIVISION 3.—ORDERS IN SPECIAL PROCEEDINGS.

A final order, on petition, under the statute, to compel specific performance of their ancestors' contract, by infant heirs, was held to fall under this provision, and to be appealable, in *Hyatt vs. Seeley*, 1 Kern., 52. See also, as to review of a final order, on apportionment of the debts of an insolvent bank, amongst its stockholders, *Matter of Hollister Bank*, 23 N. Y., 508.

But an order relative to a provisional remedy, does not fall within the definition of a special proceeding, and cannot be reviewed in this court. *Genin vs. Tompkins*, 1 C. R. (N. S.), 415.

It is clear that the special proceedings here referred to, are such as are wholly independent of, and not incidental, or collateral to an action. See definitions in Code, sections 1 to 3, inclusive.

Proceedings, in relation to a judgment, entered by confession, were considered to be a special proceeding, in *Belknap vs. Waters*, 1 Kern., 477.

(f.) SUMMARY APPLICATIONS AFTER JUDGMENT.

To be appealable, under this branch of the subdivision, the order appealed from must be based upon the judgment in question, and have been made, upon the assumption of its validity. *Sherman vs. Felt*, 2 Comst., 186; 3 How., 425; *Dunlop vs. Edwards*, 3 Comst., 341; *Humphreys vs. Chamberlain*, 1 Kern., 274; *Jones vs. Derby*, 16 N. Y., 242; *Bank of Genesee vs. Spencer*, 18 N. Y., 150; *Thompson vs. Bullock*, 16 How., 213.

It must also be final, and must not leave the action to proceed. If so, it cannot be reviewed in this court, as an order, however erroneous in itself. See *Humphrey vs. Chamberlain*, *supra*, where time to appeal was virtually extended, by ordering a judgment to be set aside and re-entered. So also, where a judgment has been set aside, for matter of irregularity, or favor resting in the discretion of the court. *Vide Sherman vs. Felt*; *Jones vs. Derby*; *Thompson vs. Bullock*; and *Bank of Genesee vs. Spencer*, *supra*; *Christopher vs. Austin*, 1 Kern., 216 (220).

But an order, vacating a judgment by confession, on account of a defect in the statement, was held appealable, both as being in the nature of a special proceeding, and also as involving a question of substantial right, and not of discretion or practice. *Belknap vs. Waters*, 1 Kern., 477.

An order, vacating an entry of satisfaction, and restoring the judgment, to render the attorney's lien available, was held appealable, as recognizing its validity. *McGregor vs. Comstock*, 19 N. Y., 581.

An appeal also lies, under this subdivision, from an order, under 2 R. S., 619, section 44, requiring a person, beneficially interested in the recovery sought to be had in the name of another, to pay the costs of the defendant. *Giles vs. Halbert*, 2 Kern., 32; 5 How., 319.

Where an order of the general term below was impeached, on the ground that that court was insufficiently constituted, it was held that the question was properly before the appellate tribunal. *Corning vs. Slosson*, 16 N. Y., 294.

(g.) SUPPLEMENTARY CLAUSE.—APPEALS IN CASES ARISING IN A JUSTICE'S COURT.

Before the amendment of 1857, this class of appeals was positively prohibited.

And the prohibition extended also, to cases, originally commenced in these tribunals, but removed to those of higher jurisdiction, on the ground that the title to land came into question, under the powers conferred for that purpose, by sections 55 to 62, and 68 of the Code. See *Brown vs. Brown*, 2 Seld., 106; 6 How., 320; *Pugsley vs. Kesselburgh*, 6 Seld., 420; 7 How., 402; *Wiggins vs. Tallmadge*, 7 How., 404. And, on a motion to dismiss such an appeal, the fact of the suit having been so commenced, might, it was held, be shown by affidavit. See above cases. It was required, however, to be shown affirmatively, that the justice was ousted of jurisdiction, in the manner there prescribed, otherwise, the case in the higher tribunal, would not be deemed a continuation of that originally brought. *Lalliette vs. Van Keuren*, 7 How., 409.

Under the present provision, the prohibition as to this class of appeals, is unconditionally removed.

The amendment of 1857, empowering this class of appeals generally, under the conditions prescribed, has no retrospective effect. It was held, therefore, that a judgment of reversal, rendered by the general term before, could not be reviewed, on leave obtained subsequent to the passage of that amendment. *Ely vs. Holton*, 15 N. Y., 595.

But, where the decision, at general term, was made after the passage of the amendment, the case was held appealable. *Cook vs. Nellis*, 18 N. Y., 126.

In *Wait vs. Van Allen*, 22 N. Y., 319, it is laid down that the limitation as to the time, within which the general term must allow an appeal of this nature, is positive, and cannot be enlarged, by the entry of an order *nunc pro tunc*, even though the motion had been made by the appellant, though not decided by the court, in due time.

Cases, commenced in a district court in the city of New York, but removed into the Court of Common Pleas of that city, under chapter 344 of 1857, are within the scope of the section, as now amended, and the obtaining of authority from the general term of that court, is a condition-precedent to their validity. If not obtained, the appeal may be dismissed. *Smith vs. White*, 23 N. Y., 572.

(h.) FURTHER JURISDICTION OF THE COURT.—OLD APPEALS.

In addition to the authority conferred by the Code, this court has also cognizance of cases, pending in the late Court of Errors, at the time of its abolition. See Judiciary Act, chapter 280 of 1847, section 12.

Likewise of cases, pending in the late Court of Chancery, down to the period of its abolition. See *Farmers' Loan and Trust Company vs. Carroll*, 2 Comst., 566; 4 How., 211; 2 C. R., 138.

And of cases, arising in the Supreme Court, as organized by the judiciary act: see that statute, sections 10, 11.

(i.) PRACTICE IN SUCH CASES.

The operation of the Code is strictly prospective, in respect to appeals. Those from judgments, or orders made before the 1st of July, 1848, when the Code took effect, were held to depend, as to the right of appeal, the time within which it must be brought, and the form of bringing and prosecuting it, upon the law, as it stood when the decision was made. *Mayor of New York vs. Schermerhorn*, 1 Comst., 423; 3 How., 334; 1 C. R., 109; *Spaulding vs. Kingsland*, 1 Comst., 426; 3 How., 337; 1 C. R., 110; *Rice vs. Floyd*, 1 Comst., 608; 3 How., 366; 1 C. R., 112; *Butler vs. Miller*, 1 Comst., 428; 3 How., 339; 1 C. R., 100; *Dunlop vs. Edwards*, 3 Comst., 341; 3 C. R., 197.

Where, on the contrary, the judgment or order appealed from, was made after the 1st of July, 1848, the right to appeal, the time within which it must be taken, and the mode of procedure, were held all to depend upon the Code, though the suit was pending before its passage. *Mayor of New York vs. Schermerhorn*, above cited; *Farmers' Loan and Trust Company vs. Carroll*, 2 Comst., 566; 4 How., 211; 2 C. R., 138; *Selden vs. Vermilyea*, 1 Comst., 534; 3 How., 338; 1 C. R., 110; *Grover vs. Coon*, 1 Comst., 536; 3 How., 341; 1 C. R., 96; *Tilley vs. Phillips*, 1 Comst., 610; 3 How., 364; 1 C. R., 111; *Lyme vs. Ward*, 1 Comst., 531; *Lake vs. Gibson*, 2 Comst., 188; 3 How., 420.

Although, in such cases, the right and incidents of appeal depend upon the Code, still, where the new practice will not answer the purpose, the old may be resorted to, unless plainly forbidden by the legislature. See, as to the form of return, in an appeal in equity, *Farmers' Loan and Trust Company vs. Carroll*, *supra*.

But, since the amendment of section 459, in 1851, the above principles have ceased to apply, and the right to appeal, and the incidents of such appeal, when taken, are now governed by the Code, in all cases (see that section, subdivision 3). See also *Dunham vs. Watkins*, 2 Kern., 556.

Actions, originally commenced in the late Court of Chancery, are, however, an exception to this rule. Since the amendment of 1858, these cases may be reviewed, both upon the facts and the law, and that, without any statement or specification of facts found, or any exception taken at the trial. See section 460, as then amended.

The same rule was held to prevail, in an equity case, commenced be-

fore the Code, but decided after its passage, and before the amendment of 1851. *Dunham vs. Watkins*, *supra*. If heard after 1851, and before the amendment of 1858, the reverse would have been the case, and the decision, in that state of the Code, could only have been reviewed upon the law. See *Same case*.

The operation of that amendment is, however, confined to cases actually commenced in the late Court of Chancery. An action commenced under the judiciary act, in the Supreme Court in equity, is not within its scope. In such a case, the review is strictly governed by the provisions of the Code. *Griffith vs. Merritt*, 19 N. Y., 529.

(j.) WRIT OF ERROR, WHEN ADMISSIBLE.

Though abolished by the Code (section 327), as regards the revision of proceedings in an action, this form of review, and the ancient mode of procedure, is still proper in criminal cases.

And likewise in special statutory proceedings, excepted from the operation of the Code, under section 471. So held, as regards the review of judgment upon the award of arbitrators. *Isaacs vs. The Beth Hamedrash Society*, 19 N. Y., 584.

And, before the statute of 1859, chapter 174, p. 421, specially extending the provisions of the Code to appeals from proceedings on *mandamus*, a writ of error, and not an appeal, was the proper mode of reviewing an adjudication in such cases. *Becker vs. The People*, 18 N. Y., 487.

But since that statute, a writ of error cannot be brought, and an appeal is the only proper mode of review under these circumstances. *The People vs. Church*, 20 N. Y., 529.

§ 319. Principles of Review.

Before passing on to the formal matters connected with the procedure of this tribunal, it will be expedient to consider, preliminarily, some few of the general principles by which its proceedings are governed.

Those principles may be reduced under the following general heads:

1. That review will be confined to questions of law, to the exclusion of questions of fact.
2. It will also be confined to judgments or orders which are final, to the exclusion of such as are interlocutory in their nature.
3. It will not extend to matters of practice, resting in the discretion of the court below, as contradistinguished from the legal rights of the parties.
4. It will be restricted to the limits of a reasonable discretion, and, in extreme cases, may be denied.

(a.) 1. QUESTIONS OF LAW ONLY REVIEWABLE.

The exception to this proposition, as regards cases commenced in the late Court of Chancery, as to which a review on the facts is provided for by section 460, on the amendment of 1858, has been noticed in the preceding section.

In all other instances of appeal from judgment in a regular action, the rule strictly applies, and a case, presenting such questions to the appellate tribunal, must be settled accordingly. As to the mode of such settlement, see next section, and decisions there cited.

The general principle, that this court will not review questions of fact, however unsatisfactory the decision upon them may seem to be, but questions of law only, is distinctly laid down in the following, among many other decisions :

As regards actions tried by a jury, *Wright vs. Douglass*, 2 Comst., 189; 3 How., 418; *King vs. Dennis*, 2 Comst., 189; 3 How., 419; *Langley vs. Warner*, 3 Comst., 327; *Rice vs. Floyd*, 4 How., 27; *Hill vs. Covell*, 1 Comst., 522; *Dain vs. Wyckoff*, 18 N. Y., 45 (47); *Oldfield vs. New York and Harlem Railroad Company*, 4 Kern., 310; *Gardner vs. McEwen*, 19 N. Y., 123 (126).

As regards equity cases, or cases tried by a judge, without a jury, *Livingston vs. Radcliff*, 2 Comst., 189; 3 How., 417; *Sisson vs. Barrett*, 2 Comst., 406; *Dunham vs. Watkins*, 2 Kern., 556; *Newton vs. Bronson*, 3 Kern., 587; and, since the amendment of section 268, in 1852, this is, in fact, a matter of special legislative provision. See also *Griscom vs. Mayor of New York*, 2 Kern., 586; and, collaterally, as to an appeal from an order granting a new trial, *Hoyt vs. Thompson's Executor*, 19 N. Y., 207; *Miller vs. Schuyler*, 20 N. Y., 522. And not merely so, but every reasonable inference will be made in favor of such decision. See *Viele vs. Troy and Boston Railroad Company*, 20 N. Y., 184.

As regards cases tried by a referee, as to which special provision was also made, on the amendment of section 272, in 1852, see *Sturgis vs. Merry*, 2 Comst., 189; 3 How., 418; *Esterly vs. Cole*, 3 Comst., 502; *Newton vs. Harris*, 1 C. R. (N. S.), 414; *Colie vs. Brown*, *ibid.*, 416; *Davis vs. Allen*, 3 Comst., 168; *Borst vs. Spelman*, 4 Comst., 284; *Morris vs. Husson*, 4 Seld., 204; *Bearss vs. Copley*, 6 Seld., 93; *Western vs. Genesee Mutual Insurance Company*, 2 Kern., 258 (264); *Griscom vs. Mayor of New York*, *ibid.*, 586; *Cady vs. Allen*, 18 N. Y., 573; *Ingersoll vs. Bostwick*, 22 N. Y., 425. See, however, as to a clearly erroneous finding, *Garrison vs. Howe*, 17 N. Y., 458 (461).

But, in cases not falling within the scope of the Code, a review is obtainable, on questions of fact as well as of law. See, as to *certiorari*

in a criminal case, *Barringer vs. The People*, 4 Kern., 593. As to an appeal from a surrogate's decree, *Schenck vs. Dart*, 22 N. Y., 420. As to the same, and as to orders in special proceedings, *Griscom vs. Mayor of New York*, 2 Kern., 586 (590).

And this rule, restricting the review to questions of law only, is confined to appeals from judgments. In those from orders, there is no such limitation, and the case comes up upon its whole merits, and on questions of fact as well as of law. There is no restriction upon the power of the court, and its duty is commensurate. *Bates vs. Voorhies*, 20 N. Y., 525 (528).

(b.) 2. FINAL JUDGMENTS, OR ORDERS ONLY, REVIEWABLE.

The policy of the Code is to allow of one single appeal to this court, and one only, in which the whole of the action taken by the court below, on the judgment or order appealed from, may be brought up for review on one single occasion. See generally, *Hollister Bank of Buffalo vs. Vail*, 15 N. Y., 593 (595).

This principle has been inflexibly maintained, in all cases, in which the decision of the general term, or proceedings taken by the special term of the same court, have been sought to be reviewed.

An interlocutory decree, or order for reference, though it may decide the principal question at issue between the parties, is not appealable, so long as there is any reservation of further directions, or so long as there exists any question, which may possibly be raised, on the coming in of the report, as to the rights of the parties, or any of them, or the mode of division, or appropriation of the subject-matter in question. *Harris vs. Clark*, 4 How., 78; 2 C. R., 47; *Cruger vs. Douglass*, 2 Comst., 571; 4 How., 215; *Chittenden vs. The Missionary Society, &c.*, 8 How., 327. The judgment is not final, so long as there may be further litigation under its provisions, even though the court below may have omitted to make provision on the subject. *Tompkins vs. Hyatt*, 19 N. Y., 534. See likewise, as to an interlocutory order, in proceedings for a statutory partition, *Beebe vs. Griffing*, 2 Seld., 465.

And the same principle is clearly laid down in *Swarthout vs. Curtis*, 4 Comst., 415; 5 How., 198; 3 C. R., 215; though, in that particular instance, the rule was so far relaxed, as to admit an appeal from a decree, directing a reference, on which questions might possibly arise, in connection with a subsequent order, confirming the referee's report, thus rendering that decree final in effect, before the appeal was taken. Before such confirmation, the decree was held not to be appealable under the present practice.

And the same rule applies to an order, denying a rehearing of a decree of this nature. *King vs. Merchants' Exchange Company*, 1 Seld., 547.

The same rule has been applied by the courts below, to appeals to the general term, from interlocutory proceedings of a like nature. See *Griffin vs. Cranston*, 5 Bosw., 658; *Lawrence vs. Farmers' Loan and Trust Company*, 15 How., 57; 6 Duer, 689; *McMahon vs. Allen*, 27 Barb., 335; 7 Abb. 1; *Lawrence vs. Fowler*, 20 How., 407 (416); *People vs. Haws*, 21 How., 178; 12 Abb., 192. And it has been held that the objection is one that cannot be waived by stipulation. *Perkins vs. Farnham*, 10 How., 120.

Nor will an appeal lie from an order, granting or refusing an amendment, or making any other partial disposition, which in effect leaves the action to proceed. *New York Ice Company vs. Northwestern Insurance Company*, 21 How., 296; 12 Abb., 414; *Jones vs. Derby*, 16 N. Y., 242; *Sackett's Harbor Bank vs. Burwell*, 9 How., 95.

So likewise, as to an order for judgment on a frivolous answer, but directing the defendant to appear, and be examined concerning the judgment to be given. *Dunham vs. Nicholson*, 4 How., 140. Or striking out an answer, as sham or irrelevant. *Briggs vs. Bergen*, 23 N. Y., 162.

So also, as to an order for judgment on a partial demurrer, leaving other issues undecided. *Paddock vs. Springfield Fire and Marine Insurance Company*, 2 Kern., 591. So likewise, as to an order overruling a demurrer, but giving leave to answer. *Ford vs. David*, 13 How., 193; 3 Abb., 385; 5 Duer, 684.

As to an order, reversing one for a new trial on the facts, and ordering judgment, being appealable, as being in effect a final determination, *vide Cook vs. New York Floating Dry Dock Company*, 18 N. Y., 229.

Analogous to the above is *The People vs. Merrill*, 4 Kern., 74, holding that a writ of error will not lie, to review judgment on some counts of an indictment, whilst others remain undisposed of.

In *Duane vs. Northern Railroad Company*, 3 Comst., 545; 4 How., 364; 3 C. R., 72, want of finality is assigned as the reason, why an order, reversing a judgment and ordering a new trial, was not appealable, in the then state of the law upon the subject.

But the above principle does not hold equally good, as to appeals, in cases where the court below has itself exercised appellate jurisdiction.

Thus, an order of the Supreme Court, reversing a surrogate's decree, was held to be appealable, though remitting the proceedings to that officer, and directing him to proceed with the accounts. So far as regarded the action of the Supreme Court, it was a final determination, within the meaning of sections 11 and 245. *Messerve vs. Sutton*, 3 Comst., 546; 3 C. R., 198; *Wagener vs. Reiley*, 4 How., 195; *Talbot vs. Talbot*, 23 N. Y., 17.

But, where the order sought to be reviewed, was in itself of an inter-

locutory nature, it was held, that it could not be brought up for review, until after a final determination in the Surrogate's Court, when, if affecting the merits, it might be reviewed, on the appeal from that determination. *Tompkins vs. Soulice*, 7 How., 194.

(c.) 3. NOT OF MATTERS OF PRACTICE, RESTING IN DISCRETION.

The Court of Appeals has uniformly refused to review the action of the court below, in questions of this nature. To warrant its interference, the appellant must show that some legal right has been interfered with, or some principle of law violated, to his prejudice.

Nor does the appeal, now allowed, from an order granting a new trial, really conflict with this principle, inasmuch as, by the course of decisions relating to that provision, the appellate tribunal has restricted its operation to questions of law only, on which, if error have been committed, the granting of a new trial is a matter of right, to the exclusion of questions of fact, on which such an order rests in the discretion of the court. See above, section 317.

An order, granting or refusing a new trial, after a verdict on an issue of fact, awarded by the late Court of Chancery, was held not appealable in *Lansing vs. Russell*, 2 Comst., 563; 4 How., 213. The disposition of such a case rested purely in the discretion of the chancellor, and that discretion was held to extend, to the disregarding error of law committed at the circuit. The proceeding was for his information, and he might use or disregard it, at his discretion. Nor could an appeal be taken from his order, granting such an issue. *Candee vs. Lord*, 2 Comst., 269.

An order, setting aside, or refusing to set aside, judgment by default, or a decree *pro confesso*, as a matter of favor, was, in like manner, held to be unappealable. *Fort vs. Bard*, 1 Comst., 43; *Schermerhorn vs. The Mohawk Bank*, 1 Comst., 125; *Spaulding vs. Kingsland*, 1 Comst., 426; 3 How., 337; 1 C. R., 110; *Carpenter vs. Carpenter*, 4 How., 139; 2 C. R., 83.

So also, as to an order of the same nature, on the ground of irregularity, *Sherman vs. Felt*, 2 Comst., 186; 3 How., 425; *Christopher vs. Austin*, 1 Kern., 216 (220); *Catlin vs. Billings*, 16 N. Y., 622. Or an order, refusing to set aside a record, claimed to be irregular, *Pendleton vs. Weed*, 17 N. Y., 72. Or, refusing to set aside an execution, merely voidable, but not void, *Bank of Genesee vs. Spencer*, 18 N. Y., 150.

Nor will this court review a judgment, on a question of mere irregularity, remediable by amendment in the court below. *Ingersoll vs. Bostwick*, 22 N. Y., 425; *Johnson vs. Carnley*, 6 Seld., 570; *Lake Ontario, Auburn, and New York Railroad Company vs. Marvine*, 18

N. Y., 585; *McCormick vs. Pickering*, 4 Comst., 276. Or, on one of a defect in pleading, which may be so cured. *Lounsbury vs. Purdy*, 18 N. Y., 515.

An order, refusing leave to file exceptions *nunc pro tunc*, was held not reviewable, in *King vs. Merchants' Exchange Company*, 1 Seld., 547.

The granting or refusing of an amendment, before or during the trial, rests in discretion, and is not reviewable. *Hodges vs. Tennessee Marine and Fire Insurance Company*, 4 Seld., 416 (418); *Van Duzer vs. Howe*, 21 N. Y., 531 (539). See also, as to an amendment, after judgment, *New York Ice Company vs. Northwestern Insurance Company*, 23 N. Y., 357; 21 How., 296; 12 Abb., 414. And generally, as to the allowance of an amendment, *Russell vs. Conn*, 20 N. Y., 81; *Lounsbury vs. Purdy*, 18 N. Y., 515. See, however, as to an unauthorized amendment, *Davis vs. Mayor of New York*, 4 Kern., 506, below cited.

The following have also been held not to be appealable:

An order, setting aside or opening the biddings, on a judicial sale, regular in itself. *Hazleton vs. Wakeman*, 3 How., 357; *Wakeman vs. Price*, 3 Comst., 334; 3 C. R., 196; *Buffalo Savings Bank vs. Newton*, 23 N. Y., 160.

An order, denying a stay of trial in one cause, until the determination of another. *James vs. Chalmers*, 2 Seld., 209; 1 C. R. (N. S.), 413. Or a refusal to adjourn the hearing before a referee. *Carpenter vs. Haynes*, 1 C. R. (N. S.), 414.

An order, denying a stay of proceedings, or facilities for review of a referee's decision, not claimable as of right. *Enos vs. Thomas*, 5 How., 361; 1 C. R. (N. S.), 67.

An order, denying a motion to compel a party to attend and be examined before a master. *Marvin vs. Seymour*, 1 Comst., 535; 3 How., 340; 1 C. R., 111.

The imposition or modification of terms, upon a party in contempt. *The People vs. Delvecchio*, 18 N. Y., 352.

An order striking out an answer, as sham or irrelevant. *Briggs vs. Bergen*, 23 N. Y., 162.

The allowance or refusal of a common-law *certiorari* to review an assessment. *The People vs. Stilwell*, 19 N. Y., 531.

The granting or vacating of an injunction, by way of provisional remedy. *Van Dewater vs. Kelsey*, 1 Comst., 533; 3 How., 338; 2 C. R., 3; *Selden vs. Vermilya*, 1 Comst., 534; 3 How., 338; 1 C. R., 110. Or the vacating a reference, to ascertain damages under such a proceeding. *Anon.*, 4 How., 80.

The award of costs in a proceeding in equity, or where such costs rest in the discretion of the court. *Calkins vs. Isbell*, 20 N. Y., 147 (153). *Sherman vs. Daggett*, 3 How., 426. See also *Ireland vs. Litchfield*, 22

How., 178 (183), decided below. See however, as to the amount of an extra allowance, *The People vs. Clark*, 5 Seld., 349.

But, although the rule is thus comprehensive, with reference to the exercise of discretion by the court below, it will not be extended to cases in which the violation or denial of any legal right can be shown.

And even the refusal to exercise a discretionary power, may be error, and is reviewable, where such refusal is grounded upon a supposed want of authority to exercise that power, when it actually exists. See, as to a refusal to allow an amendment on such ground, *Russell vs. Conn*, 20 N. Y., 81; *McElwain vs. Corning*, 12 Abb., 16. And generally, as to an order, refused on the ground of a supposed want of power. *McMahon vs. Mutual Benefit Insurance Company*, 3 Bosw., 644; 12 Abb., 28; *Artisans' Bank vs. Treadwell*, 34 Barb., 553 (558).

Russell vs. Conn, 20 N. Y., 81 (83), above cited, contains the following dicta on the subject of judicial discretion: "It is true that the allowance of an amendment, where one is required, is the exercise of a discretionary power, but it is erroneous to refuse to exercise that discretion in a proper case." Again: "Although the discretion of the court below, when exercised, cannot be reached, yet the question of power is one which depends upon strict legal principles, and may therefore be reviewed." See also generally, as to the exercise of judicial discretion, the rules which should govern it, and the limits to which its exercise must be confined, *Platt vs. Munroe*, 34 Barb., 291 (293, 294); *Artisans' Bank vs. Treadwell*, *supra*; *Bowen vs. Irish Presbyterian Congregation of the City of New York*, 6 Bosw., 245 (269).

And even the allowance of an amendment, if clearly unauthorized, will be reviewable. See, as to the addition of a party plaintiff, at the trial, and a consequent award of judgment, when, but for such addition, the action could not be maintained, *Davis vs. Mayor of New York*, 4 Kern., 506.

An order of the court below, dismissing an appeal, as taken too late, by reason of the unauthorized appearance of an attorney, has also been held appealable, as involving, not a question of practice or discretion, but one of strict legal right. *Bates vs. Voorhies*, 20 N. Y., 525.

And although the allowance or refusal of costs, or the amount allowed, when resting in discretion, is not reviewable, a question as to the right of a party to costs, given to him by the terms of the statute, is appealable. *Decker vs. Gardiner*, 4 Seld., 29; *The People vs. Clarke*, 5 Seld., 349. "There is no distinction in the right of appeal to this court, in an order affecting costs, or any other right." *McGregor vs. Comstock*, 19 N. Y., 581 (582). And an order, imposing costs upon a person beneficially interested in the recovery, under 2 R. S., 619, section 44, is in like manner reviewable. *Giles vs. Halbert*, 2 Kern., 32.

And an order for an extra allowance, would seem also to be reviewable, when brought up in connection with the judgment, and the proper papers returned to this court. *Vide Cook vs. New York Floating Dry Dock Company*, 18 N. Y., 229; *The People vs. Clarke*, 5 Seld., 349. See also below, as to such an allowance being reviewable, if granted in excess of the statutory power, *Wilkinson vs. Tiffany*, 4 Abb., 98.

A rehearing at general term, of an order in an old equity case, under the provisions of the judiciary act, has also been held to be a matter of strict legal right, and not resting in the discretion of the court below. *Vide Gracie vs. Freeland*, 1 Comst., 228; 3 How., 218; *Dillaye vs. Blair*, 2 Comst., 189; 3 How., 422. But the appellate court will not interfere, where the order, if reviewed, would be clearly unappealable. *Marvin vs. Seymour*, 1 Comst., 535; 3 How., 340; 1 C. R., 111; *King vs. Merchants' Exchange Company*, 1 Seld., 547.

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(d.) 4. REFUSAL TO REVIEW IN CERTAIN CASES.

This court will not reverse a judgment, or order, for immaterial errors in the progress of the trial, or for errors which have not really influenced the ultimate result, to the prejudice of the appellant. *Vide Fitch vs. New York and Erie Railroad Company*, Seld. Notes, July 13th, 1853, p. 24; *Howland vs. Willetts*, 5 Seld., 170; *Onondaga County Mutual Insurance Company vs. Minard*, 2 Comst., 98; *Shorter vs. The People*, 2 Comst., 193.

Nor will the court allow a controversy to be prolonged to excess. Where therefore three successive verdicts had been found, on a feigned issue, establishing the same proposition; the court refused to interfere further, though the evidence was purely circumstantial, and not entirely conclusive; and the last verdict was permitted to stand. *Ferguson vs. Ferguson*, Seld. Notes, April 18th, 1854.

And points not raised, but which might have been raised on the trial below, cannot be used as a ground of appeal to this court. *Stewart vs. Smith*, 14 Abb., 75.

§ 320. *Special Practice of this Court.*

COMMENCEMENT OF APPEAL.

The questions as to the necessary notice of appeal to this court, its constituents and service, and those of the collateral undertaking, which, in this court, is requisite to a certain extent, in all cases, and the time within which such appeal must be taken, have already been fully considered, and the decisions in point cited, in chapter I. of this book, devoted to the general consideration of the subject, sections 306, 307, and 308.

The distinction, between appeals from orders, under subdivision 2 of

section 11, and other judgments and orders reviewable by this court, as regards the time limited for appealing, will not have escaped notice (only sixty days being allowed for the former, and two years in all other cases), though there is considerable awkwardness of expression in section 331, as to the period of limitation, in relation to orders appealable under subdivision 3 of section 11. The case seems in fact not to be provided for.

And the practical limitation of appeals, in cases arising in a justice's court, effected by this last subdivision, by imposing, as a condition, the allowance of such appeal by the court below, within the next general term after the entry of judgment, will not be overlooked.

The attorneys and guardians *ad litem*, in the court below, continue to act in this tribunal, until others are duly substituted. See rule 4.

(a.) INTERLOCUTORY APPLICATIONS.

The rules make special provision for necessities of this description, arising pending the appeal. *Ex parte* applications are provided for, by rule 18; opposed or opposable motions, by rule 15.

Ex Parte Orders.

The former provides for three classes of *ex parte* orders.

1. The time prescribed for doing any act, may be enlarged by the court, or by either of the judges thereof.

The applicant should prepare an affidavit, showing the circumstances under which the extension is asked for, and that he is not himself in default at the time, accompanied by the form of the proposed order. These papers may either be forwarded to one of the judges by mail, or presented to him in person, or to the court, if in session, on one of the usual motion days.

This course is only applicable to cases, where the indulgence, if granted, will clearly work no prejudice to the adverse party. If this be not manifest, the judge may probably refuse the order, and put the applicant to his motion in regular course.

2. Any judge may make an order to stay proceedings.

In case of a refusal to extend time by an *ex parte* order, or when a motion is originally intended by the applicant, he should prepare his papers on such motion, consisting of an affidavit and notice in the usual form, and submit those papers, accompanied by a form of an order staying proceedings, to one of the judges. That order usually stays all proceedings, of the adverse party, until the hearing and decision of the proposed motion.

3. Any order may be revoked or modified by the judge who made it, or by another, in case of his absence or inability to act.

Though the terms of this portion of the rule are general, it is clearly meant to be confined to this class of orders, and not to those made by the court on regular motion.

The application for this purpose may be made by either party; by the applicant, if he desires to abandon or to modify the relief he has obtained; or by the adverse party, if the order be irregular or oppressive in its nature. It is clear, from the terms of the rule, that, whenever practicable, the judge who made the order should be applied to.

(b.) GENERAL REMARKS.

With reference to orders for extension of time, it should be remarked that the powers of a judge of the court in this respect, are without restriction, the limitation of twenty days, prescribed by section 401, not extending to this tribunal. See Code, section 8.

The extent of the indulgence granted rests, therefore, purely in the discretion of the officer applied to. Where it is clear that no detriment can accrue to the adverse party, that discretion will, as a general rule, be liberally exercised; if otherwise, the order will usually be limited, so as not to have operation beyond the next sitting of the court, and will consist in a mere stay of proceedings, for the purposes of a motion to be then made.

If granted, an *ex parte* extension should be served on the adverse party, in the usual manner, accompanied by a copy of the affidavit on which it was granted. An order to stay proceedings, for the purposes of a proposed motion, must be served with the papers upon, and the notice of that motion, as prescribed by the rule itself.

(c.) ORDINARY MOTIONS.

These must be noticed in the usual manner, and the notice served, at least eight days before the time of hearing, accompanied with copies of the moving affidavits, if any. If made on papers already served, or on file, a reference to such papers in the notice will be sufficient, as in other cases.

Rule 15 provides clearly, as to the practice on these applications, which is essentially the same as in the lower tribunals.

Only one counsel will be heard on each side, unless the court shall otherwise direct. Rule 12. The first day of the term, and the morning of each succeeding Tuesday and Friday, before taking up the calendar, are the days, on which motions are in order, and for which they may be noticed. Rule 15.

The same rule provides for taking an order by default, if no one shall appear to oppose; and likewise that, at the close of the motions

for the day for which it has been noticed, the opposing party may take a rule, denying the motion with costs, if not then brought on.

The clerk of the court enters the order when made, and forwards a copy to the party in whose favor it is granted. When received from him, it must be served upon the adverse party in the usual manner.

The notice and accompanying papers must be entitled in this court. If in the court below, it will be a fatal defect, as to the former, at all events, if not as to the latter. *Clickman vs. Clickman*, 1 Comst., 611; 3 How., 365; 1 C. R., 98.

Though unopposed, a motion will not be granted, where it interferes with the power of the court in controlling their calendar. *Crain vs. Rowley*, 4 How., 79.

(d.) RETURN BY COURT BELOW.

On the appeal being taken, the first proceeding is to obtain the return from the court below, the nature and constituents of which are fully prescribed by rule 1.

This must, under rule 2, be done within twenty days after the appeal is perfected, which time runs from the time the notice of appeal and undertaking is duly served, without regard to any subsequent proceedings as to the justification of the sureties. *Thompson vs. Blanchard*, 2 Comst., 561; 4 How., 210.

See the subject of the return to the court above, generally considered, and decisions cited, in chapter I. of the present book, section 308. Before transmitting it to the clerk of the court, the appellant must be careful to retain an exact copy, for the purposes of the case to be made.

When the appeal is taken from a case, arising on verdict, subject to the opinion of the court, the appellant must also be careful to see, that the supplementary statement, as to the action of the general term, required by section 333, is duly prepared, and annexed to the judgment-roll, before the return is made.

And it is his duty, not merely to apply for and transmit, but also to see to the correctness of the return. *Spoore vs. Fannan*, 16 N. Y., 621.

Unless there has been a revision of the case, on which the cause was determined in the court below, by action of that court, or agreement of the parties, the appellant must have that case returned on his appeal, though it may still require correction. *Vide Johnson vs. Whitlock*, 3 Kern., 344 (350); 12 How., 571. As to the nature and extent of such revision, when necessary, see below.

If the appellant be unable to procure the return, within the time allowed by the rule, or, if the case below require correction, for the purposes of a review in this court (as to which, see below), he should apply for and obtain an order, enlarging the time, or staying pro-

ceedings for the purpose of such motion, if requisite. See above, as to the mode of application in either case.

If the return, when made, be defective, rule 3 prescribes the remedy, by means of an application by either party, on affidavit, specifying the defect. If granted, the order and affidavit should be at once served on the clerk of the court below, and his further return bespoken, obtained, and forwarded in the usual manner, and his additional fees, if any, paid by the moving party.

This course is more peculiarly applicable to merely formal defects, which the appellant desires to have corrected, before printing his case, or where, after filing, the record below has been amended. Under these circumstances it will clearly be an *ex parte* proceeding. An application by the respondent will, more usually, be by means of a motion at a later stage, after service of the case, and on notice to the appellant.

(e.) PREPARATION OF CASE.

The return having been made and filed, it is then incumbent upon the appellant to make, print, and serve his case upon the appeal, which, unless the time be extended, must be done within forty days after the appeal is perfected. See rule 7.

The constituent portions of that case are clearly prescribed by rule 5. It consists of a copy of the return of the clerk, and the reasons of the court below for its judgment, including every opinion in the cause, at special as well as at general term, relating to the questions involved in the appeal. See, as to the propriety of printing a referee's opinion, if given, *Warren vs. Warren*, 22 How., 142.

If such opinion cannot be procured, an affidavit to that effect must be substituted. This affidavit should shortly state the facts, and give a sufficient reason why any opinion, if delivered, cannot be obtained.

To these should be added an index, unless the case be short and simple in its nature.

(f.) REVISION OF CASE OR RETURN.

A correction of the case on which the appeal was brought in the court below, will, however, be required in many instances. Though, in theory, a correction of the original return, the simplest way will be to attend to it, before that document is filed, and to obtain, for that purpose, an extension of the time for filing it, and also for serving the case. This will obviate the necessity of amending, or obtaining a further return, under rule 3.

But, if the application be delayed, or the necessary corrections be not completed, before the return has been filed, it may still be proceeded

with, and an amended return procured, and filed when complete. In this event, an extension of the time for serving the case will be all that is requisite.

And, even after the case has been actually printed and served, it may be corrected in this respect, by leave of the court; but this course will necessarily be inexpedient, if avoidable, as it must involve additional expense. It is more peculiarly applicable to cases of an adverse motion, grounded upon defects in the case, as originally served.

(g.) NATURE OF REVISION.

The case to be made in this court, differs from that required for the purposes of a review at general term, in this essential particular. In the court below, the review may be extended to the facts as well as to the law, directly, on appeal from a decision of the single judge or referee, under section 268 or 272; indirectly, by means of a collateral appeal from an order refusing a new trial, where the trial has been by a jury.

But (with the trifling exceptions above noticed), the review in this tribunal will be confined to questions of law. All matter, therefore, not directly bearing upon or necessary to illustrate those questions, is superfluous, and must be expunged. Nor will it be allowable to insert the evidence in detail, except so far as it may be necessary, to bring up for review exceptions, duly taken. Where the question is not brought up in this form, a succinct statement of the facts proved must be substituted.

The following principle of general application is laid down in *Grant vs. Morse*, 22 N. Y., 323 (324): "The party appealing must make his case, and have it settled, with such a statement of the facts as will show necessarily that the law is in his favor. If he does not, every intendment, not absolutely unreasonable in itself, will be against him."

The proceedings for the purposes of this revision, being essentially proceedings in the court below, have been already considered, and the cases in point, cited in book X., chapter VI.; those as to the resettlement of a case, for the purpose of separating the exceptions taken, from matter purely bearing upon questions of fact, in section 243; and those relative to the preparation of a special verdict, or verdict, subject to the opinion of the court, in sections 247 and 249.

When the appeal is brought up to this tribunal, from judgment rendered on a verdict of this last description, the appellant must be careful to have the questions or conclusions of law decided at general term, together with a concise statement of the facts, under which they arose, prepared under the direction of the court below, and filed with the

judgment-roll. It is upon this statement that the review takes place. See Code, sections 333, 265.

The practice to be pursued in the court below, on an application of this nature, has been already considered in book X., chapter VI., section 249, above referred to.

If made, within the period allowed by the rules of the court above, for filing the return and serving the case respectively, or during any extension of that period, no sanction or interference of the court above will be necessary, for the purposes of such application. But, if made after and as the result of an adverse motion, or after the return has been actually filed, or the case upon the appeal served, the leave of the appellate court should be obtained, on motion noticed in the usual manner.

In the following cases, leave was given, and proceedings stayed for this purpose, for a limited time, on the hearing of an adverse motion to dismiss, or on objection taken on the argument: *Wright vs. Douglass*, 2 Comst., 189; 3 How., 418; *Magie vs. Baker*, 4 Kern., 435 (439); *Westcott vs. Thompson*, 16 N. Y., 613. So likewise, *Johnson vs. Whitlock*, 3 Kern., 344 (350); 12 How., 571. And generally, as to the practice in such cases, *Zabriskie vs. Smith*, 1 Kern., 480 (484).

But, if the application for that purpose be denied in the court below, the appellate court cannot, it would seem, control its action. *Vide Zabriskie vs. Smith, supra* (p. 482). Nor can an order of the court below, denying such relief, be properly inserted in the case. *Smith vs. Grant*, 15 N. Y., 590 (592). See decision of court below, refusing application. *Smith vs. Grant*, 17 How., 381. See also similar denial. *Catlin vs. Cole*, 19 How., 82; 10 Abb., 387.

(h.) AMENDMENTS IN CASE.

And not merely will leave be given for the above purpose, but, if the case, as made, be otherwise defective, leave will be given to apply to the court below for the purpose of an amendment.

Thus, in *Livingston vs. Miller*, 7 How., 219, where the points actually raised in the court below, did not sufficiently appear by the bill of exceptions, the court stayed the argument of the cause, upon motion, to give the appellant an opportunity to apply to the court below, for a resettlement, according to the facts; and it was further directed that the return, after such amendment, should be allowed to retain its original date of filing.

Or, where the defects in the case are merely technical, leave will be given to supply them by amendment. *Beecher vs. Conradt*, 11 How., 181.

And, on a motion for dismissal, irrelevant portions of the case may

be stricken out, though the motion be otherwise denied. *Smith vs. Grant*, 15 N. Y., 590. So likewise, as to matter improperly inserted. *Brown vs. Saratoga Railroad Company*, 18 N. Y., 495.

A motion of the above nature will not, however, be entertained by the court, if delayed till after argument and judgment on the appeal. *Fitch vs. Livingston*, 7 How., 410.

(i.) PRINTING OF CASE.

When so resettled, or when no resettlement is required, the appellant's case must be printed in due time, the special directions given in rule 6 being strictly followed.

It may frequently be practicable to use for this purpose, the same papers, as printed for review by the court below, the formal return, notice of appeal, and opinion, or affidavit that none can be procured being added, and the whole sewed up in a new cover. But, where the case has been resettled, this cannot of course be done.

The appellant should be careful to have a sufficient number of copies stricken off. Besides those which he may want for his own use, on the argument, or otherwise, seventeen copies are necessary. Fourteen are required for the use of the court, reporter, &c. See rules 21, 9, 10. And three must be served upon the counsel for the adverse party, within forty days after the appeal is perfected (rule 7), or within such extended time, if any, as may be allowed to him, by order of the court, or stipulation with such party. A failure to comply with this last rule, will subject him to a motion for dismissal. See next subdivision.

For these reasons, and to provide for accidents, it is advisable to print twenty-five copies, or twenty, at the very least, upon all occasions.

(j.) DISMISSAL FOR WANT OF PROSECUTION.

If the return be not filed, or the case served, within the periods prescribed by rules 2 and 7, or within any extension of those periods, the respondent will, in either case, be entitled to enter an order, dismissing the appeal for want of prosecution, with costs, as there provided.

Prior to the amendment of 1858, this right was absolute, at once, upon default actually suffered. See, as to the time when this default might be taken, *Thompson vs. Blanchard*, 2 Comst., 561; 4 How., 210. Since that amendment, the appellant is entitled to a ten days' notice, in each case, before the order can be entered.

The form of notice to be given by the respondent, in the event of delay on the part of the appellant, is clearly prescribed by the rules in question. It must be in writing, assuming, as will be seen, the form of a requisition, and must be duly served on the adverse attorney.

If the requisition be complied with, within the period limited, the appellant's omission is cured, and the respondent's object gained. Should the former require further time, he must obtain it, within the period specified, either by stipulation, or, if refused, then by application to one of the judges for an enlargement, under rule 18. This precaution is essential, as, otherwise, the respondent acquires a right to enter the order at once, without further notice. See also, as to the present practice, in relation to defaults of this nature, *Spoore vs. Fannan*, 16 N. Y., 620.

Should the requisition not be duly complied with, the respondent proceeds as follows: If the application be under rule 2, he must prepare an affidavit, proving when the appeal was perfected, and the service of the notice, in the usual manner.

This affidavit, and a copy of the notice, must then be mailed to or left with the clerk of the court, requesting him to add his certificate that no return has been filed, and to enter an order dismissing the appeal for want of prosecution, with costs. On receipt of the papers, the clerk enters the order accordingly.

If the application be under rule 7, the affidavit must prove the date at which the appeal was perfected, the service of the notice, and that no copies of the case have been served; and this affidavit, and a copy of the notice, must, in like manner, be transmitted to the clerk. On these papers, that officer enters the order as above, no certificate being required in this case.

If the appellant's time have been extended, it may be as well to state the fact upon the face of the affidavit, showing that such extension has expired, and that the default still continues.

On the entry of such order, the court below may thereupon proceed, as though there had been no appeal. An official copy of it must, accordingly, be procured from the clerk, and delivered to the clerk of the court below, as a warrant for such proceeding. Where the dismissal is under rule 2, there can be no regular *remittitur* of the record, because there is, in fact, no record to remit. See note, 4 How., 211. A copy of the order is therefore all that is requisite in this case. But, when the dismissal is under rule 7, the copy should be attached to the original return, and the whole remitted. *Dresser vs. Brooks*, 2 Comst., 559; 4 How., 207. Rules 17 and 25 do not, of course, apply to this proceeding.

The proceeding under rule 2 can only be taken on a total default. If a return be actually filed, or a case actually served, however imperfect in either case, the rule does not apply, and the respondent's only remedy will be by means of a special motion, on notice. *Bowers vs. Tallmadge*, 23 N. Y., 166; 20 How., 516.

And if, on default made, the respondent omit to enter his order, he will not be allowed to raise the objection subsequently, after actual filing of return and service of case, especially if he have himself noticed the appeal for argument. *Beecher vs. Conradt*, 11 How., 181.

Prior to the amendment of 1858, this court was highly liberal in opening defaults of this nature. The rule was that, unless the respondents could show delay or inconvenience, they would be relieved against, in all cases where it appeared that the appeals were brought in good faith. *Waterman vs. Whitney*, 7 How., 407. See also *Dresser vs. Brooks*, 2 Comst., 559; 4 How., 207.

But, in the last case, it was held that, after a *remittitur*, actually filed below, such motion came too late, and could not be granted, and also that the rule, as it then stood, was retrospective, and included appeals pending at the time of its adoption.

Even at that time, an appeal, clearly untenable, was refused to be reinstated, on motion to open a default of this nature. *Sackett's Harbor Bank vs. Burwell*, 9 How., 95.

And now, since the amendment of 1858, providing for notice, the rule will be strictly applied, and a default, regularly taken, will not be opened, and the appeal reinstated (unless the right of appeal would be lost by retaining the default), unless the appellant establishes a clear case of diligence on his part, and shows either that inexcusable default of the clerk, or an unavoidable accident, has prevented the filing of the return, or an extension of the time to file it. *Spoore vs. Fannan*, 16 N. Y., 620.

(k.) DISMISSAL ON MOTION.

Where the appellant's proceedings are defective, but the case does not fall strictly within one or other of the rules last referred to, the respondent's remedy will be, by means of a motion, regularly noticed.

Vide Bowers vs. Tallmadge, 23 N. Y., 166; 20 How., 516. An application of this nature may be grounded, either upon the case served by the appellant, where the defect is patent upon the face of that document, or, upon affidavit, where the facts establishing the defect complained of are extrinsic. In the former it will, of course, be unnecessary to serve any copy of such case with the notice of motion, it being the appellant's own paper.

Applications of this nature have been granted, in the following cases :

Where the appellant's case, on the appeal, has been imperfectly made or settled. *Livingston vs. Radcliff*, 2 Comst., 189; 3 How., 417; *Sturgis vs. Merry*, 2 Comst., 189; 3 How., 418; *King vs. Dennis*, 2 Comst., 189; 3 How., 419; *Colie vs. Brown*, 1 C. R. (N. S.), 416;

Hunt vs. Bloomer, 3 Kern., 341 ; 12 How., 567 ; *Johnson vs. Whitlock*, 3 Kern., 344 ; 12 How., 571. See also, as to the power of the court in this respect, *Zabriskie vs. Smith*, 1 Kern., 480 (483, 484).

Where the appeal is defective, for want of jurisdiction. *Pugsley vs. Kesselbergh*, 6 Seld., 420 ; 7 How., 402 ; *Wiggins vs. Tallmadge*, 7 How., 404. And, in such cases, extrinsic facts may be shown by affidavit, for the purpose of establishing the objection. But such affidavit must be positive, and must show the defect in terms. *Lalliette vs. Van Keuren*, 7 How., 409.

Where an appeal from a case, originating in a justice's court, has, since the amendment of 1857, been brought, without leave duly obtained from the general term of the court below. *Smith vs. White*, 23 N. Y., 572 ; *Wait vs. Van Allen*, 22 N. Y., 319 ; *Ely vs. Holton*, 15 N. Y., 595.

Where an order or judgment appealed from, is, from its nature, or by express provision, unappealable to this court. *Moore vs. Westervelt*, 1 C. R. (N. S.), 415 ; *Genin vs. Tompkins*, 1 C. R. (N. S.), 415 ; *McAllister vs. Albion Plank Road Company*, 6 Seld., 353 ; *Matter of Canal and Walker Streets*, 2 Kern., 406 ; *New York Central Railroad Company vs. Marvin*, 1 Kern., 276.

Where such appeal is brought too late. *Bank of Geneva vs. Hotchkiss*, 5 How., 478 ; 1 C. R. (N. S.), 153 ; *Wells vs. Danforth*, 7 How., 197 ; *Woollen Manufacturing Company vs. Townsend*, 1 C. R. (N. S.), 415. Or, where brought prematurely. *McMahon vs. Harrison*, 5 How., 360.

When an appeal, originally good, is lost by a change in the law (*Gale vs. Wells*, 7 How., 191 ; *Porter vs. Jones*, 7 How., 192) ; but, in such cases, the order will usually be granted without costs.

Where the appeal was brought in bad faith, and in disregard of a stipulation, that the judgment below should be final. *Townsend vs. Masterson Stone Dressing Company*, 15 N. Y., 587.

Where, pending the appeal, the controversy had been settled. *Shank vs. Shoemaker*, 18 N. Y., 489.

Where, by enforcement of a portion of a judgment in his favor, the appellant had waived his right of appeal. *Bennett vs. Van Syckel*, 18 N. Y., 481.

When, on an appeal from an order granting a new trial, the stipulation given by the appellant was insufficient. *Lanman vs. Lewiston Railroad Company*, 18 N. Y., 493.

In this case, and also in *Porter vs. Jones*, above cited, the appellant was allowed to dismiss his own appeal ; and, in the latter, without costs, the defect being occasioned, not by his own act, but by a change in the statute.

Where an appeal has once been dismissed with costs, a second appeal

will not be allowed, until the costs of the former have been paid; and, in event of their non-payment, it will be dismissed also. *Dresser vs. Brooks*, 5 How., 75. See also same case, as to dismissal, on failure of the sureties to the undertaking to justify, if excepted to. See likewise, on the former point, *Burnett vs. Harkness*, 4 How., 158; 2 C. R., 100, decided below.

The dismissal of an appeal, on motion of the above nature, or under the rules, decides nothing, in point of law, as regards the validity or effect of the judgment appealed from. *Watson vs. Husson*, 1 Duer, 242.

(l.) ABATEMENT.

When a party to an appeal, dies after the return is filed, the court, having obtained jurisdiction, has the power to allow his legal representatives to be substituted, by order to that effect, according to the former practice, nor need a supplemental complaint be filed, where required by section 121, that section not applying to this court. *Hastings vs. McKinley*, 8 How., 175. See also *Miller vs. Gunn*, 7 How., 159. And, as to the former practice, Graham's Pr. (2 ed.), 965 to 967.

(m.) NOTICING APPEAL.

So soon as the return is filed, the appeal is technically in court, and it is competent for either party to notice and set it down for hearing.

The appellant cannot, of course, bring on the appeal, if placed upon the calendar, until his case has been made and served, and this step is usually deferred by both parties until that time. See, as to the waiver of technical objections by the respondent, if, instead of proceeding to obtain a dismissal under the rules, he notice the appeal himself. *Beecher vs. Conradt*, 11 How., 181.

The notice to be given is essentially the same as a notice for argument at general term, save that eight days only are required. The judicial district in which the cause originated, should also be specified upon its face. See rule 8. It is to be given, except in criminal cases, for the first day of the term, and must, of course, specify where that term is to be held, whether in Albany or New York. See section 13. Since the recent passage of rule 24, the case need only be noticed, on placing it on the calendar for the January term in each year, the notice then given, being available for the subsequent terms.

When a preference is claimed, the party must show that fact upon the face of his notice, and state the ground of such preference, so as to show to which class of preferred causes the case belongs. See rule of June term, 1860, 21 N. Y., 601.

And, when the people are parties, the attorney for the state must, if

he claim a preference on that ground, give notice of a motion to that effect, naming the day on which the case will be brought on, at the time he serves his notice of argument. See chapter 37 of 1858, p. 65, before referred to.

The notice must be served upon the adverse party, and that service proved by admission, or by affidavit, if necessary, in the usual manner, and such proof filed with the clerk of the court. Rule 27. As to the possible inutility, so far as taking an affirmance by default is concerned, of service upon the attorney of a party known to be deceased, before revivor of the action, see (in court below) *Warren vs. Eddy*, 13 Abb., 28.

(n.) SETTING DOWN APPEAL.

No regular notice of issue need be filed, but a copy of the notice of argument must be forwarded to the clerk, with proof of service. See rule 27. And this precaution should be taken by each party. It is essential that this copy should specify the judicial district in which the cause originated, and equally so that, if a preference be claimed, that fact, and the ground of such preference, should also appear upon its face. See rules above cited.

It must be furnished to the clerk, eight days before the first day of term, and the proof of service must accompany it. See rule 27. The usual practice is to mail it to that officer, postage paid. In this case the party must take care so to transmit it, that the clerk may actually receive it, at the latest, on the eighth day before term. The rules as to service by mail do not apply to the case. See generally, as to this principle, *Crittenden vs. Adams*, 5 How., 310; 3 C. R., 145; 1 C. R. (N. S.), 21. A failure to transmit the notice in due time, will probably involve a failure to have the cause placed on the calendar. As to the necessity of diligence in this respect, see *Wilkin vs. Pearce*, 4 How., 26.

The recent alteration in the practice, effected by rule 24 (23 N. Y., 1) and rule 27, above cited, renders it more than ever important to pay strict attention to this matter, as a failure to place the appeal on the January calendar, may now involve a delay of an entire year, in bringing it on, or necessitate a special application to the court, which might possibly be refused. See, as to its unwillingness to derange its calendar when once made out, *Crain vs. Rowley*, 4 How., 79, decided under the former practice. Above all will it be important to file with the clerk the proof or admission of service, as otherwise, that officer is specially directed not to place the cause upon the calendar.

The only exception to the above requisite, as imposed by rule 24, is as to appeals, entitled by law to a preference. These may be noticed and placed on the calendar in the above manner, for any specific term

during the year. Being entitled to be heard in priority, they do not derange the order of the other causes pending.

No special application will be necessary for this last purpose. In other cases, it must be made on motion in the usual manner, the moving papers showing either due diligence, or a sufficient excuse, and also, the inconvenience that a delay until the next January calendar will occasion. The court will probably require a strong case to be made out.

On receipt of the notices, the clerk arranges the cases on the calendar, in the order in which the returns were filed, specifying the judicial district. Rule 8. If the case has once been brought up to this court, and, by reason of a new trial having been awarded, or by a dismissal for defect or irregularity, or otherwise, comes up again on a subsequent appeal; it takes its place on the calendar, not as of the latter date, but as of the time of filing the return on the first appeal. Section 13.

Prior to the recent passage of rule 26, an appeal lost its place on all future calendars, if called and passed, without hearing or postponement, for good cause shown. Now, the only penalty is that it goes to the foot of the calendar for the current year, resuming its original order on any future one.

Where a default of the above nature has occurred, from excusable absence of the parties, the court will sometimes relieve them upon motion, and either place the cause at the foot of the existing day calendar, or make some other disposition for an early hearing. The application may be made, at the next sitting of the court, or by way of regular motion. The matter rests, of course, entirely in discretion, and especially in that of the chief judge, who has the control of the calendar. *Vide* 7 How., 240.

Before rule 26 was passed, a fresh calendar was made out for each term, and entered upon *de novo*. Now, this is only the case for the January term. As regards those subsequent, the call commences at the point at which it terminated in that immediately previous, and continues accordingly, save only as regards any new cases entitled by law to a preference. See rule 24. These will, of course, be first heard, before the general call commences.

When a cause has been exchanged for another, it exchanges also the date of issue, and each will, in all future calendars, take the date of filing the return in the other. Rule 20.

When made out by the clerk, the calendar is printed for the use of the judges and clerk (rule 8); an additional number being universally stricken off for that of the profession generally. See rule 21, directing that certain of the rules be printed on the first leaf.

Cases entitled by law to a preference, are placed at the head of the calendar for each term, and are called first in their order. See, however,

below, as to the power to move cases, to which the people are a party, for any specific day.

(o.) POINTS.

On the appeal being noticed and placed on the calendar, it becomes incumbent upon both parties, to prepare the points to be made by them upon its argument, when reached.

These documents must contain, as regards each party, a statement of "the points on which he intends to rely, with a reference to the authorities which he intends to cite." Rule 9. It is also specially prescribed by rule 10, that, upon the points so prepared, each party shall "briefly state" "the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found."

It is superfluous to insist upon the necessity of the utmost care being bestowed upon the preparation of this document, both as regards the submission of the conclusions of law to be argued, and the preparation of a lucid and accurate statement of the facts, on which those conclusions are intended to be based. It is obvious that the success or failure of the appeal itself, may be directly involved in the success or failure of the counsel, in bringing his client's case fully before the tribunal whose action is invoked; the more so, as, unless in cases which are so clear as to admit of no doubt, the usual and indeed universal practice of that tribunal is to take the cause under advisement, to be decided at the next, or, if necessary, at some subsequent term. *Vide* 7 How., 240.

It is, of course, competent for the appellant, to prepare and submit points, in reply to any line of argument which he may anticipate on the part of his adversary, but, though admissible, this will rarely be feasible upon an actual argument, inasmuch as, until the call of the cause, he cannot ascertain what the exact line of that argument may be. When the case is submitted by consent, points in reply are usually drawn up, as, in that event, the appellant has an opportunity of considering and answering the case made by the respondent. See rule 25, as to cases submitted on a default to appear.

When prepared, the points of each party must be printed, in the same form as prescribed with regard to the case. The same number of copies should be stricken off, say twenty-five, or twenty at the least; seventeen are indispensable, for service or delivery to the court, without allowance for those used by the party himself. See rule 9.

(p.) ARRANGEMENTS AS TO HEARING.—STRIKING OFF THE CALENDAR.

Rule 20 provides that any case, unless it be one of the first ten, may be stricken off the calendar of course, and without prejudice, at any time before it is reached, upon consent of the parties, any time during the

first week of the term. This consent may either be in writing, filed with the clerk, or orally, by appearance of both parties before that officer.

The alterations effected by the present rules 25 and 26, may probably have the effect of superseding this practice, as a passed case now resumes its original place on any future calendar.

(*q.*) EXCHANGE.

The parties to an appeal may also, if willing, exchange its order of precedence, with that of any other, as to which the same desire may exist.

The course to be pursued for this purpose is clearly prescribed by rule 20. A notice of the proposed exchange, with the numbers of the two causes to which it relates, must be signed by the attorneys or counsel of all the parties concerned, and filed with the clerk. On this, the proceeding is complete, and, in all future calendars, each case takes the place originally belonging to the others, the clerk being specially directed to keep a memorandum, and place them for the future accordingly. See rule 21.

This course may be a matter of expediency, where an appeal is coming forward, and the parties are not yet prepared to argue it, when reached. It involves, however, this grave inconvenience, that, once exchanged, a cause cannot afterwards be submitted on printed arguments, out of its order. The party must, in such case, wait till it is reached on the calendar, and cannot anticipate that period. See rule 14.

(*r.*) RESERVATION.

Rule 25 abolishes the former practice upon this subject. A reservation cannot now be made, except in extraordinary cases. In such, an application must be made to the court, either by way of regular motion, or orally, by the appearance and submission of both parties. If on regular motion, a clear case of necessity, and of hardship, if the application be not granted, must be shown on the face of the moving papers.

Should the application be refused, and the desire of counsel for a reservation be mutual, the only feasible way of postponing the hearing, would seem to be by means of an exchange, or by allowing the case to be passed, without appearance by either.

(*s.*) MOTIONS TO TAKE CAUSE OUT OF ORDER.

Criminal cases may be so moved on behalf of the people. Rule 13.

And, by chapter 37 of 1858, p. 65, civil cases, to which the people are a party, may also be brought on by the attorney-general, pro-

vided notice of such motion be given, at the time of service of notice of argument, specifying the day on which the hearing will be moved.

If, after such notice, the case is not brought on by the attorney-general, the defendant, on whom the notice is served, may bring it on himself on the same day.

But it cannot be moved on any other during the term, unless by special direction of the court.

(*t.*) SUBMISSION.

The parties to the appeal, if mutually desirous, may accelerate its decision, by submitting it without oral argument.

This may be done, at any time during the sitting of the court, at any of its terms, without regard to the number of the cause upon the calendar. The only restriction upon this right is with regard to exchanged causes. Parties who have once availed themselves of this latter privilege, waive, by so doing, their facilities in this respect, and must then wait, till the cause is called on in its exchanged order. Rule 14. This last restriction was imposed on the amendment of 1858.

When submitted, the case must be so upon printed arguments. The points made out, in anticipation of the hearing, may suffice for this object, but the arguments for that purpose are usually more elaborately framed, than when the parties have an opportunity of being heard in person.

The usual course is, for the appellant's and respondent's counsel to submit to each other the draft of their proposed arguments, in the order in which they would come up on the hearing, giving due time for consideration, so that each may have the opportunity of answering or replying upon the propositions urged, and authorities cited by the other; and then, when the papers are completed, to print and submit them. Points should be stated, and authorities referred to, as on an oral hearing, in addition to which, each party may be desirous of enforcing his views with greater elaboration. Brevity should, however, be studied, so far as is consistent with a proper attention to details, and to placing fully before the court, the considerations, by which each proposition taken may be supported. And, in this case, the appellant is, of course, entitled to submit a printed reply, which, on an oral argument, on points first known to him at the commencement of the actual hearing, is, of course, impracticable.

When the papers are ready, the parties may either submit them in court, in person or by deputy, or may forward their papers to the clerk, with a request that he do so. If so forwarded, they should be accompanied by a written consent to the submission, signed by both attorneys. The number of copies forwarded, should be the same as are

required on the argument of an appeal, fourteen copies of each paper, *i. e.*, of the case, and of each set of points.

The proper time for making submissions is at the sitting of the court, any morning during term. With the consent of the judges, however, they may be accepted at any other convenient opportunity. A case may also be submitted, instead of being argued, when it is called on in its order, or a submission may be agreed upon, or imposed, as a condition on opening a default suffered by either party.

(*u.*) SUBMISSION ON FAILURE TO APPEAR.

The whole of the previous practice, as to taking an affirmance or reversal, on the default of the adverse party to appear, and argue the case, or to deliver cases and points, as required by rules 9 and 10, on the cause being called on, in its order, as previously regulated by rule 11, and the consequent directions as to a delay in the *remittitur*, contained in rule 17, are now abolished, and a wholly different practice established by the present rule 25.

That rule prescribes the practice clearly and in detail, and it will be needless to do more than shortly to recapitulate its provisions. Either party may now appear alone upon the call, and submit the cause, orally, or on his printed points. The appellant must hand in the usual papers on a hearing; the respondent, the copies of the case served upon him, and the usual number of copies of his points. Either party must, also, hand to the clerk, a printed copy of the brief submitted by him. This copy is for the use of, and is to be delivered, whenever called for by the adverse party. That party may, at any time, within twenty days after the hearing, furnish to each member of the court, and serve upon the opposite party, a printed answer to such brief. The latter, when so served, may, in like manner, furnish and serve a printed reply, within fifteen days after the service of the answer upon him.

The rule omits to provide for service upon the adverse party, of notice that the case has been submitted in this manner. It will, however, be a matter of fairness and of courtesy, to serve that notice, although, no doubt, that party is bound to inform himself of the fact, and of the state of the calendar, and, if he neglect to do so, neglects it at his peril.

The rule is also silent as to furnishing additional copies of the printed answer or reply, for the libraries, and the use of the reporter, or a full number of copies of the case, when the respondent submits it. They cannot, accordingly, be required, though it would also be a matter of courtesy, to deliver them, or to procure their delivery, especially when the case submitted is one of importance.

If either party requires further time, for the purpose of serving his answer or reply, he should obtain an extension in the usual manner.

Whether the court would entertain an application, to open a submission made in this form, seems doubtful, though it is, of course, competent for it to do so. If attempted, the application should be upon motion, showing a clear case of hardship, and of necessity for an oral argument.

Under rule 11, a default could only be taken, by a party who had himself noticed and placed the cause on the calendar for argument. The present rule does not seem to contemplate any restriction of this nature. All that seems necessary is, that the case should be called in its order on the calendar, and that the party claiming to submit it, should appear at the time of the call, even though he be brought there on his adversary's notice only, without having himself actively pressed on the cause.

(v.) HEARING OF APPEAL.—CALL OF CAUSE.

Unless previously submitted, the case comes on for argument, where both parties are present, on its regular call, on the day calendar.

That calendar consists, properly, of ten cases, and only the first ten are in order, for the purpose of an *ex parte* submission as above, or of passing the cause, or forcing it on for argument, where both parties are not prepared. See rule 20.

Those ten cases consist of such as are left undisposed of, on the list for the previous day, with a sufficient number, added from the general calendar, to make up the required complement.

There may, however, sometimes be more than ten upon the actual day calendar, the surplus consisting of cases ordered to be placed at its foot.

Cases so added to the regular list, stand in an expectant or supernumerary position, pending the disposition of those which precede them, and until the number of the latter is reduced to less than ten. They take precedence, however, on any succeeding morning, according to the order in which they then stand, over others that, but for them, would have been taken from the general calendar, to make up the prescribed amount.

And if, at any time, the ten cases, in regular order for the day, are all either disposed of or passed, these supernumerary cases then stand first to be taken up, under rule 20, when both sides are ready. If this be not the case, a cause, standing more than tenth upon the list, will not be run down, but will stand in its proper order on the succeeding morning.

After the whole list for the day is gone through, any other cause, in which both parties are ready, may be taken up by the court, without regard to its original number, though, of course, as between themselves,

the earlier issues will be preferred. Once so taken up, the hearing, if not finished at the rising of the court, stands first in order for the succeeding morning, after which, the regular calendar for that day is resumed.

The calendar for each day, and the proceedings on that immediately preceding, are published daily, in the newspapers at Albany. If further information be desired, it can always be obtained, on application to the clerk, by letter or telegraph.

(w.) PAPERS FOR THE COURT.

On the case being called, each party must hand in the number of printed copies of his papers, prescribed by rule 9, *i. e.*, fourteen copies, eight for the use of the judges, and six to be delivered to the clerk. The appellant hands in his case, and his points; the respondent, his points only.

If either party neglects to do so, or if the papers handed in by him, are not made out, or are not printed in conformity with the rules, the other party may ask for leave to submit the case, under rule 25. He cannot claim to do so, however, in case of a mere defect in papers, actually handed in, if the court will consent to receive them. And, in such case, it is, of course, competent to the court, to give time to the party, or allow any defect to be cured, and to reserve or adjourn the case for that purpose, if it so think fit.

(x.) COURSE ON ARGUMENT.

One counsel only, will be heard on each side, unless the court shall otherwise direct (rule 10).

And, when so heard, the argument of each counsel will be limited to two hours, except by the express permission of the court (rule 22). That permission may be requested, either before the argument is entered upon, where the necessity is clear, or, at the close of the two hours, where the counsel requires further time to develop his argument. If reasonable, the request will rarely be refused; but, to entitle himself to this indulgence, the applicant must study brevity, in the mode of submitting his views to the court.

And, although a sufficient statement of facts, is essential to the due submission of the points of law proposed for the consideration of the court, that statement must be succinct and clear, and must not assume the form of an extended discussion, upon any mere question of this nature, which the court will not hear. Rule 10.

But, in old chancery appeals, the case will be heard on the evidence. Section 460. So also, as to appeals in special proceedings, or criminal cases. See *Barringer vs. The People*, 4 Kern., 593; *Schenck vs. Dart*,

22 N. Y., 420, and *Griscom vs. Mayor of New York*, 2 Kern., 586 (590), before referred to.

It may be convenient to cite, at this juncture, the following decisions of general bearing, though some of them may possibly seem to be foreign, strictly speaking, to the scope of the present work :

This court cannot review any portions of an adjudication, not actually appealed from. *Robertson vs. Bullions*, 1 Kern., 243; *Kelsey vs. Western*, 2 Comst., 500. Nor can any point be insisted upon, on the argument, which was not distinctly presented in the court below. *Edgerton vs. Thomas*, 5 Seld., 40 (42); *Belknap vs. Seeley*, 4 Kern., 143; *Durgin vs. Ireland*, 4 Kern., 322 (328); *Codd vs. Rathbone*, 19 N. Y., 37; *Stewart vs. Smith*, 14 Abb., 75.

Nor will the appellate court, entertain objections to the pleadings or proceedings, which might have been cured by amendment, or questions as to variance or regularity, which might have been disregarded on the hearing, or an amendment ordered, even though that amendment be not actually made. *Vide New York Central Insurance Company vs. National Protection Insurance Company*, 4 Kern., 85; *Johnson vs. Carnley*, 6 Seld., 570; *Bate vs. Graham*, 1 Kern., 237; *Lounsbury vs. Purdy*, 18 N. Y., 515; *Bank of Havana vs. Magee*, 20 N. Y., 355; *Ingersoll vs. Bostwick*, 22 N. Y., 425; *Lake Ontario, Auburn, and New York Railroad Company vs. Marvine*, 18 N. Y., 585.

On appeal, the presumption lies, that the court below discharged its duty, that its proceedings were regular, and that its action was founded on proper proof; and, to warrant an interference with the adjudication, this presumption must be overcome, and actual error shown, sufficient to exclude any inference on which it might be sustained. *Vide Corning vs. Slosson*, 16 N. Y., 294; *Keegan vs. Western Railroad Company*, 4 Seld., 175; *Beecher vs. Couradt*, 11 How., 181; *Bidwell vs. Astor Mutual Insurance Company*, 16 N. Y., 263; *Viele vs. Troy and Boston Railroad Company*, 20 N. Y., 184; *Grant vs. Morse*, 22 N. Y., 323.

And, when a finding of fact by the court below is sought to be impeached, the court will look into the evidence, for the purpose of supporting it. *Spencer vs. Ballou*, 18 N. Y., 327. But not for the purpose of impeaching such a finding, even though excepted to. *Cady vs. Allen*, 18 N. Y., 573; *Stewart vs. Smith*, 14 Abb., 75.

Any specific portion of such a finding will not, however, be conclusive, if, from other portions of the same document, it appear to be erroneous. *Vide Garrison vs. Howe*, 17 N. Y., 458 (461). And a finding of fact may be construed, by the help of a finding of law. See *Smith vs. Devlin*, 23 N. Y., 363.

An adjudication of the court below, on an appeal taken under the Code, must stand or fall, according to the state of the law at the time

it was made, without regard to that at the time the appeal is argued. *Hartung vs. The People*, 22 N. Y., 95 (108).

To be sustainable in this court, the judgment appealed from, must be the result of a valid trial in the court below. If there has been a mistrial, that judgment, though right on the merits, will be reversed, and a new trial ordered. *Vide Cobb vs. Cornish*, 16 N. Y., 602; 15 How., 407; 6 Abb., 129; *Gilbert vs. Beach*, 16 N. Y., 606.

If, on the contrary, the appeal be brought up, on a grossly imperfect case, the judgment may be affirmed, without regard to the merits of the question. *Otis vs. Spencer*, 16 N. Y., 610; 15 How., 425; 6 Abb., 127; *Titus vs. Orvis*, 16 N. Y., 617.

(y.) CONCLUSION OF ARGUMENT.

At the close of the argument, the court usually takes the papers under advisement, unless the case is so clear that all its members concur in an immediate affirmance or reversal, as the case may be.

This rarely happens, however, and the decision is usually suspended till the close of the next succeeding term, when a list of decisions is published, generally on the Friday of the fourth week, at which time the court usually adjourns, including, as a general rule, the whole of the cases which were argued or submitted at the term immediately preceding. See memorandum as to general practice, at 7 How., 240, before cited.

But, frequently, this list includes decisions, on cases argued during the term then current, and, occasionally, in cases of pressing importance, this period is anticipated, and a decision pronounced, as soon as possible after the argument.

When written opinions are given, which is usually done, when the case is of any importance, they are delivered to the reporter, except where the decision is pronounced upon a motion, in which case they usually remain with the clerk, among the motion-papers.

When, therefore, a copy of such an opinion is required, for the purposes of a new trial, or otherwise, the former is the proper officer to apply to. Such copy can always be obtained from him, on application, and payment of the proper fees.

Unless five judges concur, the appeal will not be decided, but must be reheard. And, if the same thing happen again, a second rehearing must take place. If, on this second rehearing, the court is again divided, and the required number do not concur, the judgment appealed from will then be affirmed. Code, section 14.

But, of course, an affirmance of this nature, decides nothing, beyond the case itself, leaving the questions involved in it open for future discussion.

On such a rehearing, the appeal is noticed, and placed upon the calendar in the usual manner, and comes on in its turn, as on an original hearing. Fresh papers will not of course be necessary, unless fresh points are made by the counsel, in which case, they should be printed, and served in the usual manner. If opinions have been delivered on the previous occasion, it will be a matter of convenience to have them printed also.

(2.) DECISION ON APPEAL.

On the decision of the court being arrived at, either unanimously, or by the concurrence of a sufficient number, it is competent for it to reverse, to affirm, or to modify the judgment or order appealed from, and this, in whole or in part, and as to any or all of the parties. Code, section 12.

On a total affirmance or reversal of a judgment, appealed from under the Code, the right to costs follows the decision, and the prevailing party is entitled to them, as of right, in common-law actions; and an appeal from an order stands on the same footing. *White vs. Anthony*, 23 N. Y., 164.

It has been held, however, that, on the affirmance of a decree at special term in equity, with costs, the term costs will only carry costs of the court below, unless it be stated expressly that such affirmance is with costs of the appellate court. *Bogardus vs. Rosendale Manufacturing Company*, 1 Duer, 592; 11 L. O., 125. Where a judgment is affirmed in part, and reversed in part, they rest in the discretion of the appellate tribunal. But, in the exercise of that discretion, the same rule will usually be followed, and a reversal will be with costs to the appellant, unless there be special circumstances which render a different disposition proper. *Montgomery County Bank vs. Albany City Bank*, 3 Seld., 459. The old rule of the court of errors, denying costs on a reversal, as carried out in *Bouchaud vs. Dias*, 1 Comst., 201, is abrogated by the Code. *Same case*.

The court also possesses the power of awarding, in addition to the costs upon an affirmance, a further sum, for damages caused by the delay, not exceeding ten per cent. on the amount of the judgment. See Code, section 307, subdivision 6. But it cannot order an allowance under section 308. *Wolf vs. Van Nostrand*, 4 How., 208.

On affirmance of a judgment appealed from, the judgment of the appellate court is, of course, absolute in favor of the respondent. So also, when the case is brought up, on appeal from an order granting a new trial, under subdivision 2 of section 11, and the court decides that no error has been committed in granting that order.

But, on a reversal, it may, or may not, be proper to grant a new trial, according to the circumstances. When the general term has reversed

the judgment of the special term in the court below, on any allegation of error on the trial of a common-law action, in the process of ascertaining the facts, or on any question of fact, as to which the result might be varied, on the evidence to be given upon a retrial, it will not be right to adjudicate finally on the case, and the only judgment that can properly be given in favor of the appellant, is one ordering a new trial. See *Griffin vs. Marquat*, 17 N. Y., 28 (34); *Astor vs. L'Amoureux*, 4 Seld., 107; *Marquat vs. Marquat*, 2 Kern., 336 (341); *Moffat vs. Sackett*, 18 N. Y., 522; *Schenck vs. Dart*, 22 N. Y., 420 (422). But this rule only applies to appeals in actions under the Code, and not to those in which the case is reviewable in the court above, upon the facts. See last case.

And this principle does not extend to a case, in which it is apparent that no possible state of proof, applicable to the issue, can entitle the respondent to a judgment. Under these circumstances, it is not necessary or proper that a new trial should be awarded. *Edmonston vs. McLoud*, 16 N. Y., 543.

And, where this court reverses the decision of the general term, reversing that upon the actual trial, the judgment at special term may be affirmed, and final judgment rendered. *Marquat vs. Marquat*, *supra*.

And, where the case comes up upon ascertained facts, either on special verdict, or any other form of finding allowed by law, so that the question is, which party is, upon those facts, entitled to judgment, a final disposition of the case will be proper. *Marquat vs. Marquat*, *supra*. Nor is it actually incumbent, though, in most cases, right, for the appellate tribunal to order a new trial, where there has been error in the facts. It rests, under section 330, in its discretion, to be ordered, "if necessary and proper." *Griffin vs. Marquat*, 17 N. Y., 28 (31).

In this case, the judgment was modified, by awarding a new trial, denied by the general term.

And, where it appeared that the case had not been fully considered in the court below, the judgment was reversed, and a new trial ordered, to give the parties an opportunity of presenting it more fully, upon another occasion. *Mills vs. Van Voorhies*, 20 N. Y., 412 (423); 10 Abb., 152 (162).

Where the error complained of is one rather of form than of substance, a judgment may be modified, and then affirmed, without any necessity for a new trial. *Fitzhugh vs. Wiman*, 5 Seld., 559.

When the judgment of the appellate tribunal, assumes the form of a decree, embracing complicated provisions, it is not unusual to direct that decree to be settled by the judge who delivers the opinion, on notice to the parties, in the same manner as on the settlement of a similar decree in the court below. Under these circumstances, the same

practice should be pursued, the *remittitur* being, of course, delayed, pending the settlement.

(aa.) REARGUMENT.

If the court, after deliberation, entertain any doubt as to the proper decision of the questions submitted, a reargument may be ordered. In this case, the cause may be set down expressly for this purpose, by special order to that effect.

Or such a reargument may be applied for by the parties, and the *remittitur* stayed for that object, on petition for such relief, the application being brought on by way of motion. *Vide Hoyt vs. Thompson's Executor*, 19 N. Y., 207.

If such a motion be granted, the case will be set down as above; if denied, the *remittitur* will issue, immediately upon the denial of the motion. See new Rule, No. 28, adopted January, 1863. *Infra*, p. 829.

(bb.) REMITTITUR.

This is the last proceeding connected with an appeal to this court. It is authorized by section 12, which directs that "its judgment shall be remitted to the court below, to be enforced according to law." Rule 16 prescribes that the *remittitur* "shall contain a copy of the judgment of this court, and the return made by the clerk of the court below, and shall be sealed with the seal, and signed by the clerk of this court."

The practice of delaying the *remittitur* for ten days, and requiring notice to be served upon the adverse party, in cases where an affirmance or reversal was taken by default, existent under the prior regulations, is now abrogated by rule 25. Whilst that practice existed, that party was bound to make his application to open the default, within the time allowed. If delayed, it came too late, whatever the nature of the excuse shown. *Latson vs. Wallace*, 9 How., 334; *Martin vs. Wilson*, 1 Comst., 240.

When the appeal is decided after argument, the *remittitur* issues immediately upon the decision. The prevailing party should at once apply to the clerk, who prepares and forwards it, as he may be directed. His fees must, of course, be paid immediately upon its receipt.

When a double appeal has been taken, from a judgment and also from an order, it will not be proper to issue a *remittitur* of the entire record, on a dismissal of the latter branch of the appeal only, but it must await the final disposition of that from the judgment. *McFarlan vs. Watson*, 4 How., 128; 2 C. R., 69. But, when the entire appeal is disposed of by an order of dismissal, the record should be remitted. *Dresser vs. Brooks*, 2 Comst., 559; 4 How., 207; *Langley vs. Warner*, 2 C. R., 97. The head-note in *McFarlan vs. Watson*, to the contrary

effect, is clearly wrong, and of no authority. See 4 How., 184, and two other cases, above cited. See also *Doty vs. Brown*, 4 How., 429.

So long as the *remittitur* has not been actually filed with the clerk of the court below, this court retains jurisdiction of the case, and may order it to be returned for correction. *Burckle vs. Luce*, 1 Comst., 239; 3 How., 236. See also *Thompson vs. Blanchard*, 2 Comst., 561; 4 How., 210. See, however, as to the power acquired by the court below, on its mere transmission, *Judson vs. Gray*, 17 How., 289, below cited.

But, so soon as the *remittitur* has been so filed, the jurisdiction of this court, so far as the granting of relief is concerned, is absolutely gone. See *Martin vs. Wilson*, 1 Comst., 240; *Frazee vs. Western*, 3 How., 335; *Latson vs. Wallace*, 9 How., 334; *Dresser vs. Brooks*, 2 Comst., 559; 4 How., 207. See likewise *Burckle vs. Luce*, *supra*.

The only remedy, in such cases, is a new appeal. *Dresser vs. Brooks*, *supra*. And, if taken, proceedings in such second appeal may be stayed, till the costs of the former have been paid. *Dresser vs. Brooks*, 5 How., 75.

But, where the *remittitur* is irregular in itself, and does not contain the judgment actually pronounced by the court, it may be corrected upon motion, although it may have been filed below. *Palmer vs. Lawrence*, 1 Seld., 455. Or an irregular order, upon which a *remittitur* has been actually made, may, it seems, be subsequently vacated by the court above. *Newton vs. Harris*, 8 Barb., 306; 1 C. R. (N. S.), 191.

The court below cannot entertain a motion, that the *remittitur* be taken off the file, and restored to the appellate court, for any purpose of this description. But, if the latter tribunal signify its desire to that effect, by some official act, as by resolution, duly certified to by the clerk and communicated to the court below, its direction would doubtless be obeyed. But such desire must be signified in an official form, and cannot be ascertained by affidavit, or by the opinions, declarations, or acts of members of the court individually. *Selden vs. Vermilya*, 3 Sandf., 683; 6 How., 41; 9 L. O., 83; *Bogardus vs. Rosendale Manufacturing Company*, 1 Duer, 592; 11 L. O., 125; *Newton vs. Harris*, 8 Barb., 306; 1 C. R. (N. S.), 191.

On an order, upon which a *remittitur* has been actually made, being vacated by the court above, for irregularity, there will be no foundation for any judgment entered upon that *remittitur*, and it may, if necessary, be set aside on motion. *Newton vs. Harris*, *supra*.

It has been held that the mere transmission of the *remittitur* to the prevailing party, authorizes the court below to proceed with a new trial, if awarded, and that the party holding such *remittitur*, will be estopped from objecting that it has not been actually filed. *Judson vs. Gray*, 17 How., 289.

When received, the *remittitur* should be filed with the clerk of the court below, and notice of such filing served upon the adverse party. If on appeal from an order, it may frequently dispose of the question, without the necessity of any further action. Should judgment, however, be awarded, or should any other ulterior action be necessary, it must be presented to the court, and an order applied for, that the judgment of the appellate tribunal, be made the judgment of the court below. See, as to proceedings and form of order to be applied for, *Union India Rubber Company vs. Babcock*, 4 Duer, 620 ; 1 Abb., 262. The same course may properly be pursued, with regard to the *remittitur*, on an appeal from an order, when the disposal of that order, involves the necessity of any further action on the part of the court below. Should a new trial be directed, that trial proceeds in the usual course.

The order to be entered as above, is an order of course, and the omission to enter it is a mere formal irregularity, which the court below may amend, or the court above disregard, on any future occasion. *Chataugue County Bank vs. White*, 23 N. Y., 347.

The judgment to be thus entered, being a judgment of the court below, the application should be made to the court, as such, or to a judge sitting at special term. When the *remittitur* is one of mere affirmance or reversal, it may properly be made *ex parte*.

The court may, however, direct notice to be given, if proper, which will usually be the case, when the judgment to be entered involves any special provisions. Such notice may be in the form of an order to show cause. See *Union India Rubber Company vs. Babcock*, *supra* (note at close of report). Or it will doubtless be competent to the prevailing party, to anticipate such direction, and give notice of his application for judgment, in the first instance.

Judgment cannot be entered, as of course, upon the *remittitur*, without obtaining a previous order of this description. *Seacord vs. Morgan*, 17 How., 394. A note, containing the individual views of the reporter upon these subjects, will be found at the close of this case. 17 How., 398.

When final judgment is awarded in favor of the respondent, on an appeal from an order granting a new trial, under the special provisions of section 11, subdivision 2, the order for judgment should, if necessary, provide for such ulterior proceedings, by way of assessment of damages, or otherwise, as may be requisite, to render such judgment effectual. The order may be entered in the same terms, and the same course pursued under it, as on the similar provisions on the entry of judgment by default, under section 246, subdivision 2.

On the order for judgment being made, the prevailing party taxes his costs, on notice to his adversary in the usual manner, and thereupon

completes his record, and docket his judgment for those costs, when entered, in the usual manner. The judgment-roll will consist of the *remittitur*, and order for judgment, with the usual *postea*. As to the authority of the clerk to tax the costs in these cases, see *Union India Rubber Company vs. Babcock*, *supra*.

On dismissal of an appeal with costs, after argument upon the merits, the court below is bound to suppose, that the usual costs of an appeal are intended, and not merely costs of a motion, unless the contrary is expressed in the order. *Webb vs. Norton*, 10 How., 117. Full costs follow that of an appeal from an order. *White vs. Anthony*, 23 N. Y., 164.

In *Bogardus vs. Rosendale Manufacturing Company*, 1 Duer, 592; 11 L. O., 125, it is held that, on reversal of the decision of the general term, and affirmance of a decree in equity at special term, "with costs," those terms will only carry the costs of the court below, and not those of the appellate tribunal, unless expressly so stated. The words are to be read, as if the affirmance were "with costs of the court below."

Where the *remittitur* awarded costs, and also interest on the judgment, by way of damages, it was held that the respondent could not claim double interest, once under the judgment, and once as damages, and that this formula, continued from the former practice of the Court of Errors, was in effect nugatory. See *Hoard vs. Garner*, 4 Sandf., 677.

When damages are given on an affirmance, under the clause introduced into subdivision 6 of section 307, on the amendment of 1858, the respondent will be entitled to tax and enter judgment for them, as part of his costs, in the same manner as with respect to an allowance on the trial, under sections 308 and 309.

Memorandum.—The following regulation in relation to a reargument, when ordered, was made by this court, at the January term, 1863:

Rule 28. All causes in which a reargument is ordered, may, at the election of either party, be placed on the calendar at the next term after such reargument is ordered, or the following term—the same to take its original place on the calendar.

CHAPTER V.

OF APPEALS FROM JUSTICES' COURTS.

§ 321. *Statutory and Other Provisions.*

APPEALS of this nature are regulated by chapter V., title XI., part II. of the Code of Procedure, which runs as follows:

CHAPTER V.

Appeal to the Court of Common Pleas for the City and County of New York, or to a County Court, from an Inferior Court.

§ 351. (301.) All statutes, now in force, providing for the review of judgments in civil cases, rendered by courts of justices of the peace, by the Marine Court of the city of New York, by the justices' courts in the city of New York, by the Municipal Court of the city of Brooklyn, and by the justices' courts of cities, and regulating the practice in relation to such review, are repealed; and hereafter, the only mode of reviewing such judgments shall be an appeal, as prescribed by this chapter.

Dates, as it stands, from 1849. The difference in 1848 was merely verbal, not substantial.

§ 352. (302.) When a judgment shall have been rendered by the general term of the Marine Court of the city of New York, or by a justice of a justices' court of that city, the appeal shall be to the Court of Common Pleas for the city and county of New York.

The appeal from the general term of the Marine Court, prescribed herein, shall be from an actual determination at such general term only, and shall be taken, within twenty days after judgment by such general term. In the city of Buffalo, the appeals from the courts of justices of said city shall be to the Superior Court of said city. When rendered by any of the other courts enumerated in section three hundred and fifty-one, the appeal shall be to the county court of the county where the judgment was rendered. On such appeal, when the amount of the claim or claims of either party, litigated in the court below, shall exceed fifty dollars, or when, in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered shall exceed fifty dollars, exclusive of costs, a new trial shall be had in the county court, in the following cases:

1. When the judgment was rendered upon an issue of law joined between the parties.

2. When it was rendered upon an issue of fact, joined between the parties, whether the defendant was present at the trial or not.

Wholly remodelled, and the concluding provisions, as to a new trial in certain cases, added on the amendment of 1862. The clause as to appeals, in the city of Buffalo, was likewise added on that occasion.

That in relation to appeals from the general term of the Marine Court was first inserted, and the wording of the other provisions revised, in 1857. The section, these changes excepted, dates substantially from 1849. In 1848, the appeal in New York cases lay to the Superior Court, instead of to the Common Pleas.

§ 353. (303.) The appellant shall, within twenty days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear, he shall have twenty days, after personal notice of the judgment, to serve the notice of appeal provided for in this and the next section.

Dates, as it stands, from 1852.

In 1851, the appellant was required, within the same period, to make, or cause to be made, an affidavit, stating the substance of the testimony and proceedings before the court below, and the grounds upon which the appeal was founded, and to serve it, together with a notice of appeal; the concluding sentence standing as now, with verbal differences only.

In 1848 and 1849, this affidavit was required in all cases, the concluding portion of the section being omitted.

Since the amendment of 1862, this section must be read in connection with the following, forming part of section 371, as then remodelled :

In the notice of appeal, the appellant shall state in what particular, or particulars, he claims the judgment should have been more favorable to him.

§ 354. (304.) The notice of appeal must, within the same time, be served on the justice, personally, if living and within the county, or on his clerk, if there be one, and on the respondent, personally, or by leaving it at his residence, with some person of suitable age and discretion; or, in case the respondent is not a resident of such county, or cannot, after due diligence, be found therein, in the same manner, on the attorney or agent, if any, who is a resident of such county, who appeared for the respondent on the trial; and if neither the respondent nor such agent or attorney can be found in the county, the notice may be served on the respondent, by leaving it with the clerk of the appellate court; and the appellant must, at the time of the service of the notice of appeal on the justice, or on his clerk, as herein provided (except in cases of appeals from the district courts in the city of New York, and the general term of the Marine Court of the city of New York), pay to such justice or clerk, the costs of the action, included in the judgment, together with two dollars, costs of the return, which shall be included in the judgment for costs on reversal. In all cases of appeal from the general term of the Marine Court of the city of New York, and from the district courts of the city of New York, to the Court of Common Pleas for the city and county of New York, the appellant shall, at the time of the service of the notice of appeal, pay to the clerk of the Marine Court, or to the justice or clerk of the district court, two dollars, as costs of the return to such Court of Common Pleas, which costs, so paid, shall be included in the judg-

ment for costs, in case the judgment of the court below shall be reversed ; and the appellant shall also execute, on the appeal, a written undertaking on his part, with one or more sufficient sureties, to the effect that the appellant will pay all costs, disbursements, and extra costs awarded against him in the court below, if such judgment shall be affirmed by the appellate court, on such appeal, together with all costs and damages which may be awarded against him thereon ; such sureties to justify in double the amount specified in the undertaking ; such undertaking, and the sufficiency of the sureties to be approved by the justice of the court below, or one of the judges of the Court of Common Pleas ; or the appellant may deposit with the clerk of the Court of Common Pleas, the costs, disbursements, and extra costs included in the judgment in the court below, and the sum of fifteen dollars, to meet any costs that may be awarded against him in such appeal ; and such appeal from the general term of the Marine Court and the District Court shall be ineffectual, unless, within the time specified for bringing the appeal, the appellant execute such undertaking or make such deposit ; the undertaking, when executed and approved, to be filed with the clerk of the Court of Common Pleas ; the amount so deposited shall be repaid by said clerk to the appellant, if he succeed on the appeal ; and in case the judgment be affirmed, the said clerk shall, after execution is issued, pay over the amount so deposited, to the respondent, which shall be credited on the execution issued on the judgment of affirmance, to the extent thereof, and the balance, if any, on the execution issued on the judgment appealed from.

This section dates, as it stands, from the amendment of 1858.

On that occasion, the whole of the special provisions as to appeals from the general term of the Marine Court, and from the District Courts of the city of New York, were for the first time inserted.

In 1857, the section consisted of the previous portion only, in nearly the same words as it stands now, some slight verbal differences excepted.

In 1852, the provision stood as in 1857, except that the power of service, by leaving it with the county clerk, was omitted, and some slight verbal differences at the conclusion.

In 1851, directions were given for service of the affidavit then required, together with the notice of appeal, on the justice, and of the notice of appeal only, on the respondent, nor was there any power of serving the former on the justice's clerk. Otherwise, the section was substantially the same.

In 1849, a copy of the affidavit, and a notice, were to be served, both on the justice and on the respondent. There were some verbal differences, and the concluding portion, providing for the payment of the costs of the return, was wholly omitted.

In 1848, the phraseology was different, to some extent. It was also necessary to state, on the face of the notice, that the appeal would be heard at a time and place designated, either in or out of term, and the copy affidavit and notice were to be served at least ten days before the time of hearing.

§ 355. (305.) If the appellant desire a stay of execution of the judgment, he shall give security, as provided in the next section.

Dates as it stands from 1849. In 1848 he was required to present the affidavit to a judge of the appellate court, or of the Supreme Court, who might, in his discretion, make an order that proceedings be stayed, upon security being given.

§ 356. (306.) The security shall be a written undertaking, executed by one or more sufficient sureties, approved by the county judge or by the court below, to the effect, that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied.

Dates from 1849. In 1848, the undertaking might be approved by the judge making the order staying proceedings.

§ 357. (307.) The delivery of the undertaking to the court below, shall stay the issuing of execution; or, if it have been issued, the service of a copy of the undertaking, certified by the court below, upon the officer holding the execution, shall stay further proceedings thereon.

Dates from 1849. In 1848, the order was to be delivered, and a copy served with the undertaking.

§ 358. (308.) Where, by reason of the death of a justice of the peace, or his removal from the county, or any other cause, the undertaking on the appeal cannot be delivered to him, it shall be filed with the clerk of the appellate court, and notice thereof given to the respondent, or his attorney or agent, as provided in section three hundred and fifty-four; it shall, thereupon, have the same effect as if delivered to the justice.

Dates from 1849. In 1848, the order was to be filed with the undertaking, and there were other slight verbal differences in the section.

§ 359. (309.) When, by reason of the death of a justice of the peace, or his absence from the county, or any other cause, the notice of appeal cannot be served, as provided by section three hundred and fifty-three, it may be served, by leaving the same with the clerk of the county.

Dates, as it stands, from 1852. In the previous year there was no such provision. Section 359, as it stood in 1849, provided that, after service on him, the respondent might correct material omissions or misstatements, by affidavit on his part, to be served on the justice and the adverse party, within ten days after receiving notice of appeal. In 1848, the section was to the same effect, except that the affidavit, in correction, need only be served on the adverse party, at least four days before the time for hearing.

§ 360. (311.) The court below shall thereupon, after ten days, and within thirty days after service of the notice of appeal, make a return to the appellate court, of the testimony, proceedings, and judgment, and file the same in the appellate court. The return may be compelled by attachment. But no justice of the peace shall be bound to make a return, unless the fee prescribed by the last section of this chapter be paid, on the service of the notice of appeal.

Settled, as it stands, in 1862; but substantially the same since the amendment of 1852. In 1849, the affidavits then required, were to be filed with the return.

In 1848, the procedure was wholly different. Section 310 of that year, provided for a hearing of the appeal, upon the affidavits served by the parties, or if those affidavits were defective, it might then order the court below to make a return, within ten days after the service of the order and affidavits, or of copies. Section 311 of that year, provided for the making of such return, if ordered, substantially to the same effect as the present provision.

§ 361. (312.) When a justice of the peace, by whom a judgment appealed from was rendered, shall have gone out of office, before a return is ordered, he shall, nevertheless, make a return, in the same manner, and with the like effect as if he were still in office.

§ 362. (313.) If the return be defective, the appellate court may direct a further or amended return, as often as may be necessary, and may compel a compliance with its order by attachment; and the court shall always be deemed open for these purposes.

The concluding words, "and the court, &c.," were added by amendment in 1857; otherwise, the section has come down unchanged.

§ 363. (314.) If a justice of the peace, whose judgment is appealed from, shall die, become insane, or remove from the state, the appellate court may examine witnesses, on oath, to the facts and circumstances of the trial or judgment, and determine the appeal, as if the facts had been returned by the justice. If he shall have removed to another county within the state, the appellate court may compel him to make the return, as if he were still within the county where the judgment was rendered.

§ 364. (315.) If a return be made, and the appeal is from a judgment where a new trial may not be had, as provided by this chapter, it may be brought to a hearing at a general term of the appellate court, upon notice by either party of not less than eight days. It shall be placed upon the calendar, and continue thereon, without further notice, until finally disposed of. But if neither party bring it to a hearing before the end of the second term, the court shall dismiss the appeal, unless it continue the same by special order, for cause shown. If the appeal is from a judgment where a new trial may be had, it may be brought to a hearing or trial at any term of the county court, at which a petit jury shall be summoned to attend, upon the same notice as provided for actions in the Supreme Court; at least eight days before the court, the party desiring to bring on the appeal, shall serve note of issue on the clerk, and the clerk shall, thereupon, enter the cause on the calendar, according to the date of the return.

The concluding sentence was added, and that portion of the first, which distinguishes appeals where a new trial may, from those where it may not be had, was inserted on the amendment of 1862. Otherwise, the section has come down unchanged.

§ 365. (316.) The appeal shall be heard on the original papers; and no copy thereof need be furnished for the use of the court.

Dates from 1849. Substantially the same in 1848.

§ 366. (317.) Upon the hearing of the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for errors of law or fact. If the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice, the

court may determine the alleged error in fact, on affidavits, and may, in its discretion, inquire into and determine the same upon examination of the witnesses. If the defendant failed to appear before the justice, and it is shown by the affidavits served by the appellant or otherwise that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment, and order a new trial before the same or any other justice in the same county, at such time and place, and on such terms as the court may deem proper. Where a new trial shall be ordered before a justice, the parties must appear before him according to the order of the court, and the same proceedings must thereupon be had in the action, as on the return of a summons personally served. If the appeal shall be from a judgment in which a new trial may be had as in this chapter provided, the court shall proceed to the hearing of the cause, if the issue joined before the justice was an issue of law, or to the trial thereof by jury, if such issue was upon a question of fact.

1. If the issue joined before the justice was an issue of law, the court shall render judgment thereon according to the law of the case; and if such judgment be against the pleadings of either party, an amendment of such pleading may be allowed, on the same terms and in like case as pleadings in actions in the Supreme Court, and the court may thereupon require the opposite party to answer such amended pleading or join issue thereon, as the case may require, summarily.

2. If, upon an appeal in an issue of law, the court shall adjudge the pleading complained of to be valid, it shall in like manner require the opposite party summarily to answer such pleading, or join issue thereon, as the case may require.

3. Upon an issue of fact being so joined, the court shall proceed to hear the same tried by a jury, in the same manner as issues joined in the Supreme Court.

4. Every issue of fact so joined or brought upon an appeal, shall be tried in the same manner as in actions commenced in the Supreme Court.

5. The court shall have the same power over its own determinations, the verdict of the jury, and shall render judgment thereon, in the same manner as the Supreme Court in actions pending therein.

6. Either party may move for a new trial in said court, on a case or exception, or otherwise, and such motion may be made, before or after judgment has been entered, and the provisions of this act, in relation to the proceedings on receiving the verdict of a jury, exceptions to the decisions of the court, making and settling case and exceptions, motions for new trials, and making up the judgment-roll in the Supreme Court, are hereby made applicable to all appeals, brought up for trial as in this chapter provided.

Those portions of the section which provide for a new trial in the court above, were all first added on the amendment of 1862. The phraseology of the preceding part was also, in some respects, revised on that occasion. Otherwise, that portion of the section dates from 1851. In 1849, it consisted of the two first sentences only. In 1848, it was the same, with

some verbal difference, and with this exception, that the court above might, in all cases, either order a new trial, or affirm or reverse the judgment.

§ 367. (318.) To every judgment upon an appeal there shall be annexed the return on which it was heard, which shall be filed with the clerk of the court, and shall constitute the judgment-roll.

Dates from 1852. In the previous years, the affidavits then required were also to be annexed.

In the Code of 1848, provisions were here inserted, with reference to a new trial in the court below, if ordered, by sections 319 and 320 of that year.

§ 368. (321.) If the judgment be affirmed, costs will be awarded to the respondent. If it be reversed, costs shall be awarded to the appellant. If it be affirmed in part, the costs, or such part as to the court shall seem just, may be awarded to either party.

Dates, as it stands, from 1849. In 1848, the costs of a new trial, if had, were also provided for, to be in the discretion of the appellate court.

§ 369. (322.) If the judgment below, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained, on proof of the facts, made at or after the hearing, upon a previous notice of six days; and, if the order shall be made before the judgment is entered, the amount may be included in the judgment.

Dates, as it stands, from 1857.

In 1848 and 1849, it was substantially the same, except that the concluding words, "and if the order, &c," were omitted.

§ 370. (323.) If, upon an appeal, a recovery be had by one party, and costs be awarded to the other, the appellate court shall set off the one against the other, and render judgment for the balance.

§ 371. (324.) Costs shall be allowed to the prevailing party, in judgments rendered on appeal, in all cases, with the following exceptions and limitations: In the notice of appeal, the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him. Within fifteen days after the service of the notice of appeal, the respondent may serve upon the appellant and justice an offer, in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. The appellant may, thereupon, and within five days thereafter, file with the justice a written acceptance of such offer, who shall, thereupon, make a minute thereof in his docket, and correct such judgment accordingly, and the same so corrected shall stand as his judgment, and be enforced accordingly; and any execution which has been issued upon the judgment appealed from, shall be amended by the justice, to correspond with the amended judgment; and no undertaking given to stay execution shall be enforced for more than the amount of the corrected judgment. If such offer be not made, and the judgment in the county court be made favorable

to the appellant than the judgment in the court below, or if such offer be made and not accepted, and the judgment be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs. The respondent shall be entitled to recover costs, where the appellant is not.

Whenever costs are awarded to the appellant, he shall be allowed to tax, as part thereof, the costs and fees paid to the justice, on making the appeal, as disbursements, in addition to the costs in the appellate court; and when the judgment in the suit before the justice was against such appellant, he shall further be allowed to tax the costs incurred by him, which he would have been entitled to recover, in case the judgment below had been rendered in his favor.

If, upon an appeal, a recovery for any debt or damages be had by one party, and costs be awarded to the other party, the court shall set off such costs against such debt or damages, and render judgment for the balance.

The following fees and costs, and no other, except fees of officers, disbursements, and witnesses' fees, shall be allowed on appeal, to the party entitled to costs as herein provided, when the new trial is in the county court:

For proceedings before notice of trial, ten dollars.

For all subsequent proceedings before trial, seven dollars.

For trial of an issue of law, ten dollars.

For every trial of an issue of fact, fifteen dollars.

For argument of a motion for a new trial, on a case or bill of exception, ten dollars.

In all cases, to either party, for every term, not exceeding five, at which the appeal is necessarily on the calendar and is not tried or is not postponed by the court, seven dollars.

In other appeals the costs shall be as follows: To the appellant, on reversal, fifteen dollars; to the respondent, on the affirmance, twelve dollars. If the judgment appealed from be reversed in part and affirmed as to the residue, the amount of costs allowed to either party shall be such sum as the appellate court may award, not exceeding ten dollars. If the appeal be dismissed for want of prosecution, as provided by section three hundred and sixty-four, no costs shall be allowed to either party. In every appeal, the justice of the peace, before whom the judgment appealed from was rendered, shall receive two dollars for his return. If the judgment be reversed, for an error of fact in the proceedings not affecting the merits, costs shall be in the discretion of the court.

With the exception of those portions which relate to the costs of an appeal, as distinguished from those of a new trial, in the court above, the whole of this section is new, having been first inserted on the amendment of 1862. So is also the concluding sentence, as to those of a reversal, for an error in fact, not affecting the merits, being in the discretion of the court.

The small portion of the section, which stood prior to the amendment in question, dates, as it stands, from 1851. In 1849, it was substantially the same, except that disbursements were not mentioned at the commencement, and the fee to the justice for his return was one dollar, instead of two dollars.

In 1848, no mention was made of fees of officers at the commencement. And the fees for

reversal or affirmance, if upon affidavit without a return, were ten dollars and seven dollars respectively. Otherwise the section was the same as in 1849.

The rules of the Supreme Court contain only one provision in relation to these appeals. It is contained in rule 53, as follows:

Rule 53. (87). On appeals from a justice's judgment, where the county court has not jurisdiction, by reason of relationship, &c., a notice of motion for an order to compel the justice to amend his return, may be given, in twenty days after the date of the certificate of the county judge, and not after that time.

In the New York Common Pleas the practice is regulated more in detail.

Appeals of this nature are submitted at the general term, which, in that tribunal, is held on the fourth Monday of each month.

The following rules have been made by that court upon the subject. See 7 L. O., 227, which, except as below noticed, are still existent:

**COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK.
NEW RULES.**

The following rules, with reference to the hearing of appeals from the Marine Court, and from the justices' courts, have been made:

1. If the appellant does not procure the return to be made to this court, within the time prescribed in section three hundred and sixty of the Code of Procedure, the respondent may serve a notice in writing, requiring the same to be done within ten days thereafter, and that, in default thereof, he will apply to the general term, on the first day, for an order dismissing the appeal; and, upon proof of the service of such notice, and of a non-compliance therewith, such order will be granted, unless the court grant further time therefor.

2. If the court below shall not make the return to this court, as prescribed by the Code, the appellant may apply, by motion, to a judge at chambers, to compel such return by attachment.

The third rule went on to provide that the appeal should be heard on written arguments, and points, and prescribed regulations, as to their service on the parties, and the submission, on the first day of the term.

The fourth gave power to either party to move at chambers, that the appeal be argued orally.

These two are, in effect, abrogated by that below noticed; but the following are still existent:

5. The clerk shall make a separate calendar of such appeal cases.

6. The appellant or respondent may furnish a fair copy of the original papers, for the use of the court.

The following rule, as to the argument of these appeals, was substituted for Nos. 3 and 4, above noticed (28th of September, 1857):

Appeals from the Marine and district courts shall hereafter, and until further order of this court, be heard orally, at the general term appointed for the submission thereof.

The parties will be confined, on the argument, to a brief statement of the facts and points involved, and the authorities relied on, unless the court shall otherwise direct.

The whole of this system must, however, be now confined to appeals where a new trial above is not claimable. The Code itself, as above cited, provides as to the latter.

§ 322. *General Considerations.*

By section 351, the whole of the previous existing enactments, on the subject of appeals of this nature, are swept away, and the provisions of the Code substituted for them in all cases.

Section 352 defines, as will have been seen, the courts to which such appeals are to be taken, being, in effect, to the county court of the county where the judgment was rendered, except in Buffalo, where the appeal lies to the Superior Court of that city. In New York, this court is the Court of Common Pleas; but, before the amendment of 1849, the Superior Court was the proper tribunal. During four days in 1857, *i. e.*, from the 13th to the 17th, the jurisdiction of the latter tribunal was temporarily restored, as to appeals from the district courts in the city of New York. *Vide* chapter 344 of 1857, vol. 1, p. 707, section 76, p. 727. This provision stands repealed, and the jurisdiction of the Common Pleas is reinstated, by section 352, above cited, as amended by chapter 723 of 1857, vol. 2, p. 551, section 21, p. 560. See disclaimer of jurisdiction by the Superior Court, in *Hawkins vs. Mayor of New York*, 5 Abb., 344; and *Day vs. Swackhammer*, 5 Abb., 345, note.

The powers conferred upon the Superior Court, by the Code of 1848, are exercisable, to their full extent, by the Common Pleas, notwithstanding the omission on the part of the legislature to make the necessary corrections in section 8 of the Code, when the jurisdiction in these cases was transferred by the amendment of 1849. See *Wood vs. Kelly*, 2 Hilt., 334.

Between 1853, when the general term of the Marine Court was first organized, and the amendment of 1857, when an appeal was given, in terms, from its decision at such general term, by section 352, as it now stands, the question as to appeals to the Common Pleas was involved

in some doubt. That tribunal considered that an appeal lay to it from the decision of a single judge of the Marine Court. *Heidenheimer vs. Lyon*, unreported. See also, per Mitchell, J., in *The People vs. Gale*, 12 How., 260 (264); 3 Abb., 309. The Supreme Court held, on the contrary, that the appeal to the Common Pleas, lay from the decision of the Marine Court at general term, and from that only. See *The People ex rel. Figaniere vs. The Marine Court*, 11 How., 400; 2 Abb., 126; affirmed, 2 Abb., 240; *White vs. Anderson*, 12 How., 377; *The People ex rel. Debenetti vs. Gale*, 13 How., 5; affirmed at general term, *same case*, 22 Barb., 502; 3 Abb., 57; and, finally, by the Court of Appeals, *same case*, 13 How., 260; 3 Abb., 309. The latter view prevailed, therefore, and the amendment of 1857 has finally settled the question. See generally, as to the interference of the Supreme Court by *mandamus*, in similar questions, *The People ex rel. Mactaggart vs. Gale*, 16 How., 199.

When, on an appeal of this nature, the county judge, to whom that appeal is taken, is, from any cause, incapable of acting, it may, in such case, be transferred to the Supreme Court, under the special power for that purpose, conferred by the Code, section 30, subdivision 13. Under these circumstances, the papers are to be transferred from the county court, to the Supreme Court in the same district. Same subdivision. The appeal is heard in the latter tribunal, at the special, and not at the general term, to which the ulterior appeal lies, as if the case had been tried without such transfer. *Davis vs. Stone*, 16 How., 538; *Sheldon vs. Albro*, 8 How., 305. See also decisions in sixth district, noticed at 16 How., 540. Such appeal should be heard in the same county. *Wilds vs. Peck*, 16 How., 541; and, on the original papers, *same case*; *Davis vs. Stone, supra*. And the costs thereon, are to be on the scale provided by section 371, and not as on the hearing of an appeal to the Supreme Court. *Davis vs. Stone, supra*; *O'Callaghan vs. Carroll*, 16 How., 327; *Taylor vs. Seeley*, 4 How., 314; 3 C. R., 84.

The appeal given by section 351, is in substitution for the review by *certiorari*, provided as to justices' judgments, by the Revised Statutes. *Williams vs. Bigelow*, 11 How., 83 (85); *Whitney vs. Bayard*, 2 Sandf., 634; *Derby vs. Hannin*, 15 How., 32 (33). Judgments only, and not orders, are reviewable. See *McButt vs. Frenche*, 15 How., 537.

An appeal of this nature, has been held to lie, from the decision of a justice, on summary proceedings for the possession of land. *Davis vs. Hudson*, 5 Abb., 61; *Duel vs. Rust*, 24 Barb., 438; *People ex rel. Williams vs. Bigelow*, 11 How., 83. In *The People ex rel. Nevins vs. Willis*, 5 Abb., 205, the contrary is maintained, and that *certiorari* is the only remedy in such cases. In *People ex rel. Williams vs. Bigelow, supra*, it is also held, that the remedy is concurrent.

Proceedings under the mechanics' lien law, are reviewable by appeal in this manner. *People ex rel. Bendon vs. County Judge of Rensselaer*, 13 How., 398.

To entitle himself to affirmative relief, by way of modification or otherwise, the respondent must present a counter-appeal, or the court can only affirm the judgment as it stands. *Glassner vs. Wheaton*, 2 E. D. Smith, 352. See also, as to a co-defendant, who neglects to appeal against a joint-judgment in tort, *Giraud vs. Beach*, 4 E. D. Smith, 27 (30); 10 How., 369.

§ 323. *Proceedings on Taking Appeal.*

TIME FOR APPEALING.

The time within which an appeal must be taken in these cases, is twenty days, as provided by sections 352 and 353. Where the defendant has appeared, or where the service of the original process has been personal, this time runs from the actual entry of judgment; "twenty days after judgment" is the period prescribed. It is only when the judgment is rendered on process not personally served, and on the defendant's default to appear, that notice of it need be given. See section 353.

An intended appellant must, therefore, be vigilant upon this subject, especially in the former case, and must inform himself, at his peril, of the actual date of such entry. The time for appealing cannot be enlarged, and, if suffered to elapse, he will be without remedy. See subject generally considered above, section 307, and cases there cited, especially *Wait vs. Van Allen*, 22 N. Y., 319, and *Figanieri vs. Jackson*, 4 E. D. Smith, 477; 2 Abb., 286.

(a.) NOTICE OF APPEAL.

The principal and most essential step to be taken is, the service of notice of appeal in due form.

This proceeding differs from the course pursued in the higher tribunals, both as regards the collateral steps, required by section 354, for which see below, and also on account of the condition imposed by section 353. Such notice cannot be given in general terms, as in other cases, but must state, upon its face, "the grounds upon which the appeal is founded."

By the amendment of 1862 (section 371), a further obligation is now imposed upon the appellant. He must state, upon the face of his notice, in what particular or particulars, he claims that the judgment should have been more favorable to him.

In almost all the districts, it has been held, that, unless some specific

ground is stated, upon the face of the notice, the proceeding will be a nullity. The rule is, however, less strictly enforced in the sixth district than in others. It has there been held, at general term, that, if such notice states a single ground on which the appeal is founded, it confers jurisdiction on the appellate court to examine the whole case, as set forth in the return, to see if any error has been committed, for which the judgment ought to be reversed. *Forman vs. Forman*, 17 How., 255. See also, as to the practice in the eighth district, before the amendment of 1852, and whilst the grounds of appeal were required to appear on the face of the appellant's affidavit, and not upon the notice. *Lynch vs. McBeth*, 7 How., 113.

In the seventh district, it is held, on the contrary, that the grounds must be stated on the face of the notice, thereby making them jurisdictional facts, upon which the whole proceeding of appeal is based; that the review must be confined to the precise points made, and to the exceptions taken, and specified on the face of the notice, which are the grounds of appeal required by the statute to be stated; and that a specification, "that the judgment is clearly against the law and evidence of the case," was too vague and general, and was not a sufficient specification as a ground of appeal. *Derby vs. Hannin*, 15 How., 32; affirming same case, 5 Abb., 150 (151). See also *Bush vs. Dennison*, 14 How., 307. In *Deuchars vs. Wheaton*, 16 How., 471, the same ground is taken, it being laid down that the same rule is to be applied to allegations of error on a notice of appeal, as to general exceptions to a judge's charge, or a justice's or referee's decision. The objection must be specific, and must point out the actual error committed, and which is sought to be impeached.

See also, the same rule, as laid down by a county judge in the fifth district, *Cristman vs. Paul*, 16 How., 17; and also in the fourth, *Morton vs. Clark*, 11 How., 498. In this latter case, however, the appeal was heard generally, on the merits, by consent.

The same rules, that a notice, specifying no grounds of appeal, will be unavailing; that the appellant will be confined to the grounds stated on the face of his notice; and that a mere general allegation of error, without specifying the particular errors committed, will be insufficient, are also maintained in the first district. See *Irwin vs. Muir*, 13 How., 409; 4 Abb., 133; *Griswold vs. Van Deusen*, 2 E. D. Smith, 178; *Schwartz vs. Bendel*, *ibid.*, 123; *Stern vs. Drinker*, *ibid.*, 401; *Damb vs. Hoffman*, 3 E. D. Smith, 361; *Kelty vs. Jenkins*, 1 Hilt., 73; *Moore vs. Somerindyke*, 1 Hilt., 199; *Mayor of New York vs. Green*, 1 Hilt., 393; *Davis vs. The New York and Erie Railroad Company*, 1 Hilt., 543, and *Lee vs. Schmidt*, 1 Hilt., 537; 6 Abb., 183, in which last case, the subject is fully entered into, and *Derby vs. Hannin*, above

cited, specially referred to. Nor will a reference to other portions of the proceedings cure the defect; the grounds must appear upon the face of the notice itself. *Vide Mayor of New York vs. Green, supra.*

In *Kelty vs. Jenkins*, 1 Hilt., 73 (75), the rule, as to the proper form of specification, is thus laid down: "The notice should specify, with sufficient distinctness and certainty, the error or errors committed by the court below, to rectify which the appeal has been taken."

When the appeal is from a judgment taken by default, and a reversal, and suspension of the judgment, and a new trial are asked for, under section 366, upon the ground that manifest injustice has been done, that ground must also be stated upon the face of the notice, and the appeal taken, upon the merits, and not merely for error in the judgment. *Haughey vs. Wilson*, 1 Hilt., 259. See also *Silkman vs. Bodger* 4 E. D. Smith, 236.

The rule, that the grounds of appeal must be distinctly stated, for the information of the respondent, was equally binding, prior to the amendment of 1851, when those grounds were required to be stated upon the face of the appellant's affidavits, instead of the notice of appeal. See *Thompson vs. Hopper*, 1 C. R., 103; *Williams vs. Cunningham*, 2 Sandf., 632; *Sullivan vs. McDonald*, *ibid.*, note.

The notice, when given, has been held to be amendable, and that, even to the extent of an insertion of grounds of appeal, if omitted. *Irwin vs. Muir*, 13 How., 409; 3 Abb., 133; *Wood vs. Kelly*, 2 Hilt., 334.

It is obvious, from the above cases, that the safest course for an appellant is, to state distinctly, upon the face of his notice, every objection on which he relies, and that, with the same distinctness and particularity, as on making out exceptions, for the purposes of a review in the higher courts. A general assignment of errors, standing by itself, will be wholly nugatory. It may do no harm, however, to add such a clause, at the end of the notice, after stating in detail the special objections relied upon. It may possibly become available, in aid of, though never in substitution for, a specific exception. The obligation now imposed, of stating in what particular the appellant claims a more favorable judgment, must always be kept in view.

When prepared, the notice of appeal must be engrossed in duplicate, for service as below. It must, of course, be dated, so as to show upon its face, that the appeal is taken within the period of limitation, and should be signed by the appellant or his attorney.

In *Griswold vs. Van Duesen*, 2 E. D. Smith, 178, it is held, that the appellant may serve his notice of appeal, immediately after judgment has been actually rendered by the justice, without waiting till that judgment has been docketed by the clerk of the court below.

(b.) SERVICE ON JUSTICE, AND COLLATERAL PROCEEDINGS.

The first step to be attended to, is the service of the notice, on the justice from whose decision the appeal is taken, and the necessary collateral proceedings, all of which are fully and specifically prescribed by section 354. There is, as will be observed, some slight difference between the practice, in New York, and in the country districts.

In the first place, a copy of the notice must be served upon the justice personally, or upon his clerk, if there be one. The former is the more usual practice in the country districts; the latter, in New York, where there is a regular clerk of each court. Service upon the clerk of the Marine Court, is expressly decided to be good, in *Irwin vs. Muir*, 13 How., 409; 3 Abb., 133.

The case of inability to make service upon the justice, by reason of his death, absence, or any other cause, is specially provided for, by section 353, authorizing service, in that event, by leaving the copy notice with the clerk of the county.

Simultaneously with the service of the notice, the appellant must, at the time of that service, pay to the justice, or to his clerk, two dollars, for the costs of the return. See sections 353, 371. This payment must be made, on all appeals, whether in New York or in the country districts, and is taxable as part of the appellant's costs, should his appeal be successful.

The payment of this fee, and that, at the time of service of the notice, is in the nature of a prerequisite to the validity of the appeal. See *Van Heusen vs. Kirkpatrick*, 5 How., 422; 1 C. R. (N. S.), 74; *Aldrich vs. Ketchum*, 12 L. O., 319. But no such fee need be paid, on an appeal by the corporation of New York from a judgment against it. See Laws of 1858, chapter 334, section 3.

In the country districts, the appellant is required to pay to the justice, or to his clerk, at the same time, the costs of the action, included in the judgment. This payment is equally in the nature of a prerequisite. See *Aldrich vs. Ketchum*, *supra*; *Griswold vs. Van Duesen*, 2 E. D. Smith, 178. It was held to be good, if made to the clerk of the Marine Court, instead of to a justice of that tribunal, in *Loescher vs. Nordmeyer*, 13 How., 146; 3 Abb., 244. At that time, the same rule prevailed in New York cases.

But, though *quasi*-jurisdictional in its nature, the defect was held to be curable by amendment, on application to the court, in *Aldrich vs. Ketchum*, *supra*.

The notice being served, and these two payments being made, the proceeding will, in all other districts except the first, be so far complete.

In New York, the practice, since the amendment of 1858, is less

simple. The appellant is there allowed the alternative, of either giving security for all costs, both of the court below and also of the appeal, or of depositing the same amount, with the clerk of the appellate court, at his election. The terms imposed upon him are, therefore, *pro tanto* more stringent, as, in the other districts, no provision is made for security for the costs of the appellate court.

The form of the undertaking, to be given on the part of the appellant, if he elect to take that course, is fully prescribed by section 354, the terms of which must, of course, be strictly followed. See *Wood vs. Kelly*, below cited. It must be to the effect, that such appellant will pay all costs, disbursements, and extra costs awarded against him in the court below, if the judgment be affirmed by the appellate court on such appeal, together with all costs and damages which may be awarded against him thereon. The surety or sureties must justify, in double the amounts specified, and the undertaking, and the sufficiency of the sureties must be approved by the justice of the court below, or by one of the judges of the Court of Common Pleas, with the clerk of which latter tribunal it must be filed, when executed and approved. There can be little doubt but that the sum specified in the undertaking must be sufficient to cover all costs of appeal, under the present provisions of section 371, in cases where a new trial is to be had in the court above.

This undertaking, though in the nature of a prerequisite, is amendable, if given in good faith. See *Wood vs. Kelly*, 2 Hilt., 334.

The liability of the sureties, on an undertaking of this nature, is strictly confined to its terms, and cannot be made to extend to the amount due on the judgment appealed from, irrespective of costs. It becomes fixed, the moment the judgment is affirmed, without regard to the issuing or return of execution on the original judgment. *Onderdonk vs. Emmons*, 2 Hilt., 504; 17 How., 545; 9 Abb., 187.

If the appellant elect to make a deposit, in lieu of giving an undertaking, as above, such deposit must combine the same substantial requisites, viz.: the sum total of the costs, disbursements, and extra costs included in the judgment of the court below, and the sum of fifteen dollars, to meet any costs which may be awarded against him on such appeal. This deposit must be made with the clerk of the Court of Common Pleas, with whom it remains, to abide the event of the proceeding. If the judgment be reversed, it is repaid to the appellant; if affirmed, it is then handed over by the clerk to the respondent, to be credited by him on the execution issued on the judgment of affirmance, and the balance, if any, on that issued on the judgment appealed from. The terms of the section, fixing fifteen dollars as the costs of appeal to be provided for on such a deposit, seem to have escaped notice, on the

amendment of 1862, imposing different scales, in a case of strict appeal on the one hand, or of a new trial in the court above on the other. Of course, all that an appellant can be required to do, as a prerequisite, will be to satisfy the terms of section 354, as it stands.

Either the giving of the undertaking, or the making of a deposit, as above, is essential to the validity of the appeal, which, it is expressly provided, shall be ineffectual, unless one or the other be done. *Vide Onderdonk vs. Emmons*, 2 Hilt., 504; 17 How., 545; 9 Abb., 187.

See, however, the decisions in *Wood vs. Kelly*, and *Aldrich vs. Ketchum*, above cited, as to the defect being amendable in its nature, on a proper application to the court, in respect of any defect or irregularity, when notice has been given in good faith.

(c.) SERVICE ON RESPONDENT.

The service on the justice being thus completed, that on the respondent must also be made, simultaneously, if possible, and, at all events, within the limited period.

If practicable, that service must be personal, or, if the respondent cannot, conveniently, be found, the copy may be left at his residence, with some person of suitable age and discretion.

If he be not a resident of the county, service may then be made in the same manner, on the attorney, or agent, if any, who is a resident of the county, and who appeared for him on the trial below.

And the same course may be taken, if the respondent, though a resident of the county, cannot, after due diligence, be found therein.

If neither the respondent, nor the attorney, or agent, be residents, the notice may then be served, by leaving it with the clerk of the appellate court.

Due diligence must be shown, in attempting to find the principal, before service on the agent or attorney can be accepted as sufficient. *Vide Duffy vs. Morgan*, 2 Sandf., 631.

Such latter service will be a nullity, if the party be a resident. And, if the paper, after being delivered to the attorney, be taken back by the appellant, without insisting on the service, it will be a nullity, even although the party prove to have been a non-resident. *Earll vs. Chapman*, 3 E. D. Smith, 216. See also, as to the nullity of service upon the attorney of a resident respondent, *The People vs. Eldridge*, 7 How., 108.

If due diligence be shown in attempting to find the respondent, service on the attorney will then be good. *Loescher vs. Nordmeyer*, 13 How., 146; 3 Abb., 244.

Service, in one manner or the other, within the time limited, is an essential prerequisite to the appeal, and the want of it will be a fatal

objection. *Purdy vs. Harrison*, 1 C. R., 54; *Earll vs. Chapman*, *supra*. And a verbal notice will be a nullity. *The People vs. Eldridge*, 7 How., 108. In this last case, the defect was held to be jurisdictional, and incapable of being cured by amendment. See, however, *Wood vs. Kelly*, 2 Hilt., 334, above cited. But, in that case, the defect sought to be cured was not in the notice itself, which forms the basis of the whole proceeding, but in the collateral undertaking.

(d.) STAY OF PROCEEDINGS.

The service of notice, together with the collateral payments or security, as above detailed, perfects the appeal, as such, and enables the appellant to bring up all the questions sought to be reviewed by him.

If, however, the appellant desire to obtain a stay of execution in the mean time, he must give security for payment of the judgment, in analogy with the practice of the higher tribunals.

This security is provided for, by sections 355 to 358 inclusive, as above cited. It consists of an undertaking, with one or more sufficient sureties, approved by a judge of the appellate tribunal, or by the court below, to the effect that, if judgment be rendered against the appellant, and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied. Section 356.

This undertaking must, under section 357, be delivered to the court below, *i. e.*, to the justice whose decision is appealed from, or to his clerk, or the clerk of the court. By such delivery, execution is stayed, or, if previously issued, service of a certified copy, upon the officer holding the execution, stays any further proceedings thereon.

As a general rule, the more convenient course will be to obtain the justice's approval, at the time when the undertaking is delivered. In the New York Common Pleas, the court have refused to approve an undertaking, unless absence, or sickness of the justice, whose decision is appealed from, were shown.

When, by reason of the death or removal from the county, of the justice whose decision is appealed from, or from any other cause, the undertaking cannot be delivered to him, it may then be filed with the clerk of the appellate court. Notice of such filing must, in this case, be given to the respondent, or his attorney or agent, as provided in section 354, *i. e.*, upon the former, if practicable; or, if not, then upon the latter.

In the case of an ordinary appeal, no stay of proceedings is effected, unless and until this undertaking be given. *Vide Conway vs. Hitchins*, 9 Barb., 378; *Onderdonk vs. Emmons*, 2 Hilt., 504; 17 How., 545; 9 Abb., 187. But on appeal, by the corporation of the city of New York, from a judgment of the general term of the Marine Court, the service

of the notice of appeal, effects a stay, *per se*, and no undertaking is requisite. See Laws of 1858, chapter 334, p. 569, section 3.

The requirements of the sections above cited must be strictly pursued, or no stay will be effected. *Hawkins vs. Mayor of New York*, 5 Abb., 344.

When a copy is served upon the officer holding an execution, the proceedings under it are stayed, as from that time only, without any retrospective effect, or discharge of the levy, if previously made. *Smith vs. Allen*, 2 E. D. Smith, 259. Nor will the perfecting of an appeal, stay a successful defendant, from claiming the return of property taken from him under a Marine Court attachment. *Moore vs. Somerindyke*, 1 Hilt., 199.

If defective, but given in good faith, the proceeding is amendable, (*Wood vs. Kelly, supra*); or leave to file a further undertaking may be given. *Sternhaus vs. Schmidt*, 5 Abb., 66. See also *Teall vs. Var Wyck*, 10 Barb., 376.

And where, by mistake, a copy of the undertaking had been served upon the party, instead of upon the constable, a subsequent levy, directed by the former, was set aside as made in bad faith. *Jones vs. McCarl*, 7 Abb., 418.

As to the necessity of similar security being given, on appeal from the decision of a justice, in summary proceedings against a tenant, see *Duel vs. Rust*, 24 Barb., 438.

As to the relative measure and extent of the liability of the sureties, on the undertaking given for the above purpose, and that, required under section 354, in New York cases, for securing the costs of the court below, and of the appeal, where no deposit is made, see *Onderdonk vs. Emmons*, 2 Hilt., 504; 17 How., 545; 9 Abb., 187.

§ 324. *Return and its Incidents.*

The appeal being perfected, either with or without a stay of execution, as above noticed, the next step is to procure a return from the court below, as provided by section 360.

It is the duty of the justice, whose decision is appealed from, to make and to file this indispensable document in the appellate court, in the time there prescribed, viz.: After ten, and within thirty days from the service of the notice of appeal.

All therefore that, in strictness, is necessary for the appellant to do, is to bespeak this document, pay the statutory fee of \$2 00 at the time of such service, and then, if that duty be not performed within the time limited, apply to the appellate court for an attachment. It will be convenient in practice, however, to look after the matter personally,

especially where dispatch is desired. Should any delay take place on the part of the justice, an extension of the time to make the return should be applied for. As to the power to grant such extension, see *Truax vs. Clute*, 7 L. O., 163.

Without payment of the statutory fee, such return cannot be compelled, as is clear from the terms of the section. And, if not paid at the time of service, it cannot, it would seem, be tendered afterwards, nor will the justice be liable to an attachment for a refusal. *Van Heusen vs. Kirkpatrick*, 5 How., 422; 1 C. R. (N. S.), 74. The defect is, however, amendable. *Aldrich vs. Ketchum*, 12 L. O., 319.

In the event of any neglect in making the return, on the part of the justice or court, the remedy is pointed out by the section, viz.: by motion for an attachment. In the New York Common Pleas this is a chamber motion. See special rule No. 2, above cited.

If the justice, whose decision is appealed from, has gone out of office in the interim, his return, though out of office, will be equally valid, as expressly provided by section 361. And he is compellable to do so when he has removed to another county. *Peck vs. Foot*, 4 How., 425. See also special provision in section 363.

See below, as to the proceedings admissible, in the event of his inability or removal from the state.

Prior to 1852, the practice was different. The appeal was then heard, either wholly or partially, on the affidavits of the parties, in which the proceedings were stated. Since that year, however, the return is the only document required. As to the practice prior to that period, see *Brown vs. Stearns*, 2 C. R., 119; *Partridge vs. Thayer*, 2 Sandf., 227; 1 C. R., 85; *Mulford vs. Decker*, 1 C. R., 71; *Davis vs. Lounsbury*, 1 C. R., 71; *Purdy vs. Harrison*, 1 C. R., 54; *Schermerhorn vs. Golief*, 1 C. R. (N. S.), 290; *Truax vs. Clute*, 7 L. O., 163. See likewise note, 1 E. D. Smith, 147.

The return, as now required, must contain the testimony, proceedings, and judgment.

It has been held that, in strictness, the notice of appeal does not form part of the return. See *Webster vs. Hopkins*, 11 How., 140. It seems, however, to be clearly necessary, for the information of the court above, as otherwise, that tribunal cannot be properly informed of the grounds upon which the appeal is founded, to which, as shown in the preceding section, the appellant will be confined. See decisions there cited, under head of *Notice of Appeal*. See, as to the effect of its being omitted, where the case is submitted without argument, *Suydam vs. Munson*, 2 E. D. Smith, 198. And, where it was omitted to be attached to a return to the New York Common Pleas, it was held that the appeal should be dismissed. *Cabre vs. Sturges*, 1 Hilt., 160.

It is requisite to set forth on the return, the testimony, proceedings and judgment.

The date when the summons or process was returnable, the day issue was joined, the adjournments, if any, the date of the trial, and the day whereon judgment was rendered, should all appear upon its face. *Peters vs. Diossy*, 3 E. D. Smith, 115.

Any fact, necessary to confer jurisdiction, should also be shown affirmatively, as, for instance, the absence or inability of the proper district judge, in New York, when the action is tried before another. *Reed vs. Warth*, 2 Hilt., 281.

So also as to the proper service of process. *Manning vs. Johnson*, 7 Barb., 457.

The pleadings are, of course, necessary, as a constituent part of the proceedings. *Roulston vs. McClelland*, 2 E. D. Smith, 60; *Smith vs. Van Brunt*, 2 E. D. Smith, 534; *Spring vs. Baker*, 1 Hilt., 526. And, when the judgment has been taken by default, in New York, the return should also show that the complaint was duly verified, or proof taken of the plaintiff's case.

The whole of the evidence given, whether documentary or parol, should also be set forth. *Ogden vs. Sanderson*, 3 E. D. Smith, 166; *McBride vs. Crawford*, 1 E. D. Smith, 658; *Foley vs. Alger*, 4 E. D. Smith, 719. Where no sufficient evidence is stated, and the return does not show, upon its face, that it contains all that was given, no presumption will be indulged that there was other, sufficient to sustain the judgment. *Calligan vs. Mix*, 12 How., 495. See also, as to a return, not showing any legal evidence, *Lynch vs. McBeth*, 7 How., 113.

And, as indeed prescribed by the section itself, a statement of the judgment rendered is indispensable. *Woodside vs. Pender*, 2 E. D. Smith, 390; *Davis vs. Lounsbury*, 1 C. R., 71.

The whole, and not a part of the proceedings, should appear. *Vide Belshaw vs. Colie*, 3 C. R., 184. See also *McCafferty vs. Kelly*, 3 Sandf., 637; *Brown vs. Stearns*, 2 C. R., 119. And, if it appear that those proceedings were wholly irregular, the judgment cannot stand. *Heidenheimer vs. Lyon*, 3 E. D. Smith, 54. See also *Spring vs. Baker*, 1 Hilt., 526, *supra*. But the court will not reverse a judgment, merely because the return is defective in itself. The party seeking a reversal must see that the facts are properly stated. *Klenck vs. De Forest*, 3 C. R., 185.

Although documentary evidence may be annexed, it is not proper to add material matter, in a postscript or memorandum. It should be certified in the return itself. See *Logue vs. Gillick*, 1 E. D. Smith, 398.

Where the return is clearly imperfect, the parties should not bring the case on, but should apply for a further one, under section 362.

McAllister vs. Sexton, 4 E. D. Smith, 41; *Rawson vs. Grow*, 4 E. D. Smith, 18.

When made, the return is conclusive, and the court cannot look beyond it; nor can affidavits be received, even of facts, which, had they appeared, would have been sufficient for a reversal. Parol testimony can only be received now, when the case is brought within the scope of section 363 or section 366. *Trust vs. Delaplaine*, 3 E. D. Smith, 219; *Garrison vs. Pearce*, 3 E. D. Smith, 255; *Capewell vs. Ormsby*, 2 E. D. Smith, 180; *Rawson vs. Grow*, 4 E. D. Smith, 18; *Kilpatrick vs. Carr*, 3 Abb., 117; *Spence vs. Beck*, 1 Hilt., 276. See also generally, as to its conclusiveness, *Peck vs. Richmond*, 2 E. D. Smith, 380, *Lynsky vs. Prendergast*, 2 E. D. Smith, 43; *Hyland vs. Sherman*, 2 E. D. Smith, 234; *Sloman vs. Buckley*, 29 Barb., 289; *Mitchell vs. Menkle*, 1 Hilt., 142.

(a.) AMENDED RETURN.

When the return is filed, it should be at once inspected by both parties, to see whether it is defective in any respect.

If found so, application should be made to the appellate court, which is always to be deemed open for that purpose. See section 362.

This application may be made by either party. The return itself should be produced to the judge to whom the application is made. If the defect be patent upon the face of that document, the production will be sufficient. If latent, any facts necessary to show any misstatement or omission, may be shown by affidavit, which may be used as a foundation for the order. *Vide Lynsky vs. Prendergast*, 2 E. D. Smith, 43.

Where the defect to be supplied is merely formal, an order may probably be granted, *ex parte*. Where, on the contrary, any contest as to facts may arise, it is, of course, competent for the judge to require notice to be given to the adverse party.

The proceeding should be taken at once. Where the county court has no jurisdiction, a motion for this purpose must be noticed, within twenty days after the certificate of the county judge to that effect, or it will be too late. See rule 53.

The motion cannot, however, properly be made, until the return has been actually filed. See *Fish vs. Ferris*, 3 E. D. Smith, 567.

Though this relief is obtainable, and should be applied for, by the respondent, where the return contains any matter working to his prejudice, or has omitted to state any matter, necessary to sustain the validity of the judgment, the necessity more usually devolves upon the appellant, on whom the duty rests of showing error in the adjudication of the court below, and of overcoming the presumption in its favor. It

should be carefully examined by him, with this view; and, if any omission or misstatement be discovered, the application should, at once, be made. See *Lynsky vs. Prendergast*; *Hyland vs. Sherman*; *Peck vs. Richmond*; and *Sloman vs. Buckley, supra*; *Fairbanks vs. Corlies*, 3 E. D. Smith, 582; 1 Abb., 150. Or, sometimes, the case may be remitted, for that purpose, at the trial. *Foley vs. Alger*, 4 E. D. Smith, 719; *Matthews vs. Festel*, 2 E. D. Smith, 90. And, if the original return be lost, leave will be given to the parties to procure a new one, or obtain the signature of the justice to a copy, so as to convey the same information to the appellate tribunal. *Vide Smith vs. Van Brunt*, 2 E. D. Smith, 534.

The order, when obtained, must be served upon the justice. If granted upon affidavit, a copy of the affidavit ought to accompany it. and, in any case, the defects complained of, and the additions or corrections required to be made, should be clearly explained, so as to show exactly what is required, and point out to the justice the portions to which his attention must be especially directed.

There is no limit upon the power of the parties to apply for, or of the appellate court to grant, any order for this purpose. A further or amended return may, under the section, be directed, as often as may be necessary.

And obedience to these orders is compellable by attachment, which, in case of delay or omission on the part of the justice, should be applied for in the usual manner.

No special period is fixed, within which the amended return, if ordered, must be filed. The better course will be to apply for a special direction of the court upon the subject, whereon to ground a subsequent attachment, if rendered necessary.

Pending an order of this description, all proceedings of the adverse party are stayed, and if, notwithstanding, he proceed, and obtain a dismissal of the appeal, that dismissal will be a nullity. *The People vs. County Judge of Clinton County*, 13 How., 277.

(b.) EVIDENCE IN LIEU OF RETURN.

This course is admissible, in the event of the death or insanity of the justice, or his removal from the state. In this case, but in this case only, the appellate court may take evidence as to the circumstances of the trial or judgment, and determine accordingly. See section 363.

This proceeding is necessarily of comparatively rare occurrence, the contingency upon which it depends being comparatively unusual. As to the practice, under these circumstances, and the presumption that will arise, in favor of the judgment appealed from, see *Bush vs. Denison*, 14 How., 307.

§ 325. *Proceedings for Dismissal.*

If the appellant, having given notice of appeal, neglect to procure or compel the making of the return, or of an amended return, in due time, he will be liable to a motion for dismissal. His only mode of avoiding it, will be to obtain an order for extension of his time for that purpose, in the usual manner.

In the New York Common Pleas, this proceeding is regulated by special rule No. 1, which prescribes that, in the event of a neglect on the part of the appellant, the respondent may serve a notice in writing, requiring it to be done within ten days, and that, in default thereof, he will apply to the general term, on the first day, for an order dismissing the appeal; on proof of service of which, and of a non-compliance, the order will then be made, without further notice, unless the court grant further time.

In *Coudert vs. Lias*, 11 How., 264, it was held, that an order might be taken, under this rule, on proof of service of notice and non-compliance, and that it was not incumbent upon the moving party to show affirmatively, that the time limited by section 364, had previously expired. Such non-expiration was, it was held, matter of defence, to be shown in opposition to the motion.

In the other districts, the application must be upon the usual notice of motion, grounded on proof that the time prescribed by section 360 has expired, and that no return has been filed. If the appellant require further time, he should show his reasons for asking that indulgence, affirmatively, in opposition to the motion.

When an order of this nature is taken, it is without costs to either party. See section 371.

The appeal will also be subject to dismissal, on motion by the respondent, under the following circumstances:

When the notice of appeal is insufficient, as by omitting to state the grounds of appeal. *Griswold vs. Van Deusen*, 2 E. D. Smith, 178; *Irwin vs. Muir*, 13 How., 409; 3 Abb., 133; *Derby vs. Hannin*, 5 Abb., 150; 15 How., 32; *Webster vs. Hopkins*, 11 How., 140; likewise *Morton vs. Clark*, 11 How., 498; *Schwartz vs. Bendel*, 2 E. D. Smith, 123; *Partridge vs. Thayer*, 2 Sandf., 227; 1 C. R., 85.

So also, when the notice of appeal is irregular, in which case, the only proper way of bringing the question up is by motion. *Nye vs. Ayres*, 1 E. D. Smith, 532; *Partridge vs. Thayer*, *supra*. In some of the other decisions, however, the objection of insufficiency was allowed to be taken on the hearing. See *Derby vs. Hannin*; *Webster vs. Hopkins*; and *Schwartz vs. Bendel*, *supra*. See also *Cabre vs. Sturges*, below cited.

When the notice of appeal has been served after the time prescribed by statute. *Mills vs. Shult*, 2 E. D. Smith, 139. When not apparent on the face of the return, this objection can only be taken by motion. Or, when no notice is annexed to the return. See *Cabre vs. Sturges*, 1 Hilt., 160.

A motion for this purpose should be made to the special term of the appellate tribunal. See *Griswold vs. Van Deusen*, and *Irwin vs. Muir*, *supra*. If the error or imperfection be patent on the face of the return, no other paper will be necessary; if not, such error must be shown by affidavit in the usual manner.

In *Schermerhorn vs. Golief*, however, 1 C. R. (N. S.), 290, it was held, that where it was clear that no valid appeal had ever been taken, the remedy of the defendant was to treat it as a nullity, and issue execution under his judgment, and a motion to set aside the appeal was dismissed.

§ 326. *Noticing and Bringing on for Hearing.*

Since the amendment of 1862, the hearing of an appeal, in cases in which a new trial is to be had in the court above, differs in no essential respect from an original hearing in that court. It may be brought to a hearing or trial, at any term at which jury-trials are had, on the same notice, and by means of the same note of issue as in an ordinary action, the date of issue being that of the return (section 364).

But, in the class of cases in which the appeal is still heard as an appeal, instead of coming up as a new trial of the case, it may be brought to a hearing, at a general term of the appellate court, upon notice by either party of not less than eight days (section 364).

When the judgment below has been collected, it may be convenient for the respondent to serve simultaneously, notice of an application for restitution. See below, under that head.

The appeal must be placed upon the calendar, for which purpose, a note of issue, in the usual form, must be filed with the clerk of that court.

Once placed on the calendar, it remains there without further notice, until finally disposed of. In the New York Common Pleas, a separate calendar of these cases is made. See special rule No. 5, above cited.

But, if it be not brought to a hearing before the end of the second term, the court is then to dismiss the appeal, unless it continue it, by special order for cause shown. This proceeding is taken by the court of its own motion, and, if the parties are not then prepared to bring on the case for argument, they must make special application for that purpose.

But an order of this nature cannot properly be made, when a further return has been directed, and the time for that purpose has not expired. If made under these circumstances, it will be a nullity, and a hearing may be compelled by *mandamus*. See *The People vs. County Judge of Clinton County*, 13 How., 277.

The provision that the appeal must be heard at a general term, does not apply to cases, transferred from the county court, to the Supreme Court, by reason of the incapacity of the county judge, as provided by section 30, subdivision 13. In this case, the appeal must be heard in the first instance at a special term, the judge's decision at that hearing being reviewable at general term, in the usual manner. *Davis vs. Stone*, 16 How., 538, and decisions noticed at p. 540; *Sheldon vs. Albro*, 8 How., 305. And such appeal should be heard in the same county, and no other. *Wiles vs. Peck*, 16 How., 541.

No fresh notice of argument need be given, when the appeal is not brought on, at the first term for which it is noticed and placed on the calendar. A default may be taken at any subsequent term, whilst it remains there, without any further notice. *Townsend vs. Keenan*, 2 Hilt., 544.

Pending the appeal, a motion may be made for any special purpose, such as the appointment of a guardian *ad litem*, and, if made, should be brought on at special term. *Fish vs. Ferris*, 3 E. D. Smith, 567.

The appeal, as specially provided by section 364, is to be heard on the original papers, nor need any copy be furnished for the use of the court. The court may refuse to hear it, unless upon the original return, or on a properly certified copy. See *Smith vs. Van Brunt*, 2 E. D. Smith, 534. In the New York Common Pleas, however, a fair copy of the original papers may be furnished for the use of the court. See special rule 6, of that tribunal, above cited. An appeal, transferred to the Supreme Court, and heard at special term in the first instance, must also be brought on on the original papers. See *Davis vs. Stone*, 16 How., 538; *Wiles vs. Peck*, 16 How., 541.

Either party, on bringing on the appeal, may take a judgment of affirmance or reversal by default, should his adversary not be prepared, upon the call of the case. He must, of course, be prepared with the usual proof of service of notice. See *Whitney vs. Bayard*, 2 Sandf., 634; *Geraghty vs. Malone*, 1 Sandf., 734; 1 C. R., 94. *Bellomy vs. Alexander*, 1 Sandf., 734; 1 C. R., 64, had reference to the then existent practice, under the Code of 1848.

If taken, such a default can only be opened, on motion, in the usual manner, on terms to be imposed in the discretion of the court. *Vide Tryon vs. Jennings*, 12 Abb., 33; 22 How., 421.

A default, taken in the county court, on appeal from a justice's

decision, can only be opened, on motion, in that tribunal. The judgment thus suffered, cannot be reviewed by the Supreme Court, on appeal, the jurisdiction of that tribunal being strictly appellate, and only extending to decisions made after a hearing of both parties. *Dorr vs. Birge*, 5 How., 323; 1 C. R. (N. S.), 74. See, however, below, as to power of opening a default taken before a justice.

On motion to set aside a default suffered, the court will require a sufficient excuse to be shown. *Townsend vs. Keenan*, 2 Hilt., 544. And, where an affirmance has been regularly taken, the appellant may be required to show that the case presents a meritorious question. *Tryon vs. Jennings*, 22 How., 421; 12 Abb., 33.

The New York Common Pleas will not regard the engagements of counsel elsewhere, as a sufficient excuse for neglecting to appear and argue the appeal, when called on in its order. See last case.

Prior to the amendment of these rules in 1857, that tribunal required these appeals to be brought on on written arguments and points, in all cases, and an oral argument was not allowed, except upon leave, to be applied for at chambers. In that year, the practice was entirely changed, and such appeals were directed to be heard orally. See rule of 28th September, 1857, above cited.

No lengthened argument is, however, allowed, the parties being confined to a brief statement of the facts and points involved, and the authorities cited, unless the court shall otherwise direct.

Although written arguments are no longer allowed, it will be expedient to have written points prepared and handed in, in case the court should not decide upon the spot, but take the case under advisement. See, as to the propriety of this course, *Agreda vs. Faulberg*, 3 E. D. Smith, 178.

§ 327. *Hearing and its Incidents.*

Irrespective of the hearing, by new trial, in the court above, which, being in the nature of a trial in that court, is governed by totally different principles; three descriptions of hearing are provided for by section 366, as above cited, in cases which are still brought up by way of regular appeal.

1. The hearing, by way of appeal, on the return only.

2. The hearing, in respect of extraneous errors, made patent by separate affidavits, partaking rather of the character of a motion to set aside a judgment unduly taken.

3. The hearing on affidavit, excusing the default of the defendant, being in the nature of a motion to open an inquest, and for a new trial in the court below.

All three, though different in their nature, come up for argument upon the appeal as taken, and all must be disposed of, at the same time, and upon the same hearing. The appellant cannot be required to bring up the different questions separately, at different times. *Cook vs. Swift*, 18 How., 454; 10 Abb., 212.

Where, since the decision in the court below, the law, on the subject brought in question, has been changed, the case will be governed by that, existent at the time of the decision appealed from. The case will not be tried *de novo*, by the appellate tribunal, as before the Code. *Pruyn vs. Tyler*, 18 How., 331. It may probably be held, however, that this principle does not apply to cases brought up by way of new trial in the court above.

The practice of entering a judgment below, by stipulation, and without prejudice, is condemned, in *Wing vs. New York and Erie Railroad Company*, 1 Hilt., 235. In such cases, the judgment will be held final and conclusive on questions of fact, unless clearly against the weight of evidence.

However erroneous the judgment may be, as regards his interests, no relief can be granted, on the hearing, to any party who has neglected to appeal from it in due form. A respondent, who has neglected to serve a cross appeal, can only take a simple affirmance of the judgment, though the case would have justified a larger recovery than was awarded to him. *Glassner vs. Wheaton*, 2 E. D. Smith, 352; *Geraud vs. Stagg*, 4 E. D. Smith, 27 (33); 10 How., 369.

The hearing of the appeal, when had, is less technical in its nature than that in the courts of higher jurisdiction, and less bound by strict and positive rules.

Judgment is to be given, according to the justice of the case, without regard to technical errors or defects, which do not affect the merits.

The court may affirm or reverse the judgment below, in whole or in part.

And as to any or all of the parties.

And such affirmance or reversal may be for errors of law or of fact.

(a.) DISREGARD OF TECHNICALITIES.

This rule cannot be extended to points, which involve a failure on the part of the court below to acquire jurisdiction of the cause or of the parties. See decisions on this subject, already cited, in book I., chapter VI., section 23. When the objection goes to the jurisdiction of the court to entertain the action, it would seem to be fatal, in all cases. When it is of a merely personal nature, as that of insufficient service, or the like, it may, however, be waived by appearance, and pleading to the merits without objection, but not otherwise. See cases there cited.

A judgment rendered on election day, in a cause previously tried, was sustained, in *Rice vs. Mead*, 22 How., 445.

The principle of the disregard of technical errors, has been carried out in the following cases :

Objections as to the mode of summoning and constitution of the jury, when not made in due form at the trial below, cannot be raised on appeal. *Mayor of New York vs. Mason*, 4 E. D. Smith, 142; 1 Abb., 344; *Clark vs. Van Vrancken*, 20 Barb., 278; *Cook vs. Ritter*, 4 E. D. Smith, 253. So also, as to a refusal to order a jury, on motion of the defendant, in the absence of the plaintiff, and where the former had subsequently allowed the trial to proceed without objection. *Shannon vs. Kennedy*, 1 E. D. Smith, 346. See likewise, as to conduct, amounting to a waiver to the right of trial by jury, *Babcock vs. Hill*, 35 Barb., 52.

In *Baker vs. Simmons*, 29 Barb., 198, the court refused to set aside a verdict, on the ground of an unauthorized interference on the part of the constable in charge, but which appeared to have been disregarded.

In *The Mayor of New York vs. Mason*, above cited, a reversal was refused, on the ground that the justice had erroneously assumed the power of striking out a defence on motion, where no injury had, in fact, resulted to the defendant from the ruling.

So likewise, where the return showed a special finding of fact, upon sufficient evidence, exclusive of other testimony, improperly received, but really unimportant. *Martin vs. Garrett*, 4 E. D. Smith, 346. But it is only in a very clear case, that the court will apply this principle of disregarding testimony illegally received. See *Main vs. Eagle*, 1 E. D. Smith, 619.

So also, as to a variance between the pleadings and the proof. *Briggs vs. Evans*, 1 E. D. Smith, 192; *Cushingham vs. Phillips*, 1 E. D. Smith, 416. Or a defect in pleading. *Hall vs. McKechnie*, 22 Barb., 244.

So also, where the justice had exceeded his power, in assuming to open a default, on the ground that it was taken by mistake; and, on a retrial of the case before him, substantial justice had been done. *Scranton vs. Levy*, 1 Hilt., 261; 4 Abb., 21.

So also, the adjudication below will not be interfered with, where an error, originally committed, has been waived, or the defect cured, in the subsequent progress of the trial. *De Benedetti vs. Manchin*, 1 Hilt., 213; *Mayor of New York vs. Green*, 1 Hilt., 393; *Breidert vs. Vincent*, 1 E. D. Smith, 542. Or by the subsequent appearance of the defendant, without objection. *Seymour vs. Bradfield*, 35 Barb., 49.

And irregularities will be waived, if committed with the consent or

on the motion of the appellant. *Mason vs. Campbell*, 1 Hilt., 291; *Redfield vs. Florence*, 2 E. D. Smith, 339; *Nellis vs. McCarn*, 35 Barb., 115. Or where the latter has omitted to object in due season, and allowed the trial to proceed. *Cornell vs. Bennett*, 11 Barb., 657; *Fairbanks vs. Corlies*, 3 E. D. Smith, 582; 1 Abb., 150. See also, as to variance between the summons and complaint, being waived by pleading to the merits, without objection at the time, *Bandman vs. Gamble*, 4 E. D. Smith, 463.

Nor will questions of mere irregularity, not affecting the merits, be considered on appeal. They should be brought up upon motion. *Mills vs. Shult*, 2 E. D. Smith, 139; *Nye vs. Ayres*, 1 E. D. Smith, 532; *Partridge vs. Thayer*, 2 Sandf., 227; 1 C. R., 85.

Errors committed at the trial, where not objected to at the time, so as to give opportunity for the defect to be cured, or where not stated on the notice as grounds of appeal, will not be considered on the hearing, or form ground for reversal. *Stern vs. Drinker*, 2 E. D. Smith, 401; *Lee vs. Schmidt*, 1 Hilt., 537; 6 Abb., 183; *Hunt vs. Hoboken Land and Improvement Company*, 1 Hilt., 161; *Heim vs. Wolf*, 1 E. D. Smith, 70; *Frost vs. Hanford*, 1 E. D. Smith, 540; *Ranney vs. Gwynne*, 3 E. D. Smith, 59; *Rouillier vs. Wermicke*, 3 E. D. Smith, 310; *Donohue vs. Henry*, 4 E. D. Smith, 162; *Duffy vs. Thompson*, 4 E. D. Smith, 178; *Fenn vs. Timpson*, 4 E. D. Smith, 276; *Avogadro vs. Bull*, 4 E. D. Smith, 384; *Dennistoun vs. McAllister*, 4 E. D. Smith, 729; *Tibbets vs. Percy*, 24 Barb., 39; *Hall vs. McKechnie*, 22 Barb., 244; *Smith vs. Hill*, 22 Barb., 656; *Austin vs. Burns*, 16 Barb., 643; *McEachron vs. Randles*, 34 Barb., 301. See also, as to presumption, in relation to the mode of taking an objection, when not clearly apparent, *Bellows vs. Sackett*, 15 Barb., 96.

See generally, as to the principle of disregarding technical or immaterial errors, where substantial justice has been done on the hearing below, *Burnett vs. Gwynne*, 2 Abb., 79; *Harper vs. Leal*, 10 How., 276; *Spencer vs. Saratoga and Washington Railroad Company*, 12 Barb., 382; *Buck vs. Waterbury*, 13 Barb., 116; *Doolittle vs. Eddy*, 7 Barb., 74; *Cole vs. Stevens*, 9 Barb., 676; 6 How., 424; *Bort vs. Smith*, 5 Barb., 283; *Dunkle vs. Kocker*, 11 Barb., 387; *McEachron vs. Randles*, 34 Barb., 301.

Although the general rule requires that every reasonable intendment should be made in favor of the judgment of the court below, yet, where the return does not show evidence sufficient to sustain the judgment, the omission of the justice to certify that it contains all the evidence had before him, will not warrant the presumption that there was other and sufficient testimony given, to warrant the judgment. *Calligan vs. Mix*, 12 How., 495. N. B.—Word "not" omitted in head-note.

(b.) ERRORS REVIEWABLE.

Under section 366, as above referred, the appellate court may, on the appeal, reverse the judgment, for errors of law or of fact apparent on the return. The review in respect of extraneous errors of the latter description will be considered below.

It may be convenient to notice, shortly, some of the recent decisions as to those two classes of errors, without, of course, professing to go into an exhaustive discussion upon the subject.

(c.) ERRORS OF LAW.

The refusal of a nonsuit, where proper to be granted, is, of course, error of law, for which a reversal will be awarded. *Fox vs. Decker*, 3 E. D. Smith, 150; *Fales vs. McKeon*, 2 Hilt., 53. So likewise, where error has been committed in the justice's charge. *Halloran vs. New York and Erie Railroad Company*, 2 E. D. Smith, 257 (258).

So also, as to the improper admission or rejection of material evidence. *Belden vs. Nicolay*, 4 E. D. Smith, 14; *McAllister vs. Sexton*, 4 E. D. Smith, 41; *Main vs. Eagle*, 1 E. D. Smith, 619; *Hahn vs. Van Doren*, 1 E. D. Smith, 411; *Raymond vs. Richardson*, 4 E. D. Smith, 171; *Warren vs. Van Pelt*, 4 E. D. Smith, 202; *Healey vs. Kinsley*, 4 E. D. Smith, 286; *Stewart vs. Bock*, 1 Hilt., 122; *Wiggins vs. Wallace*, 19 Barb., 338; *Rivara vs. Ghio*, 3 E. D. Smith, 264.

But the admission of irrelevant testimony may be disregarded, where the decision is correct. *Martin vs. Garrett*, 4 E. D. Smith, 346; *Cas-tree vs. Gavelle*, 4 E. D. Smith, 425; *Moore vs. Somerindyke*, 1 Hilt., 199. Nor will the exercise of discretion, as to the admission of further witnesses, after the party has rested his case, be made the subject of review. *Silverman vs. Forman*, 3 E. D. Smith, 322; *Reed vs. Barber*, 3 C. R., 160; *Harpell vs. Curtis* 1 E. D. Smith, 78; *Heidenheimer vs. Wilson*, 31 Barb., 636.

Nor will such exercise be interfered with, in other matters, where no positive error of law has been committed, or where no prejudice has resulted to the parties, as in the granting of an amendment in the process. *Cooper vs. Kinney*, 2 Hilt., 12; 6 Abb., 380; *Orser vs. Grossman*, 4 E. D. Smith, 443; 11 How., 520.

The denial of an adjournment, during the progress of the trial, will not be ground for reversal. *Matthews vs. Festel*, 2 E. D. Smith, 90; *Giberton vs. Ginoechio*, 1 Hilt., 218; *Ranney vs. Gwynne*, 3 E. D. Smith, 59; *Story vs. Bishop*, 4 E. D. Smith, 423. Or, such denial, when it is applied for on motion, *Irroy vs. Nathan*, 4 E. D. Smith, 63. And, generally, mere matters of practice in the court below will not be

reviewed on appeal. *Mitchell vs. Menkle*, 1 Hilt., 142; *Brown vs. Jones*, 1 Hilt., 204; 3 Abb., 80.

When the pleadings are insufficient, or do not conform to the proof, it is the duty of the justice to grant an amendment, and the refusal may be error. *Turck vs. Richmond*, 13 Barb., 533; *Doughty vs. Crozier*, 1 Hilt., 411; *Smith vs. Mitten*, 13 How., 325. But, when a motion was made upon the trial, to amend by adding a new defence, a denial of it was sustained. *Tattershall vs. Hass*, 1 Hilt., 56.

In *Louber vs. Childs*, 2 E. D. Smith, 577; 1 Abb., 415, it was held that the provisions of the Code as to parties, extended to these cases, and that a refusal to bring in a necessary party was error. See also *Agreda vs. Faulberg*, 3 E. D. Smith, 178. See, *per contra*, *Webster vs. Hopkins*, 11 How., 140; and *Gates vs. Ward*, 17 Barb., 424, there referred to.

Proceeding with the action, where there has been a failure to acquire jurisdiction, will of course be error. As, where a long summons has been issued against a non-resident, *Robinson vs. West*, 11 Barb., 307; *Willins vs. Wheeler*, 28 Barb., 669; 17 How., 93; 8 Abb., 116. So also, as regards an attachment irregularly granted, *Churchill vs. Marsh*, 4 E. D. Smith, 369; 2 Abb., 219; *McCabe vs. Doe*, 2 E. D. Smith, 64; *Osterstock vs. Lent*, 1 Hilt., 158; *Marsh vs. Canty*, 14 Abb., 237.

Or where a short summons has been issued, without proper proof or security. *Davidson vs. Hutchins*, 1 Hilt., 123; *Sperry vs. Major*, 1 E. D. Smith, 361; *Allen vs. Stone*, 9 Barb., 60. See also, as to the improper issue of an ordinary summons, *Cooper vs. Ball*, 14 How., 295; or of a long summons, in New York, at the suit of a non-resident, without proper security, *Palmer vs. Moeller*, 2 Hilt., 421; 19 How., 322; 9 Abb., 20, note.

But this class of objections, as to the irregular issue or service of process, are all capable of waiver, where the defendant has appeared and pleaded to the merits, without raising the point, by preliminary objection, or plea in abatement. See *Bray vs. Andreas*, 1 E. D. Smith, 387; *Sperry vs. Major*, 1 E. D. Smith, 361; *Montieth vs. Cash*, 1 E. D. Smith, 412; 10 L. O., 348; *Cushingham vs. Phillips*, 1 E. D. Smith, 416; *Andrews vs. Thorp*, 1 E. D. Smith, 615; *Miln vs. Russell*, 3 E. D. Smith, 303; *Ingersoll vs. Gillies*, 3 E. D. Smith, 119; *Agreda vs. Faulberg*, 3 E. D. Smith, 178; *Robinson vs. West*, 1 Sandf., 19; *Aldrich vs. Ketchum*, 3 E. D. Smith, 577; *Dempsey vs. Paige*, 4 E. D. Smith, 218; *Bandman vs. Gamble*, 4 E. D. Smith, 463; *Gossling vs. Broach*, 1 Hilt., 49; *Brown vs. Jones*, 1 Hilt., 204; 3 Abb., 80. See, however, *Allen vs. Stone*, 9 Barb., 60.

Where an action had been brought in one of the New York District Courts, on a judgment, without leave of the court, the judgment

was reversed. See *Mills vs. Winslow*, 2 E. D. Smith, 18 ; 3 C. R., 44. Judgment will also be void, if neither party to the suit resides within the jurisdiction. *Snyder vs. Goodrich*, 2 E. D. Smith, 84. But this objection would seem to be capable of waiver. See *Fairbanks vs. Corlies*, 3 E. D. Smith, 582 ; 1 Abb., 150.

A reversal will be proper, where the suit has been commenced, for an amount exceeding that for which the justice has jurisdiction. *Belinger vs. Ford*, 14 Barb., 250. Or, where the judgment has been taken by default, on an erroneous return as to service of process, none having in fact been made. *Fitch vs. Devlin*, 15 Barb., 47.

So also, where the justice has proceeded, after it was apparent that the title to land necessarily came into question. *Main vs. Cooper*, 26 Barb., 468. See, however, as to cases where title is not set up or controverted on the pleadings, *Adams vs. Rivers*, 11 Barb., 390 ; *Bellows vs. Sackett*, 15 Barb., 96 ; *Browne vs. Scofield*, 8 Barb., 239.

Where, on its appearing that the justice is disqualified to try it, he refused to dismiss the action, the judgment was reversed. *Carrington vs. Andrews*, 12 Abb., 348. So also, where the trial had taken place before the justice of another district, without his authority to hear the case appearing upon the return. *Reed vs. Warth*, 2 Hilt., 281.

On the defendant's failure to appear, it will be error for a judge in the country districts, as formerly in New York, to give judgment for the plaintiff, unless he proves his case by sufficient evidence. *Muscott vs. Miller*, 1 C. R., 53 ; *Perkins vs. Stebbins*, 29 Barb., 523 ; *Alburtis vs. McCready*, 2 E. D. Smith, 39 ; *Howard vs. Brown*, 2 E. D. Smith, 247 ; *Jones vs. Pridham*, 3 E. D. Smith, 155 ; *McCollum vs. McClare*, 1 Hilt., 140 ; 3 Abb., 106. So also, where, on a special defence being overruled at the trial, the court goes on and gives judgment on the pleadings, without proof of the plaintiff's case. *Raymond vs. Traffarn*, 12 Abb., 52. In the New York district, however, the plaintiff may now take judgment by default, on his complaint, if verified, as in the higher courts. See also, as to the effect of a special plea, by way of admission of the plaintiff's case, where no evidence is offered on either side. *Gregory vs. Trainer*, 4 E. D. Smith, 58.

If there has been in any manner a mistrial of the cause, on points affecting the jurisdiction, or working injury to either party, it will be ground for reversal.

As, where a jury trial, when duly demanded, has been refused. *Meech vs. Brown*, 1 Hilt., 257 ; 4 Abb., 19 ; *Mead vs. Darragh*, 1 Hilt., 395. Or, where a challenge for principal cause has been improperly overruled. *Hathaway vs. Helmer*, 25 Barb., 29.

Or, where the case has been improperly adjourned, or has fallen through, by the non-attendance of the parties on an adjourned hearing.

Peck vs. Andrews, 32 Barb., 445 ; *Aberhall vs. Roach*, 3 E. D. Smith, 345 ; 11 How., 95 ; *The Mayor of New York vs. Husson*, 2 Hilt., 7 ; *Lynsky vs. Prendergast*, 2 E. D. Smith, 43 ; *Redfield vs. Florence*, 2 E. D. Smith, 339 ; *Hogan vs. Baker*, 2 E. D. Smith, 22 ; *Wight vs. McClave*, 3 E. D. Smith, 316 ; *Norris vs. Bleakley*, 1 Hilt., 90 ; 3 Abb., 107. See, as to the right to refuse an adjournment when applied for, *Matthews vs. Festel*, 2 E. D. Smith, 90 ; *Pollock vs. Ehle*, 2 E. D. Smith, 541 ; *Story vs. Bishop*, 4 E. D. Smith, 423.

So likewise, where, after the defendant had made inquiry, and had been told there was no such case, and allowed to leave the court, the justice subsequently proceeded. *Murling vs. Grote*, 1 Hilt., 116 ; 3 Abb., 109. Or, where the case had been placed on the calendar on the wrong day. *McCollum vs. McClare*, 1 Hilt., 140 ; 3 Abb., 106 ; *Kelly vs. Brower*, 1 Hilt., 514.

Or, where the justice decided the cause, before the summing up of counsel was closed. *Prentiss vs. Sprague*, 1 Hilt., 428. See also, as to restricting a party in his defence, *Allen vs. Stone*, 9 Barb., 60.

Where the return is wholly insufficient, it will be error to render judgment upon it. *Spring vs. Baker*, 1 Hilt., 526 ; *Heidenheimer vs. Lyon*, 3 E. D. Smith, 54 ; *Cabre vs. Sturges*, 1 Hilt., 160. So also, where the return, as made, does not show an essential prerequisite, as the giving of a bond, in a suit on a lost note. *Desmond vs. Rice*, 1 Hilt., 530. But, where the question arose, as to whether the plaintiff was or was not absent on the return of the verdict, it was held that, to make such absence available as ground of error, it must be affirmatively stated on the return. *McEachron vs. Randles*, 34 Barb., 301. See, however, *Douglass vs. Blackman*, 14 Barb., 381.

As to the presumption in favor of the regularity of the proceedings below, *vide Beattie vs. Qua*, 15 Barb., 132 ; *The Mayor of New York vs. Hyatt*, 3 E. D. Smith, 156.

In *Montfort vs. Hughes*, 3 E. D. Smith, 591, it was held to be error to receive a plea to the merits, after an inquest against the defendant had actually been commenced ; and the judgment was reversed for mistrial.

A judgment, rendered after the expiration of the time limited by statute, will be erroneous, and cannot stand. *Berrian vs. Olmstead*, 4 E. D. Smith, 279 ; *Seaman vs. Ward*, 1 Hilt., 52 ; *Wiseman vs. Panama Railroad Company*, 1 Hilt., 300 ; *Kane vs. Dulex*, 3 E. D. Smith, 127. But where, after trial, the cause had been adjourned over by consent for argument, it was held that the statutory time ran, from the conclusion of such argument, and not from the day of actual trial. *Heidenheimer vs. Wilson*, 31 Barb., 636.

The awarding of final judgment, on the decision of a demurrer,

without giving the party the opportunity to amend, was held to be error, in *Glasse vs. Keulsen*, 3 Abb., 100.

So also, the awarding of judgment against several defendants for a joint tort, where some of them have not been served, has been held to be error, and that, being an entire judgment, it cannot be partially reversed, but the whole must fall. *Farrell vs. Calkins*, 10 Barb., 348. This position is controverted, however, and it has been held that, in the case of a judgment of this nature, a separate appeal is maintainable, by any one defendant, separately, and that, on such appeal, a several reversal may be awarded in favor of the defendant so appealing, the judgment standing as to the others. See *Geraud vs. Stagg*, 4 E. D. Smith, 27; 10 How., 369.

So, also, a judgment has been held to be erroneous, where different sums had been awarded, by way of separate damages, against co-defendants, guilty of trespass by a joint act. *Turner vs. McCarthy*, 4 E. D. Smith, 247.

The awarding of judgment for the whole claim of the plaintiff, without giving due credit for a deduction, justly claimable by the defendant, will be error. *Hibbard vs. Stewart*, 1 Hilt., 207. Or the dividing of a loss between the parties, in respect of which a counter-claim is made, without adjudication upon its validity. *Prentiss vs. Sprague*, 1 Hilt., 428.

A refusal to allow the plaintiff to discontinue, on his offer to do so in due time, before the case is finally submitted, is error. *Bidwell vs. Weeks*, 2 Hilt., 106. See also *Norris vs. Bleakley*, 1 Hilt., 90; 3 Abb., 107.

On appeal to the general term of the Marine Court, a simple reversal of judgment in favor of the plaintiff, grounded on a surmountable defect of proof, will not be proper. A new trial should be awarded, unless it be apparent that the plaintiff cannot recover, on any possible state of proofs. The judgment, though erroneous, is not, however, final, in such a sense as to be reviewable, on appeal to the Common Pleas. *Hone vs. Joslien*, 2 Hilt., 453; 17 How., 338; 9 Abb., 193. The return was, however, sent back to the court below, with instructions to render the proper judgment. See same course pursued in *Journey vs. Brackley*, 1 Hilt., 447.

In *Irwin vs. Lawrence*, however, 1 Hilt., 352, a reversal was granted on the same ground. See likewise, as to costs, *Ellert vs. Kelly*, 4 E. D. Smith, 12; 10 How., 392.

In *Edgerton vs. Fitzgerald*, 9 Abb., 193, note, a judgment (by the Marine Court, general term) irregularly entered, in consequence of an improper disposition of the case on the original hearing below, was reversed.

(d.) QUESTIONS OF FACT, APPARENT ON RECORD.

As a general rule, a justice's decision, upon any question of fact, where there is any evidence to support it, will be held conclusive, even though the appellate court may differ in its views, as to the weight of conflicting testimony. The same rule holds good as with respect to the verdict of a jury, or the decision of the court, or of a referee, upon a question of fact. See *Bort vs. Smith*, 5 Barb., 283; *Spencer vs. Saratoga and Washington Railroad Company*, 12 Barb., 382; *Buck vs. Waterbury*, 13 Barb., 116; *Doolittle vs. Eddy*, 7 Barb., 74; *Cole vs. Stevens*, 9 Barb., 676; 6 How., 424; *Dunkle vs. Kocker*, 11 Barb., 387; *Adsit vs. Wilson*, 7 How., 64; *Kasson vs. Mills*, 8 How., 377; *Morris vs. Third Avenue Railroad Company*, 23 How., 345.

The rule is thus stated in *Rivara vs. Ghio*, 3 E. D. Smith, 264: "Where there is evidence in support of the finding of the justice, and no such amount of countervailing evidence, as warrants a conclusion that the justice has been governed by bias, partiality, or other improper motive, or has acted under a misapprehension or mistake; or, unless there be a plain state of the proof, which would warrant the court in setting aside the verdict of a jury, as against evidence, the judgment below will not be interfered with." See also *Galoupeau vs. Ketchum*, 3 E. D. Smith, 175; *Westervelt vs. Alcock*, 3 E. D. Smith, 243; *Wilson vs. Cook*, 3 E. D. Smith, 252; *Garrison vs. Pearce*, 3 E. D. Smith, 255; *Heim vs. Wolf*, 1 E. D. Smith, 70; *Harpell vs. Curtis*, 1 E. D. Smith, 78; *Decker vs. Jaques*, 1 E. D. Smith, 80; *Easton vs. Smith*, 1 E. D. Smith, 318; *Breidert vs. Vincent*, 1 E. D. Smith, 542 (544); *Pozzoni vs. Henderson*, 2 E. D. Smith, 146; *McLaughlin vs. Barnard*, 2 E. D. Smith, 372; *Mellon vs. Smith*, 2 E. D. Smith, 462; *Dempsey vs. Paige*, 4 E. D. Smith, 218; *Crane vs. Hurdman*, 4 E. D. Smith, 339 (340); *Warren vs. Van Pelt*, 4 E. D. Smith, 202 (205); *Tattershall vs. Hass*, 1 Hilt., 56 (58); *Blakeman vs. Mackay*, 1 Hilt., 266; *Tracy vs. Hartman*, 1 Hilt., 350; *Mendell vs. French*, 2 Hilt., 178; *Smith vs. Silliman*, 11 How., 368; *Barber vs. Arnoux*, 18 How., 285; *Bennett vs. Scull*, 18 Barb., 347; *Rogers vs. Ackerman*, 22 Barb., 134; *Biglow vs. Sanders*, 22 Barb., 147; *Wiley vs. Slater*, 22 Barb., 506; *Nickley vs. Thomas*, 22 Barb., 652 (655); *Seymour vs. Bradfield*, 35 Barb., 49; *Smith vs. Hoose*, 22 How., 402.

So, likewise, as to the measure of damages in tort. *Cropsey vs. Murphy*, 1 Hilt., 126; *McCahill vs. Kipp*, 2 E. D. Smith, 413 (415); *Althause vs. Rice*, 4 E. D. Smith, 347; *Wilbur vs. Hubbard*, 35 Barb., 303.

The determination of a justice, as to the existence of jurisdiction,

where founded on conflicting testimony, will not, in like manner, be disturbed. *Parker vs. Eaton*, 25 Barb., 122.

And the same rule will apply to his decision, on a mixed question of fact and of law, so far as the question of fact is involved. *Birdseye vs. Frost*, 34 Barb., 367.

It is also competent for a justice wholly to disregard the testimony of a witness, as unworthy of belief, if there be facts to support such a conclusion. *Donohue vs. Henry*, 4 E. D. Smith, 162.

The above principle has, however, its due limits. Where evidence, upon which, in the opinion of the appellate court, the plaintiff was clearly entitled to recover, was uncontradicted and unopposed, a judgment, in disregard of such proof, was reversed. It was held, that such a finding will be treated, as founded on some erroneous view of the law applicable to the case. *Goldsmith vs. Obermeier*, 3 E. D. Smith, 121. See also *Pierce vs. Thomas*, 4 E. D. Smith, 354.

So also, a judgment will be reversed, where there is a total failure of proof, or where the proof given is so defective as to be insufficient in law to warrant it. *Fox vs. Decker*, 3 E. D. Smith, 150; *Fanning vs. Lent*, 3 E. D. Smith, 206; *Dougherty vs. Gallagher*, 3 E. D. Smith, 570; *Roulston vs. Clark*, 3 E. D. Smith, 366; *Hegeman vs. McArthur*, 1 E. D. Smith, 147; *Fly vs. O'Leary*, 2 E. D. Smith, 355; *Hunt vs. Westervelt*, 4 E. D. Smith, 225; *Cox vs. Broderick*, 4 E. D. Smith, 721; *Davidson vs. Hutchins*, 1 Hilt., 123; *Mentges vs. New York and Harlem Railroad Company*, 1 Hilt., 425; *Carter vs. Dallimore*, 2 Sandf., 222; *Lynch vs. McBeth*, 7 How., 113.

Where the weight of evidence so clearly preponderated, as to render it a case, not of conflicting, but of defective, against positive testimony, the judgment was reversed. *Dresser vs. Van Pelt*, 1 Hilt., 316.

And, where the verdict or judgment has been rendered, not merely against the weight of evidence, but against the evidence as a whole, the judgment should be reversed. *Perego vs. Purdy*, 1 Hilt., 269; *Wiley vs. Slater*, 22 Barb., 506; *Fish vs. Skut*, 21 Barb., 333; *Westbrook vs. Douglass*, 21 Barb., 602 (605); *Lambert vs. Seely*, 17 How., 432; *Easton vs. Smith*, 1 E. D. Smith, 318; *Jacks vs. Darrin*, 3 E. D. Smith, 557; *Warren vs. Van Pelt*, 4 E. D. Smith, 202 (206); *McCarty vs. Ely*, 4 E. D. Smith, 375 (377); *Storp vs. Harbutt*, 4 E. D. Smith, 464.

(e.) EXTRANEOUS ERRORS OF FACT.

The words "errors of fact," as used in section 366, do not, it has been held, refer to an erroneous finding of the court or jury upon the evidence, but to those errors of fact, which do not appear from the record or evidence, such as infancy, coverture, &c., of some of the parties. See

Adsit vs. Wilson, 7 How., 64; *Kasson vs. Mills*, 8 How., 377; *Biglow vs. Saunders*, 22 Barb., 147; *Craw vs. Daly*, 2 C. R., 118.

Under the Code of 1848, there was, it was held, no provision for the review of this class of errors. *Vide Partridge vs. Thayer*, 2 Sandf., 227; 1 C. R., 85. The amendment of 1849 provided for this defect, and they might then be brought up on the appellant's affidavit. See *Adsit vs. Wilson*; *Kasson vs. Mills*, and *Craw vs. Daly*, *supra*. See also *Lynch vs. McBeth*, 7 How., 113. Under that practice, the affidavit and the respondent's counter-affidavit, as then admissible, were equivalent to an assignment and joinder on such errors. *Lynch vs. McBeth*, and *Adsit vs. Wilson*, *supra*.

Since the amendment of 1852, substituting the justice's return for the affidavits, required by the previous system, the affidavit, showing such error, must be separate.

In *Hurd vs. Beeman*, 8 How., 254, it was considered not sufficient for the appellant to serve such affidavits upon the justice, and have them made part of the return, but that they ought to be served also upon the adverse party, so as to give him the opportunity of making a joinder in error on counter-affidavits; and the rule as to time of service, as regards special motions, was held to be a safe one to follow. In that case, this practice not having been pursued, the county judge declined to consider errors of fact presented in the above manner, without service on the adverse party. See this view approved, in *Cook vs. Swift*, 18 How., 454; 10 Abb., 212.

There can be no doubt but that this is the proper practice, and that the affidavits upon which such error is assigned, should, in all cases, be served, either with the notice of appeal, or, at the very latest, simultaneously with the notice of hearing. If the respondent contests the facts, he must be prepared with counter-affidavits, establishing the circumstances on which he grounds his opposition, at the time of the hearing, which, so far, may be considered as assuming the character of a motion to set aside the judgment for irregularity.

But the question so brought up, and likewise the application to open a judgment by default, as below considered, cannot be brought up independently. An appeal must be regularly taken, and the question so raised, must be brought up, in connection with such appeal, in all cases. See *Cook vs. Swift*, 18 How., 454; 10 Abb., 212; *Donnell vs. Cornell*, 1 C. R. (N. S.), 288.

The following reversals have been granted for extraneous errors thus made apparent:

For proceeding against a non-resident, on long summons, where the defendant merely appeared to object for want of jurisdiction. *Willins vs. Wheeler*, 28 Barb., 669; 17 How., 93; 3 Abb., 116.

For rendering judgment, prematurely, on the wrong day, *Kelly vs. Brower*, 1 Hilt., 514

But an objection of this nature may be waived, by omission to object in due season, as by neglecting to challenge an incompetent juror. See *Clark vs. Van Vrancken*, 20 Barb., 278.

A judgment, confessed before a justice, disqualified on the ground of relationship, was reversed for error of fact, on such relationship being made apparent by affidavit. *Chapin vs. Churchill*, 12 How., 367.

(f.) OPENING DEFAULT BELOW.

A judgment, taken on failure of the defendant to appear below, may also be opened, under the power conferred by section 366.

The matter is brought up on appeal in the regular manner. See *Cook vs. Swift*, and *Donnell vs. Cornell*, above cited. In addition to the regular notice, affidavits may be served, satisfactorily excusing the default, and showing that manifest injustice has been done. These should be served, either with the notice of appeal, or, at latest, at the same time as the notice of hearing. See last subdivision, *Hurd vs. Beeman*, and other cases there referred to. The matter comes up for hearing, on these affidavits, and any counter-affidavits which the respondent may serve.

On affidavits being served as above, the application assumes the shape of an ordinary motion, to open an inquest or default in the courts above, and will be decided on similar principles; it being incumbent on the moving party, to show merits in his defence, and excuse his non-appearance. If, in addition to this relief, he also seeks to review the judgment taken against him, for alleged error of law, he must bring up and argue his appeal, and the court must hear him on both grounds. It cannot dispose of either question separately. See *Cook vs. Swift*, *supra*. See also *Donnell vs. Cornell*, 1 C. R. (N. S.), 288. Nor can the motion be brought up, without an appeal being taken, even though injustice be shown.

This mode of relief is only applicable to the case of a defendant. A dismissal of the complaint, taken by default against the plaintiff, cannot be opened. The case is not provided for, and his only remedy is to bring a fresh action.

It is not sufficient for the defendant to show a case for opening the default, on his affidavit; he must also state, as one of his grounds of appeal, that it is taken on the merits. If he omits to do this, it will be unavailing. *Haughey vs. Wilson*, 1 Hilt., 259.

And the default must be on failure to appear at all. . If a defendant appears, in the first instance, and afterwards makes default, on an ad-

journd hearing, he cannot claim relief under this section. *Williams vs. McCauley*, 3 E. D. Smith, 120; *Bunker vs. Latson*, 1 E. D. Smith, 410; *Mix vs. White*, 1 E. D. Smith, 614; *Hunt vs. Westervelt*, 4 E. D. Smith, 225; *Wilde vs. New York and Harlem Railroad Company*, 1 Hilt., 302. See also *Edwards vs. Drew*, 3 E. D. Smith, 55; *Teaz vs. Chrystie*, 2 E. D. Smith, 635. See, however, *Armstrong vs. Craig*, 18 Barb., 387, as to opening a default taken on an adjourned hearing.

The default, as suffered, must be satisfactorily excused.

The negligence of a third party, intrusted with the duty of delivering the defendant's instructions to his attorney in his absence, has been held sufficient. *Camp vs. Stewart*, 2 E. D. Smith, 88. So also, misapprehension of the day, on the part of the defendant himself. *Gottberger vs. Harned*, 2 E. D. Smith, 128; *Gardner vs. Wight*, 3 E. D. Smith, 334. Or misapprehension, sufficiently accounted for, on the part of the attorney. *Lent vs. Jones*, 4 E. D. Smith, 52. Or, the failure of the latter to attend, from an accidental delay. *Seymour vs. Elmer*, 4 E. D. Smith, 199; 1 Abb., 412.

But mere forgetfulness or inattention, or the pressure of other engagements on behalf of defendant, or his attorney, will not be held as a sufficient excuse. *Fowler vs. Colyer*, 2 E. D. Smith, 125; *Mulhern vs. Hyde*, 3 E. D. Smith, 177; *Beebe vs. Roberts*, 3 E. D. Smith, 194; *Foster vs. Capewell*, 1 Hilt., 47; *Ball vs. Mauder*, 19 How., 468. Nor will alleged ignorance of law be sufficient. *Mayor of New York vs. Green*, 1 Hilt., 393.

A mere affidavit of merits, will not be sufficient for the purpose of opening a default, or even a mere denial of the allegations of the complaint. The defendant must show that manifest injustice has been done, and, for that purpose, he must satisfy the court, that he has a real and substantial defence upon the merits, must disclose its nature, and give proof that it is true in fact. See *Mix vs. White*, 1 E. D. Smith, 614; *Fowler vs. Colyer*, 2 E. D. Smith, 125; *Mayor of New York vs. Green*, 1 Hilt., 393; *Bogardus vs. Livingston*, 2 Hilt., 236; *Armstrong vs. Craig*, 18 Barb., 387.

If a defence be disclosed, and sufficient *prima facie* proof of it given, the court will not, as a general rule, try the question, on a mere conflict of affidavits between the parties, but will grant a new trial on proper terms. *Camp vs. Stewart*, 2 E. D. Smith, 88. See, however, the contrary rule laid down, and that, on such a conflict, the applicant must furnish corroborative proof of the existence of his defence. *Foster vs. Capewell*, 1 Hilt., 47. The defence in that case was usury, and the matter is one that rests very much in the discretion of the court. See also *Van Wyck vs. Kelly*, 2 E. D. Smith, 128, note.

In *Seymour vs. Elmer*, however, 4 E. D. Smith, 199; 1 Abb., 412,

the default was opened, on the uncorroborated affidavit of the defendant, in contradiction of the testimony of the plaintiff's assignor.

Where the defendant seeks to contradict a fact, proved by the testimony of a witness called on behalf of the plaintiff, he must corroborate his own affidavit by other testimony. *Lent vs. Jones*, 4 E. D. Smith, 52. Or, if he cannot obtain affidavits for that purpose, he should show that such testimony exists, and cannot be obtained, except by compulsion, upon a retrial of the case.

As to the necessity of corroboration of the defendant's affidavit, when opposed to the testimony of a disinterested witness, see also *Silkman vs. Bodger*, 4 E. D. Smith, 236.

Where the plaintiff supports his affidavit in contradiction, by other testimony, the defendant must bring the affidavit of another witness in corroboration, or the default will not be opened. *Gottsberger vs. Harned*, 2 E. D. Smith, 128. See also *Gardner vs. Wight*, 3 E. D. Smith, 334.

A judgment will not be opened, to enable the defendant to prove a valid set-off against the plaintiff's assignor, for which an action may still be maintained by him against the latter. *Travis vs. Bassett*, 3 E. D. Smith, 171.

In the following cases, a default was opened, on proof of irregularity in the process, or an improper service. *Churchill vs. Marsh*, 4 E. D. Smith, 369; 2 Abb., 219; *Carroll vs. Goslin*, 2 E. D. Smith, 376; *Fitch vs. Devlin*, 15 Barb., 47.

Also for irregularity in taking the default itself, working injustice to the defendant. *Murling vs. Grote*, 1 Hilt., 116; 3 Abb., 109. Or for taking such default, on a misstatement as to the non-appearance of the defendant. *Beach vs. McCann*, 1 Hilt., 256; 4 Abb., 18.

When opened, the default will be opened on terms, as indeed prescribed by the section. The costs of the appeal, in particular, will, as a general rule, be imposed, nor will the fact that the respondent refused to open the default, by consent, be a reason for refusing to impose them. *Camp vs. Stewart*, 2 E. D. Smith, 88. And other terms may be imposed, as, for instance, the payment of a sum admitted to be due to the plaintiff. *Bissel vs. Dean*, 3 E. D. Smith, 172.

In the event of non-compliance with the terms imposed, the order opening the judgment may be vacated. *Mitchell vs. Menkle*, 1 Hilt., 142.

On an order of this description being taken, the cause will be ordered for a new trial, before the same or any other justice, at a time and place to be prescribed. A retrial will then be had, as upon an original hearing of the cause, with all the usual incidents of that hearing. See section 366.

If, on that trial, the defendant fails to appear, the justice must take proof, and render judgment, in the usual manner. He cannot make an order that the former judgment stand, with costs. If made, it will be wholly irregular, and will be reversed on appeal. *McCollum vs. McClare*, 1 Hilt., 140; 3 Abb., 106.

On a retrial being granted, the court may either set aside the former judgment, or may suspend it, to abide the issue of such new trial. Section 366. If so suspended, and a second judgment, taken by the plaintiff, on the retrial, is reversed on appeal, the judgment so suspended will fall with it. *Pierce vs. Thomas*, 4 E. D. Smith, 354.

(g.) OTHER INCIDENTS TO HEARING.

A rehearing of the appeal will not be granted, on an affidavit, to the effect that, on the argument, the counsel was not fully prepared, and the questions not properly brought before the court. *Drucker vs. Patterson*, 2 Hilt., 135. Or, on a supposition of misapprehension in the decision. *Teaz vs. Chrystie*, 2 Abb., 259.

In *Geraud vs. Stagg*, 4 E. D. Smith, 27; 10 How., 369, a motion to correct the entry of judgment on the appeal, was entertained, but, under the circumstances, denied without costs. And, in *Frazer vs. Child*, 4 E. D. Smith, 243, the option of a reargument was given to a party applying to the court, on a doubtful point raised by him in the application.

The correction of a clearly erroneous entry of judgment may be applied for at special term. *Vide Bagley vs. Brown*, 3 E. D. Smith, 66.

§ 328. *Render of Judgment.*

On an appeal from a judgment, rendered on a contested hearing, whether that hearing be on the return only, or on affidavits showing extraneous errors of fact, the appellate court have no jurisdiction to order a new trial in the court below. They are confined to a simple affirmance or reversal of the judgment. A new trial can only be ordered, when the judgment below has been taken by default. *Story vs. Bishop*, 4 E. D. Smith, 423; *Hardy vs. Seelye*, 1 Hilt., 90; 3 Abb., 103; *Norris vs. Bleakley*, 1 Hilt., 90; 3 Abb., 107; *Teaz vs. Chrystie*, 2 Abb., 259. Nor can a new trial be granted, on any other ground, such as that of newly discovered evidence. *Schwartz vs. Bendel*, 2 E. D. Smith, 123.

In *Easton vs. Smith*, 1 E. D. Smith, 318, the appellate court, on a reversal, rendered the judgment that, in their opinion, should have been rendered by the court below. In *Frazer vs. Child*, however, 4 E. D. Smith, 243, the power of the court to do this was doubted. In the note

to that case (p. 245), it is stated that the court have since held peremptorily that, in such cases, a simple reversal is all that can be adjudged, and that the party entitled to judgment must be left to a new action. It is so decided definitely in *Hardy vs. Seelye*, 1 Hilt., 90; 3 Abb., 103. And, in *Norris vs. Bleakley*, 1 Hilt., 90; 3 Abb., 107, it is held that, on such a reversal, the power of the court is exhausted, and that the proceedings in any further action between the parties cannot be interfered with. An application to preserve the testimony of a witness was accordingly denied, on the ground of want of power.

As, however, the section gives power to affirm or reverse the judgment, in whole or in part, it may be modified, according to the justice of the case. *Norris vs. Bleakley*, *supra*. And this may be done, by giving the respondent a power to retain the judgment for a modified amount, in case he shall so elect. *La Motte vs. Archer*, 4 E. D. Smith, 46.

But a judgment cannot be modified, by increasing the amount of recovery. *Murphy vs. Long*, 1 Hilt., 309; 4 Abb., 476.

Under the power now given by the section, to affirm or reverse the judgment, as to all or any of the parties, a judgment against joint tortfeasors may be reversed, as to one only, on his sole appeal. *Geraud vs. Stagg*, 4 E. D. Smith, 27; 10 How., 369. See, *per contra*, *Furrell vs. Calkins*, 10 Barb., 348, maintaining the stricter view, as to such a judgment not being severable. And, see qualification of the general doctrine, in *Geraud vs. Stagg*, *supra*, 4 E. D. Smith (32). As to the right of one of several co-defendants to maintain a separate appeal, *vide Mattison vs. Jones*, 9 How., 152.

(a.) AWARD OF COSTS.

Special provisions on this subject are made by sections 368 and 370, and the scale of costs of the appellate court is given, by section 371, as above cited. The costs of an appeal, strictly speaking, must not be confounded with the costs of a new trial in the court above, as how authorized.

The costs of appeal follow, as will be seen, the render of an unqualified affirmance or reversal, but those of a partial affirmance, rest in the discretion of the court; whilst under section 370, the appellate tribunal may allow a mutual set-off, where proper, and render judgment for the balance.

Where the affirmance or reversal is absolute, the court have no discretion, and cannot relieve the losing party from the payment of costs. *Logue vs. Gillick*, 1 E. D. Smith, 398; *Hahn vs. Van Doren*, 1 E. D. Smith, 411; *Main vs. Eagle*, 1 E. D. Smith, 619 (621); *Chapin vs. Churchill*, 12 How., 367.

And, on a reversal, the costs of the court below follow the judgment, and the appellant is entitled to those which he would have recovered, had a proper judgment been rendered. *Jacks vs. Darrin*, 1 Abb., 232; *Estus vs. Baldwin*, 9 How., 80. See, however, qualification of this doctrine in *Ellert vs. Kelly*, 4 E. D. Smith, 12; 10 How., 392. When the amount of the plaintiff's recovery below, is fixed at a certain amount by stipulation, the right to costs, in addition, follows the judgment, unless expressly provided to the contrary. *Wing vs. New York and Erie Railroad Company*, 1 Hilt., 235.

When an appeal, taken to the county court, is transferred to the Supreme Court, by reason of the incapacity of the county judge, the costs of the hearing are those provided by section 371, and not those of an appeal to the Supreme court. *O'Callagan vs. Carroll*, 16 How., 327; *Taylor vs. Seeley*, 4 How., 314; 3 C. R., 84. See also *Davis vs. Stone*, 16 How., 538.

As to the power of the court to grant an amendment, providing that the costs of an unsuccessful proceeding on the undertaking on appeal, and those of an affirmance, be set off against each other, see *Bagley vs. Brown*, 3 E. D. Smith, 66.

(b.) COLLECTION AND RESTITUTION.

If the judgment be affirmed, the respondent is restored to the benefit of any execution, previously issued by the court below, and of any levy under that execution, and may proceed under it separately; or, if he have filed a transcript, he may take execution out of the appellate court for the original debt and costs, and costs of the appeal. *Vide Smith vs. Allen*, 2 E. D. Smith, 259. If he take the former course, he will, of course, be entitled to take out a separate execution for the latter costs.

The provision made by section 354, that, in the event of an affirmance, the respondent is entitled to take out of the hands of the clerk, the deposit, if made, in lieu of an undertaking for the costs of the appeal, and of the court below, giving credit for the amount in his execution; and also that which entitles the appellant to take that money out of court, if he succeed on the appeal, will have been noticed.

The making of restitution to the appellant, in case of a reversal, is fully provided for by section 369.

The mode of obtaining an order for that purpose, is specially pointed out by the section. It may be made, either at or after the hearing, on proof of the facts, and upon a previous notice of six days. This may be framed on the model of an ordinary notice of motion, referring to the proofs on which the application is grounded.

The direction is given by order, but, if that order is made before judgment is entered, the amount may be included in the judgment.

Where satisfaction of the judgment below, appeared upon the face of the record, it was held, that an order for restitution would follow, as of course. *Vide Sheridan vs. Mann*, 5 How., 201; 3 C. R., 213. This case came up, however, on writ of error, under the former practice, and not under the Code; and, in the decision, it is laid down that, where the matter is not patent on the record itself, the respondent has a right to be heard.

Under the present practice, notice of the application should, in all cases, be given, and, where the facts are clear, it may be a convenient course, to give that notice simultaneously with the respondent's notice of argument.

In *Hunt vs. Westervelt*, 4 E. D. Smith, 225, an order for restitution was made, upon production of a transcript from the docket, showing that the judgment was satisfied.

In a case of this description, no evidence, beyond production of the transcript, would seem to be necessary. Where no satisfaction has been entered, proof must be given of the collection of the judgment, either *vivâ voce* or by affidavit. If in the latter form, it will be the better course to serve a copy of that affidavit, with the notice of application, as, the matter resting *in pais*, the respondent has a right to be heard. *Vide Sheridan vs. Mann, supra*.

When the application is made after the hearing, affidavits or other evidence should then be produced, showing the collection of the judgment and the fact that it has been reversed. Where not matter of record, copies of this evidence ought to be served with the notice.

Where the judgment is given for the appellant, absolutely and finally, no new trial being granted, it is not merely optional with, but imperative upon the court, to make restitution, for all that the appellant has lost, including his costs of all the proceedings, from the commencement to the termination of the case; and, on application, he will be entitled to the necessary order for that purpose. *Estus vs. Baldwin*, 9 How., 80; *Jacks vs. Darrin*, 1 Abb., 232.

In *Kennedy vs. O'Brien*, 2 E. D. Smith, 41, it is laid down that the proper course, under these circumstances, is a motion to the appellate court for restoration; and, upon that motion being granted, the decision becomes a part of the judgment of that court, and the amount paid may be collected by execution, with the costs.

(c.) JUDGMENT-ROLL.

The form of this document is expressly provided for by section 367. It consists of the return on which the appeal was heard, with the usual *postea* annexed, showing the action and judgment of the appellate court.

§ 329. *Ulterior Appeal.*

As a general rule, the decision of the general term of the Supreme Court, or of the Court of Common Pleas in New York cases, is final and conclusive, and the matter cannot be carried further.

Prior to the amendment of 1857, the prohibition, in this respect, was absolute, and a cause, commenced in one of these courts, could not be carried up to the Court of Appeals, under any circumstances.

And this prohibition was extended, even to appeals in real estate cases, originally commenced in a justice's court, but discontinued and recommenced in the higher jurisdictions, under the provisions of the Code for that purpose. See *Brown vs. Brown*, 2 Seld., 106; 6 How., 320; *Pugsley vs. Kesselburgh*, 6 Seld., 420; 7 How., 402, and *Wiggins vs. Tallmudge*, 7 How., 404.

But, in 1857, this prohibition was relaxed, and the provisions in section 11, as there amended, now stand as follows:

But such appeal shall not be allowed, in an action originally commenced in a court of a justice of the peace, or in the Marine Court of the city of New York, or in an assistant justice's court of that city, or in a justice's court of any of the cities of this state, unless any such general term shall, by order duly entered, allow such appeal, before the end of the next term after which such judgment was entered. The foregoing prohibition shall not extend to actions, discontinued before a justice of the peace, and prosecuted in another court, pursuant to sections sixty and sixty-eight of this Code.

It will be observed that the class of cases, to which *Brown vs. Brown*, and the other decisions, above cited, belong, is now removed entirely from the scope of the prohibition, and placed on the same footing as actions originally commenced in the county court.

But this exemption does not extend, to cases removed out of one of the New York district courts into the Common Pleas, under chapter 344 of 1857. A case of this nature, though, in fact, tried in the court above, stands, for the purposes of appeal, on the same footing as if it had remained in the court below, and it cannot be carried up to the Court of Appeals, without an order of allowance by the general term, the same as in other cases. *Smith vs. White*, 23 N. Y., 572.

The application to the general term, may either be made at the time the decision is pronounced, if the parties are in court, or afterwards, on special motion.

In the latter case, the motion should be noticed in the usual manner, the facts tending to show the importance of the questions involved, and the propriety of their being carried up for further review being shown,

by reference to the papers on the appeal, and the opinion of the court, when given, or, if necessary, by affidavits.

In *Wait vs. Van Allen*, 22 N. Y., 319, it was held that the statutory limitation, as to the time within which the order, allowing the appeal, must be made, is peremptory, and cannot be enlarged under any circumstances. In that case, the motion had been noticed and argued in due time, but was not decided at the term at which it was made, having, as it was proved, been overlooked by the presiding justice. An order was afterwards entered, *nunc pro tunc*, as of the term at which the motion was made, but the Court of Appeals held that this order was without jurisdiction to support it, and dismissed the appeal.

This decision necessarily overrules that in *Clapp vs. Graves*, 2 Hilt., 317; 9 Abb., 20; holding that, under similar circumstances, an order for this purpose, might be entered, *nunc pro tunc*, though no decision was given on the motion, until after the close of the term.

An order of this description will be proper, when there are conflicting decisions upon the point involved. *Clapp vs. Graves*, 2 Hilt., 243.

But, as a general rule, it should not be granted, except where the case involves great interests, or settles a principle of law, affecting the decision of numerous other cases. *Jackson vs. Purchase*, 1 Hilt., 357; 14 How., 230.

Nor will such an order be made, on suggestion that, by reason of the want of preparation on the part of counsel, the case was not fully argued, or understood by the court. *Drucker vs. Patterson*, 2 Hilt., 135.

And, where the point sought to be reviewed was a mere point of practice, and had been already permitted to be taken up in another case, the order was refused. *Palmer vs. Moeller*, 2 Hilt., 421; 19 How., 322; 9 Abb., 20, note.

The question is, of course, one which rests entirely in the discretion of the tribunal applied to, but the principles laid down in the decisions above referred to, may, probably, be carried out in other cases.

Where such an order is made, the appellant must, of course, see that it is "duly entered," and also that it is included in the return to the Court of Appeals, as being a necessary prerequisite to the right of appeal in such cases.

BOOK XIV.

COSTS.

§ 330. *Statutory and Other Provisions.*

THE costs to be allowed in civil actions, are regulated by title X., part II., of the Code, which runs as follows :

TITLE X.

Of the Costs in Civil Actions.

§ 303. (258.) All statutes establishing or regulating the costs or fees of attorneys, solicitors, and counsel in civil actions, and all existing rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor or counsel, for his compensation, are repealed; and, hereafter, the measure of such compensation shall be left to the agreement, express or implied, of the parties. But there may be allowed to the prevailing party, upon the judgment, certain sums, by way of indemnity for his expenses in the action; which allowances are in this act termed costs.

§ 304. (259.) Costs shall be allowed of course, to the plaintiff, upon a recovery, in the following cases :

1. In an action for the recovery of real property, or when a claim or title to real property arises on the pleadings, or is certified by the court to have come in question at the trial ;

2. In an action to recover the possession of personal property ;

3. In the actions of which a court of justice of the peace has no jurisdiction ;

4. In an action for the recovery of money, where the plaintiff shall recover fifty dollars; but, in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages. And, in action to recover the possession of personal property, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages, unless he recovers also property, the

value of which, with the damages, amounts to fifty dollars, or the possession of property be adjudged to him, the value of which, with the damages, amounts to fifty dollars; such value must be determined by the jury, court, or referee, by whom the action is tried. When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange, or other instrument in writing, or in any other case, for the same cause of action, against several parties, who might have been joined as defendants in the same action, no costs, other than disbursements, shall be allowed to the plaintiff, in more than one of such actions, which shall be at his election, provided that the party or parties proceeded against in such other action or actions, have been within this state, and not secreted.

Subdivisions 3 and 4 were amended in 1862, as they now stand. The amendment then made was, however, rather formal than substantial. Otherwise, the section dates from 1849. In 1848, it closed at the end of the first sentence, in subdivision 4.

§ 305. (260.) Costs shall be allowed, of course, to the defendant, in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein.

§. 306. (261.) In other actions, costs may be allowed or not, in the discretion of the court.

In all actions where there are several defendants, not united in interest, and making separate defences, by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them.

In the following cases, the costs of appeal shall be in the discretion of the court :

1. When a new trial shall be ordered.
2. When a judgment shall be affirmed in part, and reversed in part.

Dates, as it stands, from the amendment of 1851.

In 1848, the section consisted of the first sentence only. In 1849, it was amended, so as to stand substantially as at present. But the words, "in all actions," were wanting at the beginning of the second clause. Those words were added on the amendment of 1851.

§ 307. (262.) When allowed, costs shall be as follows :

1. To the plaintiff, for all proceedings before notice of trial (including judgment, when rendered).

In an action, where judgment upon failure to answer may be had without application to the court, ten dollars; in an action where judgment can only be taken on application to the court, fifteen dollars; and two dollars for each additional defendant, upon whom process shall have been served. Except in actions for the foreclosure of a mortgage, the allowance for additional defendants is limited to ten such defendants, and, in other cases, to five such defendants.

2. To the defendant, for all proceedings before notice of trial, ten dollars.

3. To either party, for all subsequent proceedings before trial, ten dollars; to either party for attending upon, and taking the deposition of a witness, conditionally, or attending to perpetuate his testimony, ten dollars;

to either party, for drawing interrogatories to annex to a commission for the taking of testimony, ten dollars.

4. To either party, for the trial of an issue of law, fifteen dollars; for every trial of an issue of fact, twenty dollars.

5. To either party, on appeal, except to the Court of Appeals, and except appeals in the cases mentioned in section 349, before argument, fifteen dollars; for argument, thirty dollars; and the same costs shall be allowed to either party, before argument, and for argument, on application for judgment, upon special verdict, or, upon verdict subject to the opinion of the court, or for a new trial, on a case made, and in cases, where exceptions are ordered to be heard in the first instance at a general term, under the provisions of section 265.

6. To either party, on appeal to the Court of Appeals, before argument, twenty-five dollars; for argument, fifty dollars; and, when a judgment is affirmed, the court may, in its discretion, also award damages for the delay, not exceeding ten per cent., upon the amount of the judgment.

7. To either party, for every circuit or term, not exceeding five circuits, and five special and five general terms, at which the cause is necessarily on the calendar, and is not tried, or is postponed by order of the court, ten dollars.

But, in an action, hereafter brought to recover dower, before admeasurement, of real property, aliened by the husband, the plaintiff shall not recover costs, unless it appear that the dower was demanded before the commencement of the action, and was refused.

The same costs shall be allowed to the plaintiff, in proceedings under chapter II., title XII., of the second part of this Code (sections 375 to 381), as upon the commencement of an action.

This section dates, as it stands, from the amendment of 1862.

Previous to that year it had undergone a continued series of changes. It may, probably, be the more convenient mode to notice them, as they have affected each subdivision separately, instead of stating those on each occasion, in the aggregate.

Subdivision 1. In the Code of 1848, the allowances stood thus: in the first class of actions mentioned, \$7; in the second, \$12; and the subdivision also allowed, for subsequent proceedings before trial, \$7.

This scale continued till 1857, when the allowances were changed to the present amounts of \$10, and \$15.

The provision as to subsequent proceedings before trial, was transferred to subdivision 3.

The allowance of \$2 for each additional defendant served, was then first added.

But that allowance was left unlimited, as to the number of defendants served. The restrictions now imposed were first inserted in 1859. The word "that" seems to be wanting, after "except."

Subdivision 2. This allowance, in 1848, was \$5; the subdivision then went on to allow \$7 for subsequent proceedings before trial.

This scale continued till 1857, when the allowance of \$5 was increased to \$10, as it now stands; the allowance for subsequent proceedings being shifted to the next subdivision.

Subdivision 3. That portion of this subdivision which provides as to compensation for taking testimony, was added on the amendment of 1862; the rest of the subdivision was first inserted in 1857. Before that year, the allowance was \$7 each, forming part of subdivision 2.

Subdivision 4. In 1848, this allowance was more discriminating, and formed the subject of two subdivisions, then Nos. 3 and 4. For the trial of either issues of law or of fact, when separately tried, there was allowed to the plaintiff, \$15, to the defendant, \$12. When both tried at the same time, the allowances were, to the plaintiff, \$20, to the defendant, \$15.

This scale continued till 1857, when the allowances were fixed as they now stand.

Subdivision 5. In 1848, this subdivision stood thus, being then numbered 6. To either party on appeal, excepting to the Court of Appeals, before argument, \$15; for argument, \$30.

In 1849, there was added this clause: "But this provision shall not apply to appeals in cases other than those mentioned in section 349."

In 1851, the allowances remained the same, but the additional sentence of 1849 was made intelligible, by altering it thus: "But this provision shall not apply to appeals from an order granting or denying a non-enumerated motion."

In 1852, the wording of this last provision was changed thus: "But this provision shall not apply to appeals in the cases mentioned in section 349."

In 1857, the phraseology of that part of the section was fixed as it now stands. The concluding portion was first inserted, in the following manner: "And the same costs shall be allowed to either party before argument, and for argument, in cases ordered to be heard in the first instance at general term, under the provisions of section 265."

In 1858, the phraseology of the subdivision was fixed substantially as it now stands, except that the word "as," stood instead of "or," before the words, "for a new trial on a case made."

On the amendment of 1862, this evident error was corrected.

Subdivision 6. The allowances for an appeal to the Court of Appeals were fixed by the original Code, as they now stand, and have come down unchanged. The provision authorizing that court to award damages for delay, in case of affirmance, was not inserted, however, until the amendment of 1858.

Subdivision 7. The allowance of \$10, by way of term-fee, was fixed by the Code of 1848, and, so far as the sum is concerned, has come down unchanged. The term at which it was tried or heard, was, in that year, specially excepted.

There was no limit fixed then, upon the number of terms, for which this allowance might be made.

In 1857, the special exception of the term at which the cause was tried or heard, was stricken out, and the number was first limited, to every circuit or term, not exceeding three.

In 1858, the subdivision was amended to the same effect as at present, the limitation standing, "and is not reached or postponed." On the amendment of 1862, the phraseology was fixed as it now stands.

The clause providing that, in proceedings for the recovery of dower, the plaintiff shall not recover costs, without proof of a demand and refusal before action, was first inserted on the amendment of 1852.

The provision that the plaintiff, in proceedings against joint debtors, &c., shall be allowed the same costs as in an ordinary action, was first inserted on the amendment of 1857.

§ 308. (263.) In addition to these allowances, there shall be allowed to the plaintiff, upon the recovery of judgment by him, in any action for the partition of real property, or for the foreclosure of a mortgage, or in which a warrant of attachment has been issued, or for an adjudication upon a will or other instrument in writing, and in proceedings to compel the determination of claims to real property, the sum of ten per cent. on the recovery, as in the next section prescribed, for any amount not exceeding two hundred dollars; an additional sum of five per cent. for any additional amount not exceeding four hundred dollars; and an additional sum of two per cent. for any additional amount not exceeding one thousand dollars.

And in the actions above named, if the same shall be settled before judg-

ment therein, like allowances upon the amount paid or secured upon such settlement, at one-half the rates above specified.

This provision, except the concluding sentence, was first inserted on the amendment of 1857. That sentence was added in 1862.

In 1848, the section authorized an additional allowance to be granted by the court, in its discretion, in difficult or extraordinary cases, if the action were for the recovery of money or of real or personal property, and a trial had been had; the allowance not to exceed ten per cent. on the recovery or claim, for any amount not exceeding \$500, and not more than five per cent. for any additional amount.

In 1849, this system was continued, a clause being added, authorizing the same allowance in the several classes of cases which were then, and are now, specified in the section, with some slight verbal differences: "And also, in any case, where the prosecution or defence has been unreasonably or unfairly conducted."

In 1857, the whole power to grant discretionary allowances was taken away, until partially restored in 1858, as appears by the next section.

§ 309. (264.) These rates shall be estimated upon the value of the property claimed or attached, or affected by the adjudication upon the will or other instrument, or sought to be partitioned, or the amount found due upon the mortgage, in an action for foreclosure. And, whenever it shall be necessary to apply to the court, for an order enforcing the payment of an installment, falling due, after judgment in an action for foreclosure, the plaintiff shall be entitled to the rate of allowance in the last section prescribed, but to no more in the aggregate, than if the whole amount of the mortgage had been due, when judgment was entered. Such amount of value must be determined by the court, or by the commissioners, in case of actual partition. In difficult and extraordinary cases, where a trial has been had, except in any of the actions or proceedings (other than those for the partition of real estate) specified in section three hundred and eight, and in actions or proceedings for the partition of real estate, the court may also, in its discretion make a further allowance to any party, not exceeding five per cent. upon the amount of the recovery or claim or subject-matter involved.

The final clause, restoring the power of granting discretionary allowances, taken away by the amendment of the previous year, was first inserted in 1858. As the section then stood, a discretionary allowance might be moved for, in all cases, those specified in section 308 inclusive. In 1859, the whole of this class was excepted from the operation of the section. In 1862, the phraseology was fixed, as it now stands, favoring proceedings in partition, but still excluding the others in which an allowance is claimable as of right.

In 1848, the provision stood thus:

These rates shall be estimated as follows:

"If the plaintiff recover judgment, it shall be upon the amount of money, or the value of the property recovered.

"If the defendant recover judgment, it shall be upon the amount of money, or the value of the property claimed by the plaintiff.

"Where the action is for real or personal property, the value thereof must be determined by the jury, court, or referees by whom the action is tried."

In 1849, the provision was substantially the same, its phraseology being enlarged, to meet the requirements of section 308, as then amended.

In 1857, that portion of the section was amended, as it now stands; the conclusion being added, as above noticed, in 1858, and altered in 1859 and 1862.

§ 310. (265.) When the judgment is for the recovery of money, interest, from the time of the verdict or report, until judgment be finally entered, shall be computed by the clerk, and added to the costs of the party entitled thereto.

Has come down unaltered.

§ 311. (266.) The clerk shall insert in the entry of judgment, on the application of the prevailing party, upon five days' notice to the other, except when the attorneys reside in the same city, village or town, and then, upon two days' notice, the sum of the allowances for costs, as provided by this Code, the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing, when required by a rule of the court. The disbursements shall be stated in detail, and verified by affidavit. A copy of the items of the costs and disbursements shall be served, with a notice of adjustment.

Whenever it shall be necessary to adjust costs, in any interlocutory proceeding in an action, or in any special proceedings, the same shall be adjusted by the judge, before whom the same may be heard, or the court, before which the same may be decided or pending, or in such other manner as the judge or court may direct.

Dates, as it stands, from the amendment of 1857, except the final clause, which was added on that of 1862.

In 1848, two days' notice only was necessary. The provisions were, otherwise, substantially the same, except that the only disbursements specially enumerated were referee's fees, and the expense of printing papers on an appeal. The affidavit of disbursements was required to be filed, and no provision was made for service of a copy of the costs with the notice. In 1849 a slight verbal amendment was made, and the section remained the same, till 1857.

§ 312. (267.) The clerk shall receive,

On every trial, from the party bringing it on, one dollar ;

On entering a judgment, by filing transcript, six cents ;

On entering judgment, fifty cents ; except in courts where the clerks are salaried officers, and, in such courts, one dollar ;

He shall receive no other fee, for any services whatever in a civil action, except for copies of papers, at the rate of five cents for every hundred words.

§ 313. (268.) The fees of referees, shall be three dollars to each, for every day spent in the business of the reference ; but the parties may agree in writing upon any other rate of compensation.

It will be convenient to notice here, the provision in section 401, as amended in 1862, providing that a deposition for the purposes of a motion may be taken by a referee :

And the fees of such referee for such service, shall be three dollars per day.

§ 314. (269.) When an application shall be made to a court or referees, to

postpone a trial, the payment to the adverse party of a sum, not exceeding ten dollars, besides the fees of witnesses, may be imposed, as the condition of granting the postponement.

§ 315. (270.) Costs may be allowed on a motion, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute, or directed to abide the event of the action.

Dates, as it stands, from the amendment of 1857, on which the concluding part of the sentence was inserted.

In 1848, no motion-costs were allowed, except the costs of resisting, in the discretion of the court, not exceeding ten dollars.

In 1849, the first part of the section stood as it stands now, down to "not exceeding ten dollars," except that the words "or judge" were omitted.

§ 316. When costs are adjudged against an infant plaintiff, the guardian, by whom he appeared in the action, shall be responsible therefor, and payment thereof may be enforced by attachment.

First inserted in 1849.

§ 317. In an action prosecuted or defended, by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected of, the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defence. But this section shall not be construed to allow costs against executors or administrators, where they are now exempted therefrom, by section forty-one, of title three, chapter six, of the second part of the Revised Statutes. And, whenever any claim against a deceased person shall be referred, pursuant to the provisions of the Revised Statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law. And the court may in its discretion, in the cases mentioned in this section, require the plaintiff to give security for costs.

Dates, as it stands, from the amendment of 1852, on which occasion, the last sentence was inserted.

In 1851, the sentence immediately previous to it was added by amendment.

Otherwise, and as to the first two clauses of the section, it dates from 1849.

§ 318. When the decision of a court of inferior jurisdiction in a special proceeding, including appeals from surrogates' courts, shall be brought before the Supreme Court for review, such proceeding shall, for all purposes of costs, be deemed an action at issue on a question of law, from the time the same shall be brought into the Supreme Court, and costs thereon shall be awarded and collected, in such manner as the court shall direct, according to the nature of the case.

The inclusion of appeals from surrogates' courts, was inserted in the amendment of 1862, and a corresponding amendment was then made in section 471, the section by which a variety of special proceedings (such appeals included), are exempted from the operation of the Code.

That amendment is in these words:

“Except that the costs on such appeal, shall be regulated and allowed, in the manner provided in section 318 of this act.”

This amendment excepted, the present section, and those which follow, stand as in 1849, when they were first inserted.

§ 319. In all civil actions, prosecuted in the name of the people of this state, by an officer duly authorized for that purpose, the people shall be liable for costs, in the same cases, and to the same extent, as private parties. If a private person be joined with the people as plaintiff, he shall be liable, in the first instance, for the defendant's costs; which shall not be recovered of the people, till after execution issued therefor against such private party, and returned unsatisfied.

§ 320. In an action, prosecuted in the name of the people of this state, for the recovery of money or property, or to establish a right or claim, for the benefit of any county, city, town, village, corporation, or person, costs awarded against the plaintiff, shall be a charge against the party for whose benefit the action was prosecuted, and not against the people.

§ 321. In actions, in which the cause of action shall, by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs, in the same manner as if he were a party, and payment thereof may be enforced by attachment.

§ 322. Upon the settlement, before judgment, of any action mentioned in section 304, no greater sum shall be demanded from the defendant as costs, than at the rates prescribed by that section.

The title in question ends here. The costs of an appeal from a justice's decision are, however, specially regulated by section 371, cited in the last preceding chapter, where the scales of allowances are given.

Under the amended judiciary act, chapter 470 of 1847, section 47, a party, prosecuting or defending in person, is entitled to recover the same fees for services, as if such services had been performed by an attorney, solicitor, or counsel, and is subjected to the same statutory restrictions.

By chapter 617 of 1853, p. 1165, section 1, the jurisdiction of the Marine Court of the city of New York, was extended to comprise actions of assault and battery, false imprisonment, malicious prosecution, libel, and slander, where the damages claimed do not exceed five hundred dollars. And it was provided that the costs of all such actions, when prosecuted in any other court in the city of New York, were thereby limited to the amount which would have been recovered in such Marine Court, if prosecuted therein; also, that in no such action shall the costs exceed the damages recovered.

Under chapter 262 of 1859, p. 570, section 2, no costs, fees, disbursements, or allowance, are recoverable or taxable, in any judgment

against municipal corporations, unless the plaintiff's claim shall have been presented to its chief fiscal officer, for payment, before the commencement of the action. See also, as to exemption of the corporation of New York, from payment of costs in suits on forfeited recognizances, chapter 202 of 1855, p. 305, section 3.

The above provisions are cited here, as being of general application. A few others, extending only to specific items, or portions of the above provisions, will be cited below, in connection with the matters to which they relate.

There is no general rule of the court upon the subject, except one clause in rule 77 (72), which provides, that no separate action shall be brought for a partition of a part only of lands owned in common, without the consent of the parties interested therein; "and, if brought without such consent, the share of the plaintiff may be charged with the whole costs of the proceeding."

Rule 52 is below cited, in connection with the subject of allowances, to which it exclusively relates.

§ 331. *General Considerations.*

PRELIMINARY REMARKS.

In no respect has the Code effected a more radical and complete change, than as regards the costs of actions or suits in the different courts, whether as to the relations of the parties in a proceeding to each other, or with reference to those between such parties, and their attorneys or counsel. The former provisions on both subjects are completely swept away, and an entirely new system substituted.

It is hardly possible, indeed, to imagine a more complete contrast, than that which exists, between the former and the present provisions on the subject. Whether too much may not have been attempted on the one hand, and too little preserved on the other, is a matter by no means free from doubt; and, possibly, some may even be entertained, as to whether the provisions of the Code itself, do not really tend, in many respects, to counteract the expressed intentions of its framers. Those intentions are thus stated, by the parties in question, upon their report:

"The losing party ought, as a general rule, to pay the expense of the litigation. He has caused a loss to his adversary unjustly, and should indemnify him for it. The debtor, who refuses to pay, ought to make his creditor whole."

The extent to which the object thus proposed is actually carried out, will best be seen hereafter. The practical effect of the provisions made for this purpose, seems rather to be, the rendering a complete and

accurate indemnification, a matter of impossibility in practice; and this, even with the precarious assistance, which an application for an allowance may, perhaps, afford in some cases. The prevailing party is, as a general rule, saddled with the payment of his counsel fees, without the possibility of obtaining reimbursement from his opponent, however unavoidably he may himself have been forced into the suit, or however great, nay, even ruinous, the burden may be upon him.

The wisdom of giving an attorney in a cause, a direct interest in procrastinating proceedings to the utmost, by the disproportionate ratio which exists between the allowances for term-fees, and those for the preparation and argument of a cause, seems very questionable. It appears to be assumed, too, that all causes require the same preparation, and present the same difficulties; no means of making any distinction, between a simple inquest or judgment by default, and a really litigated trial, involving forethought and preparation, being provided by the present enactments.

To argue that the same compensation is adequate in all these cases, without any distinction whatever, would shock common sense; and yet, no adequate means of drawing that distinction are provided: at least, as regards the very large and important class of cases, which, though requiring a large sacrifice of time and labor for their due preparation, and experience and skill in their conduct, may, perhaps, not strictly fall within the definition of being either "difficult" or extraordinary, within the meaning of the legislature.

Whether the retention of the double scale of taxation—1st. As between party and party, comprising the costs of an ordinary recovery, or defence, and including a reasonable and proper counsel-fee on the hearing; and, 2d. As between solicitor and client, under which a party, whose costs are ordered to be so taxed, obtains a complete indemnity, against every reasonable expense incurred by him in consequence of the litigation—would not have given greater facilities for the attainment of substantial justice, and been more consonant with the expressed intentions of the framers of the Code itself, seems more than questionable.

At present, the latter seem to be practically abortive, the former, practically impossible.

The questions which have arisen, as to the mutual liabilities of attorney and client, as between each other, and the scale of remuneration and rights of the former, as regards the acquisition and enforcement of his lien on the fund in question, or the judgment, if any, recovered through his instrumentality, have been already fully considered, and the decisions in point cited above, book I., chapter VII., section 30.

(a.) RIGHT TO COSTS, GENERALLY CONSIDERED.

Subject to the above right of the attorney, and to the exercise of the power of the court for its enforcement, when necessary, costs, under the Code, are, as between the parties to the action, expressly awarded to the prevailing party, as provided by section 303. And, even when the judgment is for costs alone, such party is, *prima facie*, entitled to it. *Vide Martin vs. Kanouse*, 11 How., 567; 2 Abb., 327.

The right of the plaintiff to costs, accrues immediately on suit brought; nor will a settlement, in fraud of that right, avail to defeat it. *Bogardus vs. Richtmeyer*, 3 Abb., 179. See also generally, *Taylor vs. Rennie*, 22 How., 101. But costs do not become a debt to either party, until the recovery of judgment in his favor, unless he expressly agree to pay them. *Warfield vs. Watkins*, 30 Barb., 395; *Torry vs. Hadley*, 14 How., 357.

Where a second suit is brought, for the same cause of action on which the plaintiff has been previously nonsuited, proceedings will be stayed in the second, until the costs of the first litigation have been paid. *Edwards vs. Ninth Avenue Railroad Company*, 22 How., 444. See likewise, as to an appeal, *Dresser vs. Brooks*, 5 How., 75. But not so, where the nature of the relief, asked in the two proceedings, is not identical. *Davis vs. Duffie*, 5 Duer, 688; 3 Abb., 363.

(b.) RIGHT, AS GOVERNED BY THE CODE.

In all cases falling within the operation of that measure, the right to costs is governed absolutely by it, the previous statutes being repealed. *Vide Harriott vs. New Jersey Railroad Company*, 8 Abb., 284 (294).

Where an amendment, affecting the allowances for costs, has taken place, the amount due to the prevailing party, will be regulated by the provision in force at the time of the recovery by, or the decision in favor of the party entitled to them, without regard to the time when such costs may be actually taxed, or that, at which the trial, which has resulted in such recovery or decision, may have originally commenced.

Vide Fisher vs. Hunter, 15 How., 156; *Huber vs. Lockwood*, 15 How., 74; *Crary vs. Norwood*, 5 Abb., 219. (See decision, not head-note.) In *Steward vs. Lamoreaux*, 5 Abb., 14, it was held that, in a case of judgment by default to answer, the costs were governed by the statute in force at the time of taxation, without regard to the time when the default actually occurred.

Where the case has been tried by a jury, the date of the verdict, is the date of the recovery, as regards the right to costs. *Moore vs. Westervelt*, 6 Duer, 684; 14 How., 279; *Burnett vs. Westfall*, 15 How., 420.

And, where the case has been tried more than once, it is fixed by that of the final verdict. *Jackett vs. Judd*, 18 How., 385; *Jones vs. Underwood*, 18 How., 532.

In *Hunt vs. Middlebrook*, 14 How., 300, it was held that the date of the plaintiff's recovery was, in a case tried by the court, the making and filing the decision; and, when tried by a referee, the making and delivery of the report. In *Torry vs. Hadley*, 14 How., 357, the filing, not the delivery of the report, was held to be the proper date, in the latter category.

A proceeding, commenced after the passage of the Code of 1848, but decided after that of 1849, was held to be governed, so far as costs were concerned, by the provisions of the latter measure. *Holmes vs. St. John*, 4 How., 66; 2 C. R., 46.

(c.) RIGHT, IN PROCEEDINGS COMMENCED BEFORE THE CODE.

But, as regards suits commenced before the passage of the Code of 1848, and all proceedings in those suits, and likewise, as regards appeals taken to the Court of Appeals, before the same period, the rule is different. None of the provisions of the Code as to costs, except only section 315, in relation to the costs of a motion, in courts other than the Court of Appeals, were rendered retrospective, by the supplementary act of 1849. The costs of all proceedings in such suits, are regulated by the old fee-bill, and not by the Code. *Truscott vs. King*, 4 How., 173; *Doty vs. Brown*, 4 How., 426. See also memorandum, 3 C. R., 119. See likewise cases below cited.

And this rule holds good, even as regards all other proceedings, except appeals, in the same class of suits, taken after the amendment of section 459 in 1859. Though that section applies the provisions of the Code to all future proceedings in pending actions, that expression fails to reach, or to render applicable, the provisions as to the costs of those proceedings. These are still governed by the former rule, with the single exception of the costs of appeals, which are reached, and rendered applicable, by the present terms of that section. Such costs, in these cases, are taxable under the Code; all others, as before, under the old fee-bill. See *Rich vs. Husson*, 1 Duer, 617; 11 L. O., 119; *Traver vs. Kip*, 4 Abb., 358; *Curtis vs. Leavitt*, 19 Barb., 530; 1 Abb., 118. See also *McMaster vs. Vernon*, 4 Duer, 625; 1 Abb., 179, extending the term, costs of an appeal, to the hearing of exceptions at general term, as being in the nature, though not in the form of an appeal.

But the above rule was never applicable to an appeal to the Court of Appeals, in such a suit, taken after, though from a decision rendered before the passage of the Code. Such appeal is, it was held, a new suit, for the purposes of costs, and they were always taxable under the

Code, and not under the old fee-bill. See *Kanouse vs. Martin*, 2 Sandf., 739; *Bokes vs. Banks*, 3 C. R., 218; 9 L. O., 135.

Section 315, was held not to be applicable to the costs of a motion to the Court of Appeals, in an old case, in *Lyme vs. Ward*, 1 Comst., 531; 3 How., 342; 1 C. R., 101; 7 L. O., 10.

(d.) COSTS IN SPECIAL PROCEEDINGS.

The provisions of the Code are expressly applied, to appeals, or other proceedings, for the review of an adjudication in these cases, by section 318, as above cited.

And this provision has been held to apply to the review of such a proceeding, when brought up by way of *certiorari*. *Haviland vs. White*, 7 How., 154; *The People vs. Flake*, 14 How., 527. See, however, *The People vs. Heath*, 20 How., 304, controverting the last case, so far as it decides, that an appeal from the decision of referees, under the highway act, is reached by these provisions.

See also, as to the costs of the review of special proceedings by appeal, *The People vs. Sturtevant*, 3 Duer, 616; 9 How., 304. And express provision is made upon the subject, by chapter 270 of 1854, p. 592, section 3, to the same general effect as section 318.

Prior to the amendment of 1862, the costs of appeals from a surrogate's decision, were expressly excepted from the operation of the Code, by section 471. *Sherman vs. Youngs*, 6 How., 318; *Brockway vs. Jewett*, 16 Barb., 590. See also *Van Pelt vs. Van Pelt*, 16 How., 299. Since that amendment, they are now taxable under the Code, under the conjoint operation of sections 471 and 318, as they at present stand.

But, in a special proceeding, no costs can be awarded under the Code, on an original application, beyond the costs of a motion. *In re Pierce*, 12 How., 532.

In proceedings on *mandamus*, costs are taxable under the old fee-bill. *The People vs. Ewen*, 8 Abb., 359, note.

See, as to the costs of street opening cases in New York, and the special rates allowed; and as to the statutes, by which such rates are governed, *In the Matter of Opening and Extending the Bowery*, 19 Barb., 588.

§ 332. *Rights and Liabilities of Parties, in Specific Cases.*

(a.) PUBLIC OFFICERS, &c.—DOUBLE COSTS.

By the Revised Statutes, 2 R. S., 617, section 24, a public officer, or person acting under his authority, or under an authority conferred by statute, is entitled, on render of judgment in his favor, in the cases there

specified, to double costs, *i. e.*, the amount of his taxed costs, and one-half in addition, such costs to belong to the defendant himself, and not to be awarded to any other persons rendering services in the proceeding. Section 25. See also, as to the award of double costs, in a vexatious suit against a foreign corporation, 2 R. S., 461, section 26. And, by 1 R. S., 324, section 6, officers of the militia, or persons acting under their command, are entitled to treble costs.

By chapter 96, of 1854, p. 222, organizing the Superior Court of Buffalo, express provision is made, by section 27, for the allowance of double costs as above, to public officers, in the cases first above stated.

Considerable discussion has arisen, as to whether the above provisions of the Revised Statutes, for the allowance of double costs to public officers, are not repealed by the Code.

The point has been finally settled, in favor of their right to recover such costs, in cases falling under 2 R. S., 617, sections 24, 25, above cited, by the Court of Appeals, in *Bartle vs. Gilman*, 18 N. Y., 260; 17 How., 1. See also, subsequent cases of *Bradley vs. Fay*, 18 How., 481, and *The People vs. Colborne*, 20 How., 378, as to costs of a *mandamus*. See likewise allowance, in *Van Bergen vs. Ackles*, 21 How., 314.

Bartle vs. Gilman, confirms the authority of the following previous decisions, holding the same doctrine: *Murray vs. Haskins*, 4 How., 263; *Chadwick vs. Brother*, 4 How., 283; *Westervelt vs. Nelson*, 8 L. O., 173; *Foster vs. Cleveland*, 6 How., 253; 1 C. R. (N. S.), 402; *Calkins vs. Williams*, and *Calkins vs. Brand*, 5 How., 393 (395); 1 C. R. (N. S.), 53; *Barber vs. Crosset*, 6 How., 45; 1 C. R. (N. S.), 401; *Saratoga and Washington Railroad Company vs. McCoy*, 8 How., 526; *Tillou vs. Sparks*, 9 How., 465. See also, *Walker vs. Burnham*, 7 How., 55, giving treble costs, in the case of a militia officer.

It overrules the following series of decisions, holding that the provisions in question are repealed by the Code: *Hallenbeck vs. Miller*, 4 How., 239; *Van Rensselaer vs. Kidd*, 5 How., 242; 3 C. R., 224; *Moore vs. Westervelt*, 3 Sandf., 762; 1 C. R. (N. S.), 131; *Nestle vs. Jones*, 6 How., 172; 1 C. R. (N. S.), 401; *Bagner vs. Jones*, 1 C. R. (N. S.), 234; *Platt vs. Wilson*, 9 How., 375 (as to the costs in actions against Indians); and *Thompson vs. Stryker*, 6 Abb., 381.

Such an officer, defendant in error, was held entitled to double costs of the appellate court. *Burckle vs. Luce*, 1 Comst., 239; 3 How., 236. But not so, it would seem, when plaintiff in error. *Foster vs. Cleveland*, 6 How., 253; 1 C. R. (N. S.), 402. Or, when an appellant. *Estus vs. Baldwin*, 9 How., 80; *Wheelock vs. Hotchkiss*, 18 How., 468. But, on an ulterior appeal, when such officer stood in the position of respondent, it was held that he might then claim them. *Wheelock vs. Hotchkiss*, *supra*.

But the statute will be construed strictly. In *Calkins vs. Williams*, and *Calkins vs. Brand*, above cited, it was held that the statute did not apply to judgment, entered in favor of the defendant on the report of a referee, and that he could only be compensated, by means of an allowance. This conclusion is, however, controverted in *Tillou vs. Sparks, supra*, which holds that judgment, on a reference, is within the statute.

But, where an officer sued, has joined in a plea, or answer of justification, with another party, not entitled to double costs, he cannot claim them. He can only do so, when he answers separately. *Bradley vs. Fay*, 18 How., 481.

In *Van Bergen vs. Ackles*, 21 How., 314, such costs were awarded on motion. In *Wheelock vs. Hotchkiss*, however, 18 How., 468, it was held that the clerk might adjust them without application to the court.

(b.) GUARDIAN AD LITEM.

The responsibility of the guardian, *ad litem*, for an infant plaintiff, is expressly provided for, by section 316. If costs are adjudged against the infant, the guardian must pay them.

The case of the guardian, *ad litem*, for an infant defendant, not being provided for, would seem to fall within the purview of section 317, which exonerates him from personal liability for costs, except in cases of mismanagement or bad faith.

As to the right of a next friend, whilst such was the practice, to be reimbursed, out of any fund recovered by him, see *Leopold vs. Meyer*, 10 Abb., 40; 2 Hilt., 580. The next friend of a married woman, suing for divorce, was held as a general rule, not to be chargeable with costs, in *Thomas vs. Thomas*, 18 Barb., 149; 12 L. O., 274.

(c.) EXECUTORS, TRUSTEES, &c.

Parties, standing in a representative or fiduciary capacity, are exempted from all personal responsibility for costs, except in cases of mismanagement or bad faith; but costs may be awarded, either in favor of or against them, in all cases, with the exception below noticed. But such costs are only chargeable upon, and can only be collected out of the estate, fund, or party represented. Section 371.

But executors or administrators, stand in a somewhat different position from that of the other parties entitled to the benefit of this provision, the exemption, accorded to them by section 41, title III., chapter VI., part II. of the Revised Statutes, 2 R. S., 90, section 41, being continued in force.

That provision runs as follows: N. B.—The actions referred to at the commencement, are those, where the plaintiff's claim against the estate

has not been presented to the executor, in due time after publication of notice. *Vide* 2 R. S., 89, sections 39, 40.

§ 41. In such suit, no costs shall be recovered against the defendants; nor shall any costs be recovered, in any suit at law, against any executors or administrators, to be levied of their property, or of the property of the deceased, unless it appear, that the demand on which the action was founded, was presented within the time aforesaid, and that its payment was unreasonably resisted or neglected; or that the defendant refused to refer the same, pursuant to the preceding provisions; in which cases, the court may direct such costs to be levied of the property of the defendants, or of the deceased, as may be just, having reference to the facts that appeared on the trial. If the action be brought in the Supreme Court, such facts shall be certified by the judge before whom the trial shall have been had.

The statutory provisions, as to the reference of claims presented to executors or administrators, and disputed by them, and the previous enactments, as to the time within, and the mode in which they should be exhibited, will be found at 2 R. S., 88, 89, sections 34 to 38 inclusive; section 36, being amended by chapter 261 of 1859, section 2, p. 569, so as to allow of the reference being made to a single referee, instead of to three, as previously necessary in all cases.

The section of the Revised Statutes, saved by section 317, has, however, been held only to apply to suits, against an executor defendant. Where he is plaintiff, the exemption does not apply, and a successful defendant will be entitled to enter up judgment for costs, against the estate, or they may be awarded against the executor personally, if proper, as in the other cases provided for in section 317. *Fox vs. Fox*, 22 How., 453; *Curtis vs. Dutton*, 4 Sandf., 719; *Woodruff vs. Cook*, 14 How., 481.

But, where the suit is brought against him, and he has not unreasonably resisted, or neglected to provide for, or refused to refer the plaintiff's claim, the exemption is absolute, under section 41 of the Revised Statutes, and costs cannot be recovered, either against the executor, or against the estate which he represents. *Fox vs. Fox, supra*; *Belden vs. Knowlton*, 3 Sandf., 758; 1 C. R. (N. S.), 127.

In no case, can judgment be taken against the executor personally, without the special direction of the court, either on the trial, or on a subsequent motion with that view. *Woodruff vs. Cook*, 14 How., 481. On such a motion, when made in the Supreme Court, and before another officer, the certificate of the judge, before whom the trial was had, must be presented, as expressly required by the section, so far at least as regards proof of the matters there stated, as grounds for the allowance of costs, of which it is necessary, though not conclusive proof. *Parkhill vs. Hillman*, 12 How., 353.

The statutory provision in question, only applies to the Supreme Court. In the Superior, and other analogous courts, it would seem that such a certificate would not be a prerequisite, though proper, if possible to be procured.

It has been held that a referee cannot pass upon the question, the power of allowance resting solely with the court. But, on the motion, the better practice will be to present his certificate of the facts. *Merseureau vs. Ryerss*, 12 How., 300.

And, in cases where executors are defendants, judgment cannot be awarded against the estate, without the special direction of the court. *Mersereau vs. Ryerss*, *supra*.

To bring the case within the terms of the statute, and to deprive the executor of the protection as to costs, which it otherwise gives, there must be an actual offer to refer on the part of the claimant, and an actual refusal, or its equivalent, on the part of the executor. *Proude vs. Whiton*, 15 How., 304; *Stephenson vs. Clark*, 12 How., 282; *Buckhout vs. Hunt*, 16 How., 407.

And, after such offer, the executor is entitled to reasonable time for consideration. If not allowed such time, the plaintiff will lose any benefit of a premature proceeding. See two last cases. And there must also have been a previous presentation of a sufficient and proper account. See cases below cited.

No particular form is prescribed, with respect to the offer, which may be by parol. *Lanning vs. Swarts*, 9 How., 434. If accepted, the acceptance must be unqualified, or the executor will not be protected. An attempt to impose different conditions, if persevered in, will be equivalent to a refusal. *Gorham vs. Ripley*, 16 How., 313.

In *Fort vs. Gooding*, 9 Barb., 388, an unqualified rejection of the plaintiff's demand, was held to be equivalent to a refusal to refer. This doctrine is, however, disapproved, and an actual offer and refusal held to be essential, in *Proude vs. Whiton*, and *Buckhout vs. Hunt*, above cited.

To bring the case within the exception, the plaintiff's claim must be referable, and the proceeding a suit at law. If he seeks equitable relief, the case will fall within the general purview of section 317, and costs may be awarded in all cases. *Yorks vs. Peck*, 9 How., 201; *Sands vs. Craft*, 18 How., 438; 10 Abb., 216.

Provision is made by section 317 that, on a reference of this description, the prevailing party is to recover his necessary disbursements, in all cases. It has been held that, under this provision, no costs, beyond disbursements, can be awarded to either party. *Avery vs. Smith*, 9 How., 349; *Van Sickler vs. Graham*, 7 How., 208. *Lansing vs. Cole*, 3 C. R., 246, holding that such a reference was an action at law, as

regards costs, was before the amendment of 1851, by which that clause was added to the section. The principle of that amendment had been previously anticipated, in *Newton vs. Sweets' Executors*, 4 How., 134; 2 C. R., 61.

The contrary doctrine, *i. e.*, that the provision as to disbursements, does not take away the powers of the court, to award costs of the reference, in a case falling within the exception, where the plaintiff's claim has been unreasonably resisted or neglected, is maintained, in *Linn vs. Clow*, 14 How., 508. See likewise, *Boyd vs. Bigelow*, 14 How., 511; and *Munson vs. Howell*, 12 Abb., 77; 20 How., 59.

To entitle the party, succeeding in such a reference, to claim costs, the proceedings must be regular, and the agreement to refer filed, and an order entered with the clerk, as prescribed by the Revised Statutes. Unless this be done, the court does not become possessed of the cause, and no award can be made. *Comstock vs. Olmstead*, 6 How., 77. See also *Munson vs. Howell*, *supra*; and *Akeley vs. Akeley*, 17 How., 21.

In order to charge an executor with costs, it is not absolutely sufficient that there should have been an offer, and refusal to refer; there must also have been a previous presentation to the executor, of an account or claim against the estate, which could be supported by vouchers or affidavits. A general vague demand of a gross sum, is not sufficient. The plaintiff must bring himself strictly within the statute. *Cruikshank vs. Cruikshank*, 9 How., 350. See also *Belden vs. Knowlton*, 3 Sandf., 758; 1 C. R. (N. S.), 127.

The plaintiff may also be entitled to recover costs, where, after presentation of his claim, payment of it is unreasonably resisted, or neglected by the executor. See such an allowance made, in *Boyd vs. Wilkin*, 23 How., 137.

A mere neglect, on the part of the executor, to advertise for claims, will not form sufficient ground for an award of costs against him. *Snyder vs. Young*, 4 How., 217; *Van Vleck vs. Burroughs*, 6 Barb., 341. If, however, he omit to give due notice, no *laches* will be imputable to a creditor, for not presenting his account on an early day. *Fort vs. Gooding*, 9 Barb., 388.

A diminution effected in the creditor's charge will, of itself, go far to show, that the demand was not unreasonably resisted. *Snyder vs. Young*, 4 How., 217, above cited; *Lansing vs. Cole*, 3 C. R., 246; *Belden vs. Knowlton*, 3 Sandf., 758; 1 C. R. (N. S.), 127; *Comstock vs. Olmstead*, 6 How., 77; *Cruikshank vs. Cruikshank*, 9 How., 350. In *Fort vs. Gooding*, however, above cited, a stricter view was taken, and it was held that a mere reduction of the claim, by the referee, upon a *quantum meruit*, was not sufficient to take away the imputation of

unreasonable resistance, where the claim had been denied *in toto*, and a fair offer of settlement rejected.

Where the proceeding has, through irregularity, assumed the form of an arbitration, and not of a statutory reference, costs cannot be recovered, or awarded by the court. *Akeley vs. Akeley*, 17 How., 21.

The above provisions, only extend to suits commenced by or brought against executors or administrators, as such. Where the proceeding was originally commenced by the deceased, and revived or continued by or against the representative, the case does not fall within the exception, and the right to costs accrues, as in an ordinary action coming within the scope of section 317. *Benedict vs. Caffé*, 3 Duer, 669; 12 L. O., 262; *Tindall vs. Jones*, 19 How., 469; 11 Abb., 258; *Lemon vs. Wood*, 16 How., 285. See also *Theriot vs. Prince*, 12 How., 451. See, however, *per contra*, *McCann vs. Bradley*, 15 How., 79.

Where an executor sues, as such, the fact that he is also beneficially interested in the recovery, will be no ground for charging him with costs, if not otherwise proper. *Finley vs. Jones*, 6 Barb., 229.

The incident, that the plaintiff's claim was not presented in time, though it may avail to deprive that plaintiff of the right to recover costs, under any circumstances, does not affect his right to recover upon the claim itself, if otherwise enforceable. *Baggott vs. Boulger*, 2 Duer, 160.

In the case of trustees, the right to costs is governed simply by section 317, without any reference to the provisions of the Revised Statutes.

To claim the benefit of that provision, the trustee must sue in his representative capacity, and not in his own right. In the latter case, he will be charged personally, as of course, and without any order of the court. *Murray vs. Hendrickson*, 1 Bosw., 635; 6 Abb., 96.

A general assignee for creditors, is a trustee within the meaning of the section, and cannot be charged personally with costs, unless on the ground of mismanagement or bad faith. Nor is it bad faith, on his part, to prosecute a suit against a responsible debtor, though without funds, to pay the costs out of the estate, if unsuccessful. *Cunningham vs. McGregor*, 5 Duer, 648; 12 How., 305. Nor can a special assignee, in trust, be charged personally. He is entitled to claim the benefit of the section. *Conger vs. Hudson River Railroad Company*, 7 Abb., 255.

But where, in a suit by a general assignee, the court decided that the assignment was void, and that no title passed, it was held, that the decision deprived him of the right to claim the benefit of the section. *Sibell vs. Remsen*, 30 Barb., 441.

The president of a bank, suing in his own name, on behalf of the bank, is not a trustee within the meaning of the section, and is personally responsible. *Lowerre vs. Vail*, 5 Abb., 227.

As to the partial award of costs against a trustee, where the charges against him are only partially substantiated, see *Ray vs. Van Hook*, 9 How., 427.

A receiver is within the scope of the section, and is not liable for costs personally, unless by special direction of the court. *Devendorf vs. Dickinson*, 21 How., 275. Nor is perseverance, on his part, in resisting a claim, evidence of mismanagement or bad faith. See also *Marsh vs. Hussey*, 4 Bosw., 614; *St. John vs. Denison*, 9 How., 343.

But, if he has brought suit, without leave of the court, he ought not, as a general rule, to be exempted from personal liability. *Smith vs. Woodruff*, 6 Abb., 65; *Phelps vs. Cole*, 3 C. R., 157. See also rule 92.

The plaintiffs in one of several judgments, in supplementary proceedings upon which, a receiver was appointed, were held not to be liable for the costs of an action brought by him, as being the party represented within the meaning of the section, where they were not, in fact, concerned in the proceedings, or instrumental in procuring his appointment, or personally connected with, or directing the prosecution of the suit. *McHarg vs. Donnelly*, 27 Barb., 100.

And, where an action was brought by such a receiver, under the special direction of the court, an order to compel the judgment-creditor to pay the costs of that action was refused. *Wheeler vs. Wright*, 23 How., 228.

As to the right of parties, standing in any of the foregoing capacities, to recover over, from their principals, or *cestuis que trust*, any reasonable costs or expenses, paid or incurred by them, in good faith, see chapter 314 of 1858, p. 506, section 3.

(d.) ACTIONS ON BEHALF OF THE PEOPLE, &c.

These cases are provided for, by sections 319 and 320, above cited. Where the action is brought directly on their behalf, they are liable for costs, as other parties; but, where a private person is joined with them as plaintiff, their liability is only contingent, on a failure to collect from such person.

When the suit is brought in the name of the people, but for the benefit of another person, or body corporate, the costs are chargeable against the latter only.

As to the liability in these cases, see *The People vs. Tremain*, 17 How., 10, but reversed, as to the award of a *mandamus*, 17 How., 142.

(e.) ASSIGNEES OF CAUSE OF ACTION.

An assignee of this description is, by section 321, expressly subjected to the same liability for costs, as if the suit were originally brought by him, and their payment may be enforced by attachment.

The test of the liability of an assignee, in such cases, is, Would he have been personally liable, if he had himself brought the action? Where, therefore, the assignment to him was in trust, the case was held to be governed by the rule laid down in section 317. *Conger vs. Hudson River Railroad Company*, 7 Abb., 255.

The above provision is closely analogous to that of the Revised Statutes, 2 R. S., 619, section 44, providing to the same effect, and also that, when an action was brought in the name of another, the person beneficially interested should be liable. See this liability enforced, in *Giles vs. Halbert*, 2 Kern., 32; affirming *same case*, 5 How., 319.

By this section, and by section 316, with reference to costs payable by a guardian *ad litem*, the remedy of attachment is specifically given, for the collection of the demand of the successful party. This provision seems clearly inconsistent with chapter 390 of 1847, abolishing that remedy, as a means of collecting costs, process in the nature of a *fiery facias*, against property, being substituted. See heretofore, under the head of *Execution*.

The point has not yet been made the subject of decision, but it would seem that, under section 468, the act of 1847 is, *pro tanto*, repealed, as being so far inconsistent with the Code.

(f.) OTHER SPECIAL LIABILITIES, OR IMMUNITIES.

It remains to notice a few special cases, of this description, not provided for by the Code.

Where a person, having privity of estate, defended a suit in ejectment unsuccessfully, in the name of the tenant, without causing himself to be substituted, under the power conferred by 2 R. S., 341, section 17, he was ordered to pay the plaintiff's costs, after execution, against the defendant on record, had been returned unsatisfied. *Farmers' Loan and Trust Company vs. Kursch*, 1 Seld., 558.

The husband was held not to be liable for the costs of an unsuccessful suit for divorce, instituted by his wife, in *Phillips vs. Simmons*, 20 How., 342; 11 Abb., 287.

A municipal corporation is not liable for costs on a judgment, unless, before action, the plaintiff's claim shall have been presented for payment to its chief fiscal officer. Laws of 1859, chapter 262, section 2, p. 570.

§ 333. Costs to Plaintiff, as of Course.

The rule may be laid down that, in all common-law actions, whether for the recovery of a debt, of unliquidated damages, or of the possession of real or personal property, the right to costs is incident to, and follows

the award of judgment, with the few special exceptions below noticed. In actions, in the nature of a suit in equity, they rest, on the contrary, in the discretion of the court.

The cases in which the plaintiff is entitled to costs of course, upon his recovery, are defined by section 304. They are classified thus:

1. Actions for the recovery of real property, or when a claim of title to real property has come in question.

2. Actions for the recovery of personal property.

3. Actions, of which a justice of the peace has no jurisdiction, *i. e.*, the following:

Actions, to which the people of the state are a party, excepting for penalties not exceeding one hundred dollars.

Actions, where the title to real property shall come in question, so as to oust the justice's jurisdiction. See sections 55 to 62 inclusive.

Civil actions for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction.

Actions, in respect of a matter of account, where the sum total of the accounts of both parties, as proved, exceeds four hundred dollars.

Actions against an executor or administrator, as such; and—

4. Actions for the recovery of money, where the plaintiff shall recover fifty dollars or more.

But this right is subjected to the following limitations:

In the class of actions for torts, above enumerated, if the plaintiff recovers less than fifty dollars damages, he cannot recover any more costs than damages.

In the same class of actions, with the exception of those for criminal conversation or seduction, a plaintiff, suing in the city of New York, and not claiming damages over five hundred dollars, can only recover costs, as in the Marine Court, and cannot claim them under the Code, with a similar limitation as above, that, in no such action, shall the costs exceed the damages recovered. See chapter 617 of 1853, section 1, p. 1165.

In replevin, the plaintiff, if he recovers less than fifty dollars damages, cannot recover any more costs than damages, unless he also recovers property, or the possession of property be adjudged to him, the assessed value of which, with the damages, amounts to that sum.

When several actions are brought, against several parties to the same instrument in writing, the plaintiff, as a general rule, can only recover costs in one action, and nothing more than disbursements in the others.

It is proposed to consider the decisions on these subjects, *seriatim*, in the order above described.

(a.) ACTIONS AS TO REAL PROPERTY.

Where it appears that the title to land has been directly brought into question on the trial, a recovery, however small, will carry costs to the plaintiff. *Powell vs. Rust*, 8 Barb., 567; 1 C. R. (N. S.), 172. The certificate of the judge who tried the case, would seem to be the only proper evidence, as to whether title came in question on the trial, where the issue is not raised by the pleadings. See *Niles vs. Lindsey*, 1 Duer, 610; 8 How., 131; *Mayor of New York vs. Hillsburgh*, 2 C. R., 152. See also, as to the refusal of such a certificate, *Burnet vs. Kelly*, 10 How., 406. See likewise, as to the necessity of its being obtained by the defendant, in cases removed by him from a justice's court, on plea of title, *Blake vs. James*, 19 How., 321.

But, where an issue of title is joined, the defendant cannot relieve himself from the liability to costs, by admitting it upon the trial. *Niles vs. Lindsey*, *supra*. See also, as to an action, in the nature of the former action for waste, *Snyder vs. Beyer*, 3 E. D. Smith, 235.

Where the action is for damages, for a mere trespass, a claim of leave and license, not amounting to a contest of right to the property itself, does not present a question of title, sufficient to carry costs. *Launitz vs. Barnum*, 4 Sandf., 637; *O'Reilly vs. Davies*, 4 Sandf., 722. See, however, as to a license by deed, *Powell vs. Rust*, *supra*. So also, as to a claim, under a mere executory contract for sale, *Doolittle vs. Eddy*, 7 Barb., 74; or, for damages for violation of such a contract, *Smith vs. Riggs*, 2 Duer, 622. In neither case is title brought into question, so as to carry costs.

See likewise, as to a mere allegation, that the plaintiff in trespass was where he had no right to be, *Pierret vs. Moller*, 3 E. D. Smith, 574.

So further, as to a mere question of possession, not requiring proof of title, *Burnet vs. Kelly*, 10 How., 406. Or an action for damages, in respect of an injury to the plaintiff's possession, *Rathbone vs. McConnell*, 20 Barb., 311. Or, a case, arising under the assessment laws, *Mayor of New York vs. Hillsburgh*, 2 C. R., 152.

Where the defendant succeeds upon the issue of title, a mere technical verdict in favor of the plaintiff, for collateral damages, will not entitle him to costs. On the contrary, he must pay them. *Burhaus vs. Tibbitts*, 7 How., 21.

Where the case has been discontinued, on plea of title in the court below, as provided by sections 55 to 62, the right to costs in the substituted action is governed, not by this portion of the Code, but by section 61. If the plaintiff succeeds on any issue, this entitles him to costs, even though the defendant prevail on the others, unless the latter pro-

cures a certificate of the judge, that title to real property came in question on the trial. *Blake vs. James*, 19 How., 321.

(b.) REPLEVIN.

Subdivisions 2 and 4 of section 304, require to be considered in connection, so far as regards this subject. The aggregate value of the plaintiff's recovery, in damages and property, must exceed fifty dollars, to entitle him to full costs of course. If they, or either of them, exceed that amount, he taxes his full costs, as of right.

But, if they fall under that aggregate, the amount of costs is determined by the amount of damages only, without regard to the amount of property obtained. Thus, where the damages were six cents, and property to the amount of twenty-five dollars was recovered, the plaintiff was held entitled to six cents costs, and no more. *Minks vs. Wolf*, 8 How., 238.

A verdict in the plaintiff's favor is, however, sufficient to deprive the defendant of any right to tax his costs as of course, though the recovery be insufficient to carry full costs to the former. *Van Schoning vs. Buchanan*, 23 How., 164; 14 Abb., 85; affirming *same case*, 23 How., 44.

If the plaintiff resort to any other form of action, he cannot tax any costs at all against the defendant, where his recovery is less than fifty dollars, though he may have actually possessed himself of the property. *Ashley vs. Marshall*, 30 Barb., 426; 19 How., 110; 9 Abb., 361. As to the effect of a tender, kept good, in defeating the plaintiff's claim to costs, on a recovery in replevin, *vide Archer vs. Cole*, 22 How., 411.

(c.) ACTIONS, WHERE A JUSTICE OF THE PEACE HAS NO JURISDICTION.

The following have been decided to fall within this class, besides those already noticed, in which the title to real estate came substantially into question.

A case, where the matter in account between the parties, exceeded four hundred dollars. *Stillwell vs. Staples*, 5 Duer, 691; 3 Abb., 365; *Gilliland vs. Campbell*, 18 How., 177.

But matter, constituting a mere defence of payment, will not, *per se*, render the case a case of mutual accounting between the parties, so as to oust the jurisdiction. *Vide Brady vs. Durbrow*, 2 E. D. Smith, 78. See also *Crim vs. Cronkhite*, 15 How., 250; *Crane vs. Holcomb*, 2 Hilt., 269; 8 Abb., 35, note.

As to a case, where the mutual demands of the parties did not reach four hundred dollars, being clearly a case, of which a justice had jurisdiction, see *Hoadless vs. Brundage*, 8 How., 263; *Crim vs. Cronkhite*, 15 How., 250.

The following belong to a class of cases, of which a justice has, in

fact, no jurisdiction, and in which, nevertheless, a plaintiff, failing to recover fifty dollars, was held, under the section as it stood, not to be entitled to his costs, inasmuch as they did not fall within the scope of section 54; viz., an action against a sheriff for a false return. *Worden vs. Brown*, 14 How., 327. Or, for an omission to return. *Laughran vs. Orser*, 15 How., 281; 6 Duer, 697.

Under the last amendment of subdivision 3, this objection is now removed, and all cases, in which a justice has no jurisdiction, fall within the same category.

(d.) LIMITATIONS ON RIGHT TO COSTS.—INSUFFICIENT RECOVERY.

It follows, by necessary implication from subdivision 4 of section 304, read in connection with section 305, that, in actions for the recovery of money, the plaintiff, if he fails to recover fifty dollars, not only loses his own costs, but pays those of the defendant, unless the case falls within some one of the excepted instances, in which the plaintiff is to recover no more costs than damages. Nor can the plaintiff, in such a case, claim his disbursements. *Peet vs. Warth*, 1 Bosw., 653.

This rule has been applied, and costs absolutely denied to the plaintiff, in the following cases, where his recovery fell under fifty dollars:

On recovery of a trifling balance of account, in a case where (the whole of the mutual demands of the parties being less than four hundred dollars), a justice of the peace had jurisdiction. *Hoadless vs. Brundage*, 8 How., 263; *Crim vs. Cronkhite*, 15 How., 250; *Brady vs. Durbrow*, 2 E. D. Smith, 78.

In an action, for a malicious trespass on personal property. *Smith vs. Keeler*, 8 How., 55.

In actions for trespass upon, or for damages for breach of an executory contract for sale of real estate, where title did not come into question. *Launitz vs. Barnum*, 4 Sandf., 637; *O'Reilly vs. Davies*, 4 Sandf., 722; *Smith vs. Riggs*, 2 Duer, 622; *Pierret vs. Moller*, 3 E. D. Smith, 574; *Rathbone vs. McConnell*, 20 Barb., 311. In an action to enforce the assessment laws. *Mayor of New York vs. Hillsburgh*, 2 C. R., 152. Or, in an action, where the plaintiff, though technically recovering a verdict, has failed on the issue of title to real estate. *Burhaus vs. Tibbetts*, 7 How., 21.

Generally, where the plaintiff only recovered a less sum than fifty dollars, no counter-claim being made on the part of the defendant. *Landsberger vs. Magnetio Telegraph Company*, 8 Abb., 35; *Peet vs. Warth*, 1 Bosw., 653.

In an action against the sheriff for a false return, the plaintiff, having recovered less than fifty dollars, was held to have lost his right to costs.

Worden vs. Brown, 14 How., 327. So also, in one for an omission⁴ to return. *Laughran vs. Orser*, 6 Duer, 697; 15 How., 181.

These decisions proceeded on the ground, that these were not cases, in which the failure of a justice's court to acquire jurisdiction, was regulated by section 54. Under the amendment of 1862, this distinction can no longer be drawn, all cases in which a justice has no jurisdiction, being now placed upon the same footing.

In cases, where a justice of the peace has no jurisdiction, the right to costs follows the recovery, without regard to its amount. They fall then within subdivision 3, and not subdivision 4 of section 304. *Stillwell vs. Staples*, 5 Duer, 691; 3 Abb., 365; *Gilliland vs. Campbell*, 18 How., 177, before cited.

Considerable discussion has arisen, as to the effect of a recovery, on the part of the plaintiff, of less than fifty dollars, by reason of the allowance of a counter-claim, on the part of the defendant.

Where the plaintiff's claim, allowed, *per se*, at over fifty dollars, was so reduced to less than that amount, by the allowance of a counter-claim, it was held that costs could not be allowed to either party. Neither had prevailed. *Kalt vs. Lignot*, 3 Abb., 190; affirming *same case*, 3 Abb., 33; 12 How., 535.

But this conclusion is denied, and it is held, that the right to costs depends upon the amount of the plaintiff's actual recovery, without regard to the fact of his having extinguished any claim of the defendant, in *Crane vs. Holcomb*, 2 Hilt., 269; 8 Abb., 35, note.

The general term of the Supreme Court, in the first district, and that of the New York Common Pleas, are, accordingly, in direct conflict on this point. The case of *Spring Valley Shot and Lead Company vs. Jackson*, 2 Sandf., 622, a decision of the general term of the Superior Court, supports the views of the latter tribunal.

Where the claim of the plaintiff was allowed for less than fifty dollars, and was reduced by a counter-claim, to only one dollar, the defendant was held entitled to his costs. *Trust vs. Person*, 3 Abb., 84; affirmed, 1 Hilt., 292.

Where costs are allowed to the defendant, under the above circumstances, there should be only one judgment, for the amount of the ultimate balance due, allowing the set-off of the other claim, for the plaintiff, or the defendant, according to circumstances. *Vide Crane vs. Holcomb*, 2 Hilt., 269; 8 Abb., 35, note; *Johnson vs. Farrell*, 10 Abb., 384. See, as to the proper course to be pursued by a defendant, under these circumstances, *Runnell vs. Griffin*, 8 Abb., 39; *Johnson vs. Sagar*, 10 How., 552.

(e.) EFFECT OF OFFER.

The plaintiff's right to costs will also be affected, by an offer made on the part of the defendant, and not accepted, where he fails in obtaining a more favorable judgment on the trial. See heretofore, book VIII., chapter 1, section 164, under the head of *Offer to Compromise*.

In this case, he cannot recover, but, on the contrary, must pay the defendant's costs, from the time of the offer, recovering only those incurred prior to its service. See generally, on this head, *Kilts vs. Seeber*, 10 How., 270; *Burnett vs. Westfall*, 15 How., 420.

In relation to the effect of such an offer, as extinguishing the counter-claim of a defendant, and entitling the defendant to costs as above, if not accepted, see *Schneider vs. Jacobi*, 1 Duer, 694; 11 L. O., 220; See also, *per contra*, *Ruggles vs. Fogg*, 7 How., 324.

(f.) NEW YORK CASES, TRIABLE IN MARINE COURT.

The special limitation, or rather reduction, of the amount of the plaintiff's costs, in the class of actions referred to in the statute of 1853, above cited, is regulated, not by the amount of the plaintiff's recovery, but of his claim for damages. If he claims more than \$500 damages, he will be entitled to tax his costs, under the Code, and not according to the scale in the Marine Court, though his recovery be for a lesser amount. *Murray vs. De Gross*, 3 Duer, 668; 12 L. O., 311.

The operation of that statute has been decided not to be retrospective. *Dunbar vs. Duffy*, 11 L. O., 349.

And it has been held only to apply to actions commenced in that city, and not to one, commenced elsewhere, but removed to that district on a change of venue. *Sleight vs. Hancox*, 4 Abb., 245.

(g.) LIMITATION OF COSTS TO AMOUNT OF DAMAGES, WHEN RECOVERY LESS THAN FIFTY DOLLARS.

This principle, as applicable to the specific actions, sounding in tort, enumerated in subdivision 4, was applied in *Holmes vs. St. John*, 4 How., 66; 2 C. R., 46; *Runnell vs. Griffin*, 8 Abb., 39; and several others of the decisions below cited. Nor does the fact that the plaintiff has recovered this modicum, deprive the defendant, of his right to recover costs, as against the plaintiff, under these circumstances. See *Runnell vs. Griffin*, *supra*.

Although this limitation was not introduced, until the amendment of 1849, it has been held to be retrospective in its effect, as regarded a suit, commenced before, but decided after the passage of that measure. *Holmes vs. St. John*, 4 How., 66; 2 C. R., 46.

The limitation of the plaintiff's recovery of costs, in replevin, where

his aggregate recovery, in damages and property, does not exceed fifty dollars, has been already adverted to. In such case, his recovery of costs is regulated by the amount of damages only, without regard to the value of the property. See *Minks vs. Wolf*, 8 How., 238, above referred to.

If, instead of asserting his claim in replevin, the plaintiff resorts to any other form of action, he cannot claim the benefit of this rule; and, although he may have taken possession of the property, still, if his money recovery be less than fifty dollars, he cannot recover any costs, but must pay those of the defendant. *Ashley vs. Marshall*, 30 Barb., 426; 19 How., 110; 9 Abb., 361.

A question has been raised, as to whether, on a limited recovery of costs, of this description, the plaintiff is or is not entitled to recover his disbursements, in addition to the amount to which he is entitled, or whether, on the contrary, the limitation extends to costs generally, and to disbursements also, as forming part of them. The right to tax disbursements, in addition, is maintained, in *Taylor vs. Gardner*, 4 How., 67; 2 C. R., 47. See also *Newton vs. Sweet's Executors*, 4 How., 134; 2 C. R., 61.

These cases are, however, overruled, and the principle established, that the limitation extends to disbursements as well as costs, by the following: *Beldin vs. Conkling*, 4 How., 196; 2 C. R., 112; *Wheeler vs. Westgate*, 4 How., 269; *Stone vs. Duffy*, 3 Sandf., 761; 1 C. R. (N. S.), 129; *Keating vs. Anthony*, 1 C. R. (N. S.), 233. See also *Swift vs. De Witt*, 3 How., 280; 1 C. R., 25; 6 L. O., 314; *Ped vs. Warth*, 1 Bosw., 653.

(h.) LIMITATION, IN CASES OF SEVERAL ACTIONS UPON ONE INSTRUMENT.

The principle, embodied in the concluding clause of section 304, that, when several actions are brought upon the same written instrument, against several defendants, who might have been jointly sued, the plaintiff shall recover costs in one action, and only disbursements in the others, provided such other parties were, at the time, within the state, and not secreted, is so plain and simple, as regards the case of separate actions, that it has not been made the subject of direct decision.

But it has also been applied, to that class of cases, where all the parties have been originally sued, but have, nevertheless, severed their defences, by appearing by different attorneys.

It has been held that, under these circumstances, the plaintiff, where he recovers one single judgment, can only recover one full bill of costs, and can charge nothing beyond, except his additional disbursements, occasioned by the severing of the defences. The case may, however, be different, where judgment is allowed against one defendant, leaving

the action to proceed, as against the others. See *Buell vs. Gay*, 13 How., 31; *Latham vs. Bliss*, 13 How., 416; 6 Duer, 661; *Phipps vs. Van Cott*, 15 How., 110. See also, as to the costs of an appeal, *Everson vs. Gehrman*, 2 Abb., 413. These cases seem to overrule *Comstock vs. Halleck*, 4 Sandf., 671, to the contrary effect.

And, where an action had been commenced against all such parties, but was severed, by reason of different lines of pleading adopted by them, and separate judgments taken, the same principle was applied. *Pratt vs. Allen*, 19 How., 450.

But, where the plaintiff has proceeded to judgment against the defendants, as joint debtors, he will be entitled to his full costs of any subsequent proceedings, to enforce the liability, as against the property of any, not personally served with the original process. These are expressly given to him, by the last clause of section 307, added on the amendment of 1857. And, before that amendment, it had been held that he was entitled to them, under similar circumstances. See *Yorks vs. Peck*, 9 How., 201.

(i.) GENERAL CONSIDERATIONS AS TO PLAINTIFF'S RIGHTS.

Where there are several joint defendants, all are liable for the plaintiff's costs, and they are taxable against all, though some may have defended, and others suffered a default. *Warner vs. Ford*, 17 How., 54; *Catlin vs. Billings*, 16 N. Y., 622; 13 How., 511; 4 Abb., 248.

Judgment, entered in favor of the plaintiff, upon a stipulation, carries the right to costs, though not mentioned. *Vide Wing vs. New York and Erie Railroad Company*, 1 Hilt., 235.

Though, on the trial, a part of the defendants may be entitled to costs, as against the plaintiff, this does not present an obstacle to his recovering his, as against others, against whom he may severally prevail. *Cuyler vs. Coats*, 10 How., 141; *Marks vs. Bard*, 1 Abb., 63. So held also, in an action, where there were cross recoveries, as between plaintiff and defendant, on separate counts, amounting to a statement of separate causes of action. *Dresser vs. Wickes*, 2 Abb., 460.

§ 334. Costs to Defendant.

(a.) AS OF COURSE.

Under section 305, as above cited, the defendant is to be allowed costs, as of course, in all the cases mentioned in the preceding section, unless the plaintiff is entitled to costs therein.

In all such cases, therefore, where there is a sole defendant, or where the plaintiff fails in his action, as against all the defendants, costs follow the verdict, or judgment, as a matter of course. Nor can the plaintiff

claim any allowance for disbursements. *Peet vs. Warth*, 1 Bosw., 653.

The citation of many of the cases in point, upon this question, has, necessarily, been anticipated in the preceding section.

Costs to the defendant have, accordingly, been held to follow the verdict, as of course, where the plaintiff's recovery was insufficient to carry them. See *Crim vs. Cronkhite*, 15 How., 250; *Launitz vs. Barnum*, 4 Sandf., 637; *O'Reilly vs. Davies*, 4 Sandf., 722; *Smith vs. Riggs*, 2 Duer, 622; *Rathbone vs. McConnell*, 20 Barb., 311; *Landberger vs. Magnetic Telegraph Company*, 8 Abb., 35; *Peet vs. Warth*, 1 Bosw., 653; *Worden vs. Brown*, 14 How., 327; *Laughran vs. Orser*, 6 Duer, 697; 15 How., 281; *Trust vs. Person*, 3 Abb., 84; affirmed, 1 Hilt., 292. See also, where the plaintiff, though recovering a small verdict, had failed upon an issue of title, *Burhaus vs. Tibbitts*, 7 How., 21; or where title did not really come in question. *The Mayor of New York vs. Hillsburgh*, 2 C. R., 152.

Where the defendant, by means of the allowance of a set-off, had reduced the plaintiff's claim below fifty dollars, he was held entitled to his costs. *Crane vs. Holcomb*, 2 Hilt., 269; 8 Abb., 35, note; *Spring Valley Shot and Lead Company vs. Jackson*, 2 Sandf., 622. See, however, *Kalt vs. Lignot*, 3 Abb., 190; affirming *same case*, 3 Abb., 33; 12 How., 535, holding that, as neither party had prevailed, neither should be allowed costs, in such a case.

See also, as to the effect of an offer, as extinguishing a counter-claim of the defendant, and entitling the defendant to costs, if the plaintiff recovers a less favorable verdict, *Schneider vs. Jacobi*, 1 Duer, 694; 11 L. O., 220. See, however, *per contra*, *Ruggles vs. Fogg*, 7 How., 324. See likewise generally, as regards the effect of an offer, as conferring a right to costs upon the defendant, *Kilts vs. Seeber*, 10 How., 270; *Burnett vs. Westfall*, 15 How., 420, also before cited.

In a case, where the plaintiff's costs are limited to the amount of his damages, on a recovery of less than fifty dollars, the defendant will also be entitled to costs, as of course. *Runnell vs. Griffin*, 8 Abb., 39.

Where the plaintiff accepts an offer, to enter up judgment for less than fifty dollars, this entitles the defendant to costs, as of course. *Johnson vs. Sagar*, 10 How., 552.

If, in an action in relation to personal property, the plaintiff adopts any other form of proceeding than replevin, the defendant is entitled to costs, on a recovery of less than fifty dollars, though the plaintiff may have actually possessed himself of the property. *Ashley vs. Marshall*, 30 Barb., 426; 19 How., 110; 9 Abb., 361.

A verdict, recovered by the plaintiff in replevin, is sufficient to deprive the defendant of any right to costs, though the recovery be insufficient

to give full costs to the former. The case falls within subdivision 2 of section 304. *Van Schoning vs. Buchanan*, 23 How., 164; 14 Abb., 185; affirming *same case*, 23 How., 44.

The defendant is entitled to enter judgment for his costs, as of course, on a dismissal of the complaint at the trial, for want of jurisdiction, then proved, but not apparent on the record. *McMahon vs. Mutual Benefit Life Insurance Company*, 3 Bosw., 644; 8 Abb., 297. Or, on appeal, reversing a judgment for the same cause. *Gormley vs. McIntosh*, 22 Barb., 271. See also *Frees vs. Ford*, 2 Seld., 176; 1 C. R. (N. S.), 413; and *Kundolf vs. Thalheimer*, 2 Kern., 593, there cited. But otherwise, where the want of jurisdiction is apparent, *ab initio*. In such a case, the court should dismiss the suit without costs, having no jurisdiction to render any judgment. *Gormley vs. McIntosh*, *supra*. And, where the want of jurisdiction was not raised by the issues in the action, nor presented on affidavits, but settled by an admission in court, it was held that no judgment whatever could be rendered. *Harriott vs. New Jersey Railroad Company*, 8 Abb., 284 (293); 2 Hilt., 262.

Where, after the death of one of two joint defendants, and revivor against his representatives, the plaintiff was required to sever his action, and elect against which he would proceed, it was held that the defendant dismissed, was entitled to enter judgment for his costs. *Gardner vs. Walker*, 22 How., 405.

As to an award of costs, to both plaintiff and defendant, where two separate causes of action were in fact presented, on one of which each had succeeded, see *Dresser vs. Wickes*, 2 Abb., 460.

(b.) COSTS OF SEPARATE DEFENCES.

Under the first clause of section 306, where there are several defendants, not united in interest, and making separate defences, by separate answers, the court may award costs to such as have judgment in their favor, though the plaintiff may recover his, as against others, as to whom he may prevail.

This state of things differs from that last considered, because, in this, the award or refusal of costs, rests in the discretion of the court; but, where a sole defendant prevails, or where the plaintiff fails, as against all the defendants, in a common-law case, the defendant's costs are taxable, as of right, and do not depend upon the award of the court.

Under the Code of 1849, it was held that a defendant, thus succeeding, was entitled to tax his costs, as of course, under section 305. *Hinds vs. Meyers*, 4 How., 356; 3 C. R., 48; *Comstock vs. Bayard*, 2 Sandf., 705; *Stone vs. Duffy*, 3 Sandf., 761; 1 C. R. (N. S.), 129; *Stafford vs. Onderdonk*, 8 Barb., 99; 2 C. R., 115. It was then considered, that the provision in section 306 only applied to equitable cases.

The amendment of 1851 has, however, removed all doubt upon this subject, and rendered that provision generally applicable.

The doctrine, in *Comstock vs. Bayard*, and *Stone vs. Duffy*, is likewise followed by the Court of Appeals, in *Decker vs. Gardiner*, 4 Seld., 29; and *Daniels vs. Lyon*, 5 Seld., 549. On examination, it will appear that both these cases were decided, under the Code of 1849. In *Brown vs. Bowen*, 16 How., 544, they are also followed, in a subsequent case. See likewise *Cuyler vs. Coats*, 10 How., 141.

But this seems to be an error, occasioned by overlooking the words, inserted on the amendment of 1851. In a case, where the defendants have answered separately, any one of them, prevailing against a plaintiff who has obtained a verdict against others, must now obtain an award of his costs from the court, or he cannot tax them. *Wilklow vs. Bell*, 18 How., 397; *Bank of Attica vs. Wolf*, 18 How., 102; *Zink vs. Altenburg*, 18 How., 108; *Williams vs. Horgan*, 13 How., 138; 6 Duer, 658; *Bulkeley vs. Smith*, 1 Duer, 704. See also, as to a discontinuance, *Butler vs. Morris*, 1 Bosw., 329; and *Marks vs. Bard*, 1 Abb., 63; and generally, *Wood vs. Brooklyn Fire Insurance Company*, 10 How., 154.

But this rule does not apply, it would seem, to defendants who have put in a joint answer; under these circumstances, it has been held, that the amendment of 1851 does not apply, and that any one of them, prevailing against the plaintiff, is entitled to tax his costs, as of course, and without an order of the court.

To this class of cases, the doctrine laid down in *Decker vs. Gardiner*, and *Daniels vs. Lyon*, and the other decisions under the Code of 1849, above referred to, still continues to apply. *Zink vs. Atterburg*, 18 How., 108; *Corbett vs. Ward*, 3 Bosw., 632.

And, under these circumstances, the fact that one of defendants, jointly interested, has suffered judgment by default, will not prejudice the right of another, who has defended successfully, to tax his costs against the plaintiff. *Comstock vs. Bayard*, 2 Sandf., 705, above cited.

And the rule that costs, as of course, still follow the judgment, has also been held applicable, to cases where the defendants are united in interest, and the defence set up is in fact joint, though presented by separate answers. *Williams vs. Horgan*, 13 How., 138; 6 Duer, 658. See also *Stafford vs. Onderdonk*, 8 Barb., 99; 2 C. R., 115; *Gardner vs. Walker*, 22 How., 405; *Bridgeport Fire and Marine Insurance Company vs. Wilson*, 20 How., 511; 12 Abb., 209.

Defendants, appearing and answering by separate attorneys, are entitled to tax separate bills of costs, as against an unsuccessful plaintiff. *Collumb vs. Caldwell*, 5 How., 336; 1 C. R. (N. S.), 41; *Hinds vs. Myers*, 4 How., 356; 3 C. R., 48; *Wilbur vs. Wiltsey*, 13 How., 506;

Bridgeport Fire and Marine Insurance Company vs. Wilson, 20 How., 511; 12 Abb., 209; *Corbett vs. Ward*, 3 Bosw., 632. So also, as regards any portion of a proceeding, during which, separate attorneys have been employed, though, afterwards, the defences may have been joined. *Castellanos vs. Beauville*, 2 Sandf., 670.

But, if more than one of the defendants appear by the same attorney, either originally, or in the subsequent progress of the suit, they can only tax one bill of costs, either generally, or for the period during which they are thus jointly represented, even though they answer separately. *Castellanos vs. Beauville*, 2 Sandf., 670; *Tracy vs. Stone*, 5 How., 104; 3 C. R., 73; *Braden vs. Kakhaizer*, 3 Sandf., 760; 1 C. R. (N. S.), 129.

So also, where they appear by different attorneys, who are partners. *Crofts vs. Rockefeller*, 6 How., 9; 1 C. R. (N. S.), 177. See also *Brockway vs. Jewett*, 16 Barb., 590. Or by an attorney, and by another, acting as his clerk, and not claiming that he appeared, otherwise than for the benefit of his principal. *Perry vs. Livingston*, 6 How., 404.

See, however, as to the strict rule, that only one bill of costs will be taxed, in favor of defendants, who appear by the same attorney, qualified, so far as regards the costs of separate answers, as applicable to cases, where the defences presented were clearly several, and were properly so presented, in *Walker vs. Russel*, 16 How., 91; 7 Abb., 452, note; and *Hall vs. Lindo*, 8 Abb., 341.

But, where defendants have jointly succeeded on the trial, it seems that they can only tax one set of costs, on appeal of the plaintiff, though they may then employ different attorneys. *Wilbur vs. Wiltsey*, 13 How., 506.

Although separate bills of costs may be taxable, as against the plaintiff, yet, where the costs have been unnecessarily increased in that manner, the court will not feel disposed to award an allowance. *Mathewson vs. Thompson*, 9 How., 231; *Tillman vs. Powell*, 13 How., 117.

§ 335. *Costs in Discretion of Court.*

In the whole class of actions for equitable relief, and any others, not falling within the scope of sections 304 and 305, costs may be allowed or not, in the discretion of the court.

And this same rule is applicable to the costs of an appeal, when the affirmance or reversal by the appellate court is partial only, or where a new trial is ordered. See section 306.

There is this material distinction between the foregoing, and the other provision contained in the same section, and noticed above, in the preceding subdivision; i. e., that, in the latter class of cases, the discretion

conferred upon the court, is merely the allowance or withholding of costs to a defendant, defending separately, whereas, in the former, the whole question of right, and that, as applicable to either of the parties, rests wholly on the award of the original or appellate tribunal.

The words, "other actions," as employed in the first clause of section 306, have been held applicable to equity causes of action only, the class of common-law actions being all provided for by section 304. *Vide Hinds vs. Meyers*, 4 How., 356; 3 C. R., 48; *Daniels vs. Lyon*, 5 Seld., 549.

And there can be no doubt, but that this rule still holds good, and is not affected by the amendment of 1851, before noticed.

. In *McGowan vs. Morrow*, 3 C. R., 9, it was considered that the court had no discretionary power, to charge either party with the whole costs of a suit in partition, inasmuch as the right to costs, in such cases, was still governed by the Revised Statutes (2 R. S., 328, section 72), qualifying the provisions of the Code. But, under rule 77, the share of the plaintiff, in a suit for the partition, of only a portion of lands held in common, instituted without the consent of his co-tenants, may be charged with the whole costs of the proceeding.

The unlimited discretion of the court, with regard to the allowance, and provision for the payment of costs in equity cases, is fully asserted in *Pratt vs. Ramsdell*, 16 How., 59; 7 Abb., 340, note. See also *Bartow vs. Cleveland*, 16 How., 364; 7 Abb., 339; and *Thurston vs. Marsh*, 14 How., 572; 5 Abb., 389. See likewise, as to the exoneration of a party from their payment, in a case calling for that description of relief, *Gallagher vs. Egan*, 2 Sandf., 742; 3 C. R., 203.

Although, as a general rule, the plaintiff, on a bill to redeem, must pay the costs of the defendant, his own were awarded to him, where he succeeded in showing, that the mortgage in question was satisfied before suit. *Calkins vs. Isbell*, 20 N. Y., 147.

Where both parties to a suit in equity were in fault, costs were refused to either. *Johnson vs. Taber*, 6 Seld., 319.

Where, in replevin, an equitable defence was set up, and a tender of the full amount was made, and kept good, costs were refused to the plaintiff. *Archer vs. Cole*, 22 How., 411.

A defendant, under the mechanics' lien law, who stood in the position of a mere stakeholder between the real contending parties, was exonerated from costs, in *Eagleson vs. Clark*, 2 E. D. Smith, 644; 2 Abb., 364.

In proceedings in interpleader, the successful party has been held entitled to his costs, and that the party who failed, was bound to pay them, and those of the other parties in the proceeding, and also in a preliminary suit at law. *Miller vs. Watts*, 4 Duer, 203; 1 Abb., 234.

Where a money-judgment is prayed for, the costs of the action will follow the judgment, as of right, and will not rest in discretion, though the cause of action may be otherwise of an equitable nature. *Trust vs. Person*, 3 Abb., 84; affirmed, 1 Hilt., 292.

In an action to vacate an award, the costs were held to lie in discretion, in *Wood vs. Brooklyn Fire Insurance Company*, 10 How., 154.

As to the costs of setting aside a report resting in discretion, where a new trial is ordered, see *Wentworth vs. Candee*, 17 How., 405. See also *Scranton vs. Baxter*, 4 Sandf., 5; *Smith vs. Schanck*, 18 Barb., 344; and *Bulkeley vs. Smith*, 2 Duer, 261; 11 L. O., 300, as to their being ordered to abide the event, on the granting of a new trial. See likewise *Kennedy vs. New York and Harlem Railroad Company*, 3 Duer, 659, where the costs below were ordered to be paid, and costs of appeal to abide the event.

In *Ives vs. Miller*, 19 Barb., 196, the court held that, on an appeal from an order, it had discretion as to costs.

The principle that where, on appeal, a judgment is affirmed in part, and reversed in part, the costs rest in discretion, is carried out in the following cases: In *Montgomery County Bank vs. Albany City Bank*, 3 Seld., 459, costs were awarded in favor of the appellant, as against one of the respondents, as to whom the judgment was reversed, that judgment being affirmed, with costs, in favor of another. In *Flagg vs. Munger*, 5 Seld., 483; reversing, *pro tanto*, same case, 14 Barb., 196, a defendant, partially prevailing in foreclosure, was awarded his costs in the court below, neither party having costs on the appeal.

§ 336. *Scale of Costs.*

It is proposed to cite the various decisions, bearing upon the scale of costs, as established by section 307, in the order of the different subdivisions, as they there occur, reserving the consideration of any dependent points, till the close of this section.

(a.) PROCEEDINGS BEFORE NOTICE OF TRIAL.—ALLOWANCE TO PLAINTIFF.

The right to this allowance accrues immediately the action is brought, and cannot be defeated by any subsequent act of the defendant. *Vide Rockefeller vs. Weiderwax*, 3 How., 382; 2 C. R., 3; *Keese vs. Wyman*, 8 How., 88; *Burnett vs. Westfall*, 15 How., 420. But, to have this effect, the action must be regularly commenced. *Hull vs. Peters*, 7 Barb., 331; 3 C. R., 255.

Whether the allowance is of the larger or the smaller amount prescribed by the subdivision, is dependent, not upon the fact of applica-

tion being or not being actually made to the court for judgment, but upon the nature of the action itself, and whether the plaintiff can or cannot, by the form of the summons, take judgment, without such application. *Vide The People vs. Van Dusen*, 3 How., 385; 2 C. R., 7; *Van Valkenburgh vs. Van Schaick*, 8 How., 271; *Candee vs. Ogilvie*, 5 Duer, 658; *Pardee vs. Schenck*, 11 How., 500. These cases overrule *Lawrence vs. Davis*, 7 How., 354, holding the contrary; and the indication to the same effect, in *Gould vs. Carpenter*, 7 How., 97.

As to the right to claim this allowance, or the reverse, on the decision of a demurrer, see below, under that head, and cases there cited.

This fee is not taxable, on the decision of a case, submitted to the general term, under section 372, as indeed specially provided by section 373. See *Neilson vs. Mutual Insurance Company*, 3 Duer, 683.

The allowance for additional defendants, which the plaintiff is entitled to tax, under this subdivision, as now amended, is limited to defendants, necessarily and properly joined. It will not be made for parties, whom he has no right to bring before the court. *Case vs. Price*, 17 How., 348; 9 Abb., 111.

(b.) ALLOWANCE TO DEFENDANT.

The right to this allowance accrues to the defendant, immediately on action brought, and without regard to his having or not having retained an attorney; and the plaintiff cannot discontinue, without payment to him of that amount. *Foster vs. Bowen*, 1 C. R. (N. S.), 236.

A defendant, who has made an offer, cannot tax this fee, though the plaintiff obtain a less favorable judgment. *Burnett vs. Westfall*, 15 How., 430; *Keese vs. Wyman*, 8 How., 88.

(c.) SUBSEQUENT PROCEEDINGS BEFORE TRIAL.

The right to this allowance, does not accrue, until notice of trial has been actually served, notwithstanding other proceedings may have been taken. *Morrison vs. Ide*, 4 How., 304; 3 C. R., 27.

But, where notice has once been given, it becomes taxable, and a plaintiff cannot discontinue, without its payment. *Hall vs. Lindo*, 8 Abb., 341.

Where the plaintiff does not accept an offer made by the defendant, and obtains a less favorable judgment, he cannot tax it, but the defendant can. *Burnett vs. Westfall*, 15 How., 430; *Keese vs. Wyman*, 8 How., 88.

This item is taxable, as part of costs of the hearing, or of the term, when conditionally imposed upon either of the parties. *Buckingham vs. Minor*, 18 How., 287; *Dewey vs. Stewart*, 6 How., 465; *Mitchell*

vs. *Westervelt*, 6 How., 265 ; affirmed, 6 How., 311 ; *Shanks vs. Rae*, 19 How., 540.

As to the taxation of this fee, on the imposition of costs of the argument of a demurrer, see below, under that head, and cases there cited.

In *Jackett vs. Judd*, 18 How., 385, it was held to be taxable only once, where the issues have not been changed, though more than one trial has been had. See also generally, *Perry vs. Livingston*, 6 How., 404 ; *Jackson vs. McBurney*, 6 How., 408.

It is not taxable, as against a defendant who has suffered a default, and against whom the case has not been noticed. *Sluyter vs. Smith*, 2 Bosw., 673 (678). Or as against a plaintiff, on dismissal of the complaint on motion. *Tillsbaugh vs. Dick*, 8 How., 33. Or on a motion for judgment on a frivolous demurrer. *Butchers' and Drovers' Bank of Providence vs. Jacobson*, 22 How., 470 ; *Rochester City Bank vs. Rapelye*, 12 How., 26.

(d.) TRIAL FEE.

A trial-fee will be allowed, where judgment is taken on the call of the cause, by reason of the failure of the adverse party to appear. *Dodd vs. Curry*, 4 How., 123 ; 2 C. R., 69. Or, where the plaintiff is nonsuited on the trial. *Shannon vs. Brower*, 2 Abb., 377. See likewise, *Allaire vs. Lee*, 4 Duer, 609 ; 1 Abb., 125.

But this fee is not taxable, on an application for judgment, on service by publication. *Chapman vs. Lemmon*, 11 How., 235.

Nor, it has been held, is any trial-fee taxable, as against a defendant who has suffered judgment by default, though the cause may have been tried as to others. *Sluyter vs. Smith*, 2 Bosw., 673 (678).

Considerable discussion has arisen, as to whether a trial-fee is taxable, on the obtaining of judgment by motion.

It was held not to be so, on a dismissal of the complaint for want of prosecution, in *Tillsbaugh vs. Dick*, 8 How., 33.

As to the award of judgment upon a frivolous pleading, on motion under section 247, the cases are conflicting.

In the following, it was held, that such a motion involves substantially the trial of an issue of law, and that a trial-fee should accordingly be taxed : *Roberts vs. Morrison*, 7 How., 396 ; 11 L. O., 60 ; *Laurence vs. Davis*, 7 How., 354 ; *Pratt vs. Allen*, 19 How., 450. See also *Tillsbaugh vs. Dick*, 8 How., 33 (34). But these cases seem to be overruled, by the undermentioned, holding that, inasmuch as the application is in form a motion, motion costs can only be allowed : *Gould vs. Carpenter*, 7 How., 97 ; *Rochester City Bank vs. Rapelye*, 12 How., 26 ; *Marquise vs. Brigham*, 12 How., 399 ; *Roberts vs. Clark*, 10 How., 451 ; *Butchers' and Drovers' Bank of Providence vs. Jacobson*, 22

How., 470. See also *Wesley vs. Bennett*, 6 Abb., 12; and *Candee vs. Ogelvie*, 5 Duer, 658.

A trial-fee for an issue of fact, has been held taxable, on a motion at special term on a case, granted on the ground that the verdict was against evidence. *Mechanics' Banking Association vs. Kiersted*, 4 Duer, 639; 10 How., 400. Also a trial-fee for an issue of law, on a similar hearing on a case, where questions of law were presented. *Waterbury vs. Westervelt*, 3 Sandf., 749; 1 C. R. (N. S.), 215; *Wiggins vs. Arkenburgh*, 4 Sandf., 688; *Roosevelt vs. Brown*, 1 Duer, 642. See also *Ellsworth vs. Gooding*, 8 How., 1; *Van Schaick vs. Winne*, 8 How., 5; *Hager vs. Danforth*, 8 How., 448.

This conclusion is, however, disputed, and the costs of a motion only, declared to be taxable, in *Fellows vs. Sheridan*, 6 How., 419; *Moore vs. Cockroft*, 9 How., 479. See also *Potsdam and Watertown Railroad Company vs. Jacobs*, 10 How., 453; disapproving of *Ellsworth vs. Gooding*. See likewise, the same conclusion maintained, after a full comment on all the above decisions, in *Jackett vs. Judd*, 18 How., 385. As to this last decision, as regards its authority in the first district, see *Malan vs. Simpson*, 20 How., 488; 12 Abb., 225.

The final conclusion come to in *Jackett vs. Judd*, is, however, that, under subdivision 5, as it now stands, the costs of an appeal may be taxable under these circumstances.

Since the amendment of 1862, there can be no doubt, that such is the effect of that subdivision. As it stood, before that amendment, and at the time of the decision in question, the phraseology was hopelessly confused, as regards this particular point.

The trial-fee, on an issue of law, has also been held to be the proper allowance, on appeal from an order, sustaining or overruling a demurrer to the whole of an adverse pleading. *Sutherland vs. Tyler*, 11 How., 251; *Van Schaick vs. Winne*, 8 How., 5; *Phipps vs. Van Cott*, 15 How., 110. This conclusion is, however, disputed in *Nellis vs. De Forest*, 6 How., 413, holding, that only the costs of a motion are allowable. See also *Ives vs. Miller*, 19 Barb., 196; and *Richards vs. Cook*, 1 E. D. Smith, 386, awarding the costs of an appeal.

A similar trial-fee was also held to be the only proper allowance, on the hearing, at general term, of a controversy submitted without action, under section 372. *Neilson vs. Mutual Insurance Company*, 3 Duer, 683.

So also, on the argument on a verdict subject to the opinion of the court. *Wilcox vs. Curtiss*, 10 How., 91. But this view is disputed, and motion costs only, held taxable, in *Potsdam and Watertown Railroad Company vs. Jacobs*, 10 How., 453. The point is, however, now set at rest, and the costs of an appeal taxable on such a hearing, under subdivision 5, as amended in 1858.

As to the costs, properly taxable on the decision on a demurrer, on a postponement of the cause, on the granting of a new trial, or the opening of a judgment, see below, under those special heads.

In *Hager vs. Danforth*, 8 How., 448, a trial-fee was held taxable, on the decision of a cause, submitted by stipulation, upon written arguments.

(e.) COSTS OF SUCCESSIVE HEARINGS.

The allowance of a trial-fee is not confined to one single occasion. It is taxable, on the contrary, upon every actual hearing of the case upon the merits, when not brought up on interlocutory application, or upon appeal for which costs are taxable under subdivision 5, however often those hearings may occur. See *Roosevelt vs. Brown*, 1 Duer, 642; *Mechanics' Banking Association vs. Kiersted*, 4 Duer, 639; 10 How., 400; *Wiggins vs. Arkenburgh*, 4 Sandf., 688; *Ellsworth vs. Gooding*, 8 How., 1; *Van Schaick vs. Winne*, 8 How., 5; *Hager vs. Danforth*, 8 How., 448, above cited.

(f.) APPEALS TO GENERAL TERM.

An appeal from a justice's court, transferred to the Supreme Court, by reason of the incompetency of the county judge to hear it, is, on the original hearing at special term, not within the scope of this section, and the only costs allowable, will be costs of the court below. *Vide Taylor vs. Seeley*, 4 How., 314; 3 C. R., 84; *O'Callaghan vs. Carroll*, 16 How., 327.

Although in the court below, a plaintiff, bringing several actions upon the same instrument, can only recover costs in one, being limited to disbursements in the others, the rule has been held not to apply to appeals from the judgment he may obtain. If separate appeals are brought, he may, if successful, recover his costs, as in other cases. *Pratt vs. Allen*, 19 How., 450.

Considerable discussion arose, at the first introduction of the Code, as to what costs, if any, were taxable, under an appeal from an order, taken under the powers conferred by section 349. See *Livingston vs. Miller*, 4 How., 42; *Wilson vs. Allen*, 4 How., 54; 2 C. R., 26; 7 L. O., 288; *Smith vs. Lynes*, 2 Sandf., 733; *Savage vs. Darrow*, 4 How., 74; *Nicholson vs. Dunham*, 1 C. R., 119.

The point is, however, now set at rest, by the more recent amendments. The costs, provided for by subdivision 5, are only taxable, where the appeal is taken from a judgment, or where the hearing has been on some other of the different categories specified in the section.

Appeals from orders, as such, are clearly not comprised within its operation, and the utmost that can be claimed on such an appeal, by

way of taxable costs, will be ten dollars, the costs of a motion, if allowed by the court.

And this allowance rests, it has been held, in discretion. *Ives vs. Miller*, 19 Barb., 196.

But this leaves open the whole question, already considered, and the cases cited, in the previous subdivision, as to whether, on certain of such appeals, such as from orders sustaining or overruling a demurrer, a trial-fee may not be taxable, instead of the costs of a motion.

But, where the demurrer is only to part of a pleading, it has been held, that the order upon it, is clearly within section 349, and that, on appeal from such an order, only motion-costs can be taxed. *Drummond vs. Hussen*, 1 Duer, 633; 8 How., 246.

Since the amendment of 1862, the costs on an appeal from a surrogate's decision, are governed by the Code. Previous to those amendments, they were taxable under the old fee-bill. See *Sherman vs. Youngs*, 6 How., 318; *Brockway vs. Jewett*, 16 Barb., 590; *Van Pelt vs. Van Pelt*, 16 How., 299.

But, in appeals from special proceedings, the costs are now governed by the Code (section 318). See also chapter 270 of 1854, p. 592, section 3.

If, where the appeal is manifestly defective, the respondent waits till the argument to take the objection, instead of moving to dismiss, in the first instance, he may be refused his further costs. See *Williams vs. Fitch*, 15 Barb., 654; *Webb vs. Norton*, 10 How., 117.

A party may dismiss his own appeal, but cannot do so, without payment of costs to the respondent. *Burnett vs. Harkness*, 4 How., 158; 2 C. R., 100.

If the appeal be dismissed, on motion, the proper costs will be costs of the appeal, and costs of the motion. But, to be collectible, the amount should be fixed in the order, or liquidated under the direction of the court. *Eckerson vs. Spoor*, 4 How., 361; 3 C. R., 70.

And, when an appeal is dismissed with costs, the appellant cannot bring a fresh one, until the costs of the former have been paid. *Vide Dresser vs. Brooks*, 5 How., 75.

(g.) TO COURT OF APPEALS.

Costs of appeals, taken after the passing of the Code, though from a judgment previously pronounced, have been held to be governed by its provisions. Such appeal is a new suit, for the purposes of costs. *Kanouse vs. Martin*, 2 Sandf., 739; *Boker vs. Banks*, 3 C. R., 218; 9 L. O., 135. See, *per contra*, *Doty vs. Brown*, 4 How., 429.

In appeals to this tribunal, there is no distinction between those from a judgment, and those from an order. All are governed by the same

scale, and the same costs are allowable in all, when the appeal is reached and decided, or dismissed, after an argument upon the merits.

White vs. Anthony, 23 N. Y., 164; *Webb vs. Norton*, 10 How., 117.

And full costs were held to be allowable, as a condition of opening a default, taken on the case being reached in its order, under the practice antecedent to the recent revision of the rules in that respect. *Slade vs. Warren*, 1 Comst., 431; *Reed vs. Child*, 4 How., 125; 2 C. R., 69.

But, on a dismissal upon motion, it has been held that an argument-fee will not be allowed, nor will term-fees. The proper costs will be twenty-five dollars, before argument: *Peterson vs. Dickel*, 8 Abb., 259; to which may be added, ten dollars costs of motion, if allowed by the court above. *Kanouse vs. Martin*, 2 Sandf., 739.

And, if the appeal be manifestly defective, it is the duty of the appellant to move to dismiss it forthwith. If, instead of doing so, he waits till the hearing to make his objection, he may be refused his further costs. *Webb vs. Norton*, 10 How., 117 (119); *Williams vs. Fitch*, 15 Barb., 654.

After dismissal of his appeal, the appellant cannot bring a fresh one, until the costs of the former one have been paid. *Dresser vs. Brooks*, 5 How., 75. See generally, as to a dismissal, *Burnett vs. Harkness*, 4 How., 158; 2 C. R., 100, and *Eckerson vs. Spoor*, 4 How., 361; 3 C. R., 70, cited in last subdivision.

Where, under the change of the law, as to appeals to this court from orders granting a new trial, an appeal, originally well taken, had become untenable, the appellant was held entitled to take an order of dismissal, without costs of the appeal, or of the motion. *Gale vs. Wells*, 7 How., 191; *Porter vs. Jones*, 7 How., 192.

The same costs are allowable, on an appeal to this court, in a special proceeding, as in an action. *The People vs. Sturtevant*, 3 Duer, 616; 9 How., 304. See also chapter 270 of 1854, p. 592, section 3.

The percentage, now authorized by subdivision 6, must, of course, be awarded by the appellate court, in terms, and form part of their judgment, though taxable as an item in the costs.

(h.) TERM-FEES.

Under the amendment of 1862, the following conditions are requisite in order to the allowance of a term-fee. The case must be necessarily upon the calendar for that term. It must not have been then tried, or it must have been postponed by order of the court. The term *tried*, is substituted for the term *reached*, employed in former years. What view may be taken as to a case *reached*, but not *tried*, where the postponement is not by order of the court, remains for the present uncertain.

Term-fees cannot be charged by either party, until the cause is actually at issue, even although the issue may have been antedated, and the cause placed on the calendar, by stipulation. *Livingston vs. Vielle Montagne Zinc Mining Company*, 4 Duer, 681; 2 Abb., 255.

Nor can they be allowed, for a term subsequent to an actual settlement of the cause, even although all formal proceedings may have been taken, in ignorance of the fact. *Latham vs. Bliss*, 6 Duer, 661; 13 How., 416.

And, it has been held, that a term-fee cannot be taxed, for a term during which the proceedings of the party are stayed. *Shufelt vs. Power*, 13 How., 89.

A cause is necessarily on the calendar, when it is ready for trial, and regularly put there by the party noticing it. *Sipperly vs. Warner*, 9 How., 332.

But, if so placed there, after an actual discontinuance, no subsequent term-fees can be taxed. A dismissal should be applied for. The case is no longer necessarily on the calendar. *Jennings vs. Fay*, 1 C. R. (N. S.), 231.

Term-fees cannot be allowed, as against a defendant who has never answered; the case is not noticed for trial as against him. *Sluyter vs. Smith*, 2 Bosw., 673 (678); *Tillsbaugh vs. Dick*, 8 How., 33.

A term-fee cannot properly be taxed, for any term, at which the party has had an opportunity of trying the cause, but has neglected to bring it on. *Vide Hendricks vs. Bouck*, 4 E. D. Smith, 461; 2 Abb., 360; *Whipple vs. Williams*, 4 How., 28.

If the cause, when placed on the calendar, is not reached, or, if reached, it is postponed for any cause, without fault of the party, in whose favor the allowance is claimed, it has been held that he is entitled to tax a term-fee. *Fisher vs. Hunter*, 15 How., 156; *Sipperly vs. Warner*, 9 How., 332; *Shufelt vs. Power*, 13 How., 89.

But where the postponement is the act, and at request of the ultimately prevailing party, his adversary being then ready, the former cannot tax a term-fee, for that term. *Hinman vs. Bergen*, 5 How., 245; 3 C. R., 225. See also *Sipperly vs. Warner*, 9 How., 332, *supra*; and *Perry vs. Livingston*, 6 How., 404.

Where the case is placed upon two calendars, for the same term, it cannot be necessarily or properly upon both, and the costs of both cannot be taxable. *Wilson vs. Allen*, 4 How., 54; 2 C. R., 26; 7 L. O., 288. Nor can a term-fee be allowed, when the cause is, by order of the court, transferred from one calendar to the other, and heard at the same term. *Comstock vs. Halleck*, 4 Sandf., 671.

Where an appeal was reached, and refused to be heard, it was held that a term-fee was not taxable for that term, but that it was for a pre-

vious one, during which the appeal was on the calendar. *Eckerson vs. Spoor*, 4 How., 361 ; 3 C. R., 70.

A term-fee is taxable, when the cause, though reached and set down to be heard on a particular day, is not reached at that time, or subsequently during the term. *Ormsby vs. Babcock*, 4 Duer, 680 ; 2 Abb., 253. See also *Post vs. Westervelt*, 4 Sandf., 689.

When the cause, on being called, was referred on stipulation, a term-fee was held taxable, in *Benton vs. Sheldon*, 1 C. R., 134. So also, when referred on stipulation, before the actual call. *Sipperly vs. Warner*, 9 How., 332. But, where referred on motion, before the actual call, the allowance was denied. The motion should, it was held, have been made, without placing the cause upon the calendar. *Perry vs. Livingston*, 6 How., 404. Where the case is referred, after a partial hearing, a trial-fee is taxable. *Vide Wiggins vs. Arkenburgh*, 4 Sandf., 688, *supra*.

Where several causes, involving the same subject, were at issue, and a stipulation was entered into, that all should abide the event of the first, term-fees were allowed in all the cases, though only one was actually on the calendar. *Minturn vs. Main*, 2 Sandf., 737. And, where the costs of the term were, by stipulation between the parties, to abide the event, it was held that such agreement should be enforced, though in excess of the legal number of term-fees, then allowable. *Emmons vs. New York and Erie Railroad Company*, 17 How., 490.

A liberal construction was also put upon this provision, in *Forbes vs. Locke*, 8 How., 218, where, on a discontinuance, the plaintiff was held chargeable with a term-fee, for a circuit, at which the cause was called and passed, upon the first, but, after discontinuance, was reached, on the second call of the calendar.

Where, on the case being reached, it was submitted to another judge, on stipulation that the costs of the term should abide the event, the stipulation was enforced, and the term-fee allowed. *Hager vs. Danforth*, 8 How., 448.

In a case where judgment is awarded upon motion, term-fees are not taxable. And this, even though the moving party had previously placed the case upon the calendar. *Candee vs. Ogilvie*, 5 Duer, 658. See also *Tillspaugh vs. Dick*, 8 How., 33 ; *Kanouse vs. Martin*, 2 Sandf., 739.

And, in various cases, in which a trial-fee was held taxable, on a motion for a new trial on a case, term-fees were also allowed. See *Mechanics' Banking Association vs. Kiersted*, 4 Duer, 639 ; 10 How., 400, and other decisions, above cited, under the head of *Trial-fee*.

And, even where it was held, that only a motion-fee could be allowed for the actual hearing, term-fees were considered to be taxable, for the

previous terms, for which the case was on the calendar. *Moore vs. Cockroft*, 9 How., 479; *Malan vs. Simpson*, 20 How., 488; 12 Abb., 225. This latter case dissents, in terms, from *Jackett vs. Judd*, 18 How., 385, so far as it holds, by implication, that term-fees are not taxable in such a case.

Term-fees are, of course, taxable, in all cases where the prevailing party is entitled to tax the costs of an appeal.

And also, it would seem, in all where he is allowed a trial-fee, on an appeal from an order on a demurrer, on the ground that it is substantially the trial of an issue of law. See cases above cited, under the head of *Trial-fee*. The allowance is expressly made, in *Van Schaick vs. Winne*, 8 How., 5; *Phipps vs. Van Cott*, 15 How., 110.

Term-fees on an appeal, were held not to be taxable, under an order granting a new trial, upon payment of all costs after notice of trial, but that such allowance was confined to the costs of the court below. *North vs. Sargeant*, 13 Abb., 259.

Term-fees cannot be charged, during the progress of a hearing before a referee. *Anon.*, 1 Duer, 596; 8 How., 82; *Anon.*, 1 Duer, 651. The former case overrules, in terms, the decision, in *Benton vs. Bugnall*, 1 C. R. (N. S.), 229, to the contrary effect, and the doctrine of the latter seems clearly unsustainable. A reference is, to all intents and purposes, a trial, for which a trial-fee is taxable, and, when once referred, the case cannot be said to be either necessarily or properly on the calendar.

A term-fee cannot be taxed, where the costs of the same term have been paid, on a postponement under section 413. *Trustees of Penn Yan vs. Tuell*, 9 How., 400.

It remains to consider the following cases, with reference to the line of allowance, and amount of costs, taxable in specific cases.

(i.) COSTS OF A DEMURRER.

The following decisions have reference to the costs taxable on the decision of a demurrer, when leave is given to the plaintiff to amend his complaint, on the one hand, or to the defendant to answer over, on the other, on payment of costs.

When the demurrer is sustained, it has been held, that the party demurring is entitled to tax a fee for proceedings before notice of trial, and also to its payment, as part of his costs. It is the compensation allowed, for drawing the successful demurrer. *Collomb vs. Caldwell*, 5 How., 336; 1 C. R. (N. S.), 41; *Van Valkenburgh vs. Van Schaick*, 8 How., 271. See also *Saratoga and Washington Railroad vs. McCoy*, 7 How., 190, when the result of the readjustment, there granted, is considered. See likewise *Hendricks vs. Bouck*, 4 E. D. Smith, 461; 2 Abb., 360; *Considérant vs. Brisbane*, 1 Bosw., 644; 7 Abb., 345, note.

But, where the demurrer is overruled, with leave to answer over, the successful party cannot claim payment of the above fee, as part of the costs to be paid on answering. It is only taxable once, on an ultimate recovery. *Van Valkenburgh vs. Van Schaick*, 8 How., 271; *Nellis vs. De Forest*, 6 How., 413 (416); *Roberts vs. Morrison*, 11 L. O., 60; *Phipps vs. Van Cott*, 15 How., 110 (121); *Anon.*, 3 Sandf., 756; 1 C. R. (N. S.), 214; *Crary vs. Norwood*, 5 Abb., 219; *Young vs. Gori*, 13 Abb., 13, note.

Subsequent costs before trial, a trial fee for an issue of law, and term-fees, if any incurred, are taxable, as the condition of amending or pleading over, in all cases, together with any necessary disbursements. See the above cases, *passim*. See, however, as to unnecessary term-fees, *Hendricks vs. Bouck*, *supra*.

The same costs are taxable, and payable, as a condition on an amendment or pleading over, on every occasion, on which the case may come before the court on demurrer. *Considérant vs. Brisbane*, 1 Bosw., 644; 7 Abb., 345, note.

And, where defendants demur separately, each may claim them, as against the plaintiff. *Collomb vs. Caldwell*, 5 How., 336; 1 C. R. (N. S.), 41.

In *Comstock vs. Halleck*, 4 Sandf., 671, a plaintiff was held entitled to claim separate bills of costs, as against each of several defendants so defending. This position is, however, controverted in *Phipps vs. Van Cott*, 15 How., 110; and *Buell vs. Gay*, 13 How., 31.

In *Sleight vs. Hancox*, 4 Abb., 245, it was considered that costs could not be taxed, for the hearing of a demurrer, not allowed by law.

The costs on a partial demurrer have been held to be final, not interlocutory, in their nature, and not to be taxable or collectible, until final judgment is rendered. *Palmer vs. Smedley*, 13 Abb., 185; *Moza vs. Sun Mutual Insurance Company*, 13 Abb., 304.

(j.) COSTS ON POSTPONEMENT.

When the cause is postponed, on application of either party, the allowance is regulated by section 314, at ten dollars, together with witnesses' fees.

This amount is specially limited, and cannot be exceeded. *Noxon vs. Bentley*, 6 How., 418. See, however, *Shanks vs. Rae*, 19 How., 540.

These costs are payable *instantly*, and, if not paid, the adverse party may either bring on the cause, or apply for an order compelling their payment. This must be done, however, at once; if delayed, they will then be costs in the cause. *Bulkeley vs. Keteltas*, 2 Sandf., 735; 1 C. R. (N. S.), 119; *Whipple vs. Williams*, 4 How., 28.

If the plaintiff offers to pay the costs of the circuit, the defendant

cannot properly move for a dismissal, under rule 27, when he has taken no steps to obtain them. *Vide Hawley vs. Seymour*, 8 How., 96.

(k.) COSTS OF TRIAL.

Costs of this nature are frequently imposed, when a party seeks to set aside a verdict or judgment, taken against him by default, or to be allowed to amend his pleadings or proceedings, in matter of substance, requiring a postponement of the cause, after the hearing has been actually commenced.

On setting aside a judgment taken by default, the costs imposed will be: costs after notice of trial, trial-fee, all necessary disbursements, and, generally, the costs of the motion to open the default. *Vide Mitchell vs. Westervelt*, 6 How., 265; affirmed, 6 How., 311, note; *Buckingham vs. Miner*, 18 How., 287.

Where leave was given to amend, in connection with a postponement, \$10 costs of the circuit, costs after notice of trial, and costs of motion, were imposed. *Shanks vs. Rae*, 19 How., 540.

In the following case, costs of the term, and costs of motion, without specifying the former, were made payable. *Bradford vs. Greenwich Insurance Company*, 8 Abb., 261. And, at least a trial-fee and disbursements will be imposed, as a condition of granting leave to amend. *Union Bank vs. Mott*, 19 How., 267; 11 Abb., 42. This decision reverses that at special term, granting the amendment on more favorable terms, but seems to leave it unaffected, so far as it imposed the costs of motion. *Union Bank vs. Mott*, 19 How., 114; 10 Abb., 376.

On the plaintiff withdrawing a juror, and being allowed to amend, costs after notice of trial, and a trial-fee, were imposed. *Dewey vs. Stewart*, 6 How., 465.

On leave being given to file a reply, after the cause had been noticed, the court imposed \$10 costs of the term, and the costs of two motions, two having been made on the subject. *Montecarbole vs. Mundel*, 16 How., 141.

When the payment of costs of the term is imposed, on opening a default, it will be confined to those of the specific term, in respect of which the order is made. The applicant will not be bound to pay the plaintiff's witness-fees, for attendance on a previous circuit. Nor will he be liable to pay any allowance, which may have been awarded, on the coming in of the verdict. An allowance can only be awarded once, on a final recovery. *McQuade vs. New York and Erie Railroad Company*, 5 Duer, 613; 11 How., 434. See also, on the last point, *Hicks vs. Waltermore*, 7 How., 370.

On staying judgment in foreclosure, grounded on a default in payment of interest, there were imposed as a condition, payment of the full

costs of the plaintiff, and of all the defendants who had appeared, costs of motion, and an allowance to the plaintiff's attorney. *Lynch vs. Cunningham*, 6 Abb., 94.

On opening a judgment against the comptroller of New York, under the statute of 1859, no costs were imposed, save only costs of motion to abide the event. *Outwater vs. Mayor of New York*, 20 How., 213. In *Millemann vs. The Same*, 18 How., 542, the judgment, though sought to be vacated in that manner, was opened on another ground, costs being imposed.

(l.) COSTS ON GRANTING A NEW TRIAL.

Where a new trial is granted by the general term, on appeal, on payment of costs, a similar scale of allowance will be imposed. They will usually be confined, to the costs of the term at which the trial was had, without including any allowance, the costs of appeal being ordered to abide the event. *McQuade vs. New York and Erie Railroad Company, supra*. And, in *North vs. Sargeant*, 13 Abb., 259, term-fees, on an appeal, which resulted in granting the new trial, were refused, the allowance being confined to costs of the court below.

But, where the new trial has been granted, on the ground that the verdict was against evidence, a more liberal scale may be imposed. The application, in such cases, rests rather in the favor of the court, than as a matter of right. *Ellsworth vs. Gooding*, 8 How., 1. In that case, the court imposed costs, after notice of trial, trial-fee, and disbursements, extra allowance, term-fees, motion-fee on motion, and full costs of appeal.

A trial-fee, and full costs of the motion for a new trial, including term-fees, were imposed, in *Mechanics' Banking Association vs. Kiersted*, 4 Duer, 639; 10 How., 400.

(m.) COSTS IN OTHER CASES.

The costs on the entry of a judgment by confession, are specially provided for by section 384; those of proceedings supplementary to execution, by section 301.

§ 337. *Extra Allowance.*

The provisions of sections 308 and 309 afford, to a certain degree, the means of remedying the unequal measure of justice, which the Code holds forth to litigant parties, as regards the amount of costs awarded to them, when successful.

The remedy thus afforded is, however, very imperfect. It fails to reach altogether, a numerous class of cases, in which an innocent party

has no relief whatever, as regards the expenses of a litigation, in which he has been involved, without blame on his part, and, in a still larger class, a complete adjustment of the mutual equities of the parties, as regards the measure of allowances to them, is left wholly unattainable.

A purely equitable proceeding, in which, specific relief, not involving the recovery of money, or the recovery or title to property, is sought, may be instanced as an example of this latter inconvenience. However proper in other respects, there is no pecuniary basis or value of subject-matter involved, upon which an order for allowance can be grounded, and none therefore can be made. *Vide Sprong vs. Snyder*, 6 How., 11; 1 C. R. (N. S.), 178; *Osborne vs. Betts*, 8 How., 31; *Powers vs. Wolcott*, 12 How., 565; *Gray vs. Robjohn*, 1 Bosw., 615; *Weeks vs. Southwick*, 12 How., 170; *Buchanan vs. Morrell*, 6 Duer, 658; 13 How., 296. Not so, however, as to a case, partly legal and partly equitable, involving a recovery of money, in fact. *Davis vs. Glean*, 14 How., 310. See also, as to a proceeding in the nature of a *quo warranto*, *The People vs. Flagg*, 25 Barb., 652; 15 How., 36.

And, when actually within the provision of the section, the right may be lost, by the omission to assess the value of property in question. See *Flint vs. Richardson*, 2 C. R., 80; *Van Rensselaer vs. Kidd*, 5 How., 242; 3 C. R., 224. A more liberal rule on the subject is, however, laid down, in *Saratoga and Washington Railroad Company vs. McCoy*, 9 How., 339.

And, whether the inconvenience in this and the preceding class of cases may not now be cured, in some slight degree, by the amendment of section 309 in 1858, so far as regards the award of an allowance in discretion, in cases, where the amount of the subject matter involved is ascertainable, from the pleadings or otherwise, without going through the actual process of assessment, seems to admit of a question.

Nor can an allowance be granted, on a statutory reference of a claim presented to executors. *Van Sickler vs. Graham*, 7 How., 208.

See also, cases below cited, with reference to the allowance, now claimable as of right, under the present section 308, and in which the controversy has been held not to fall within the terms of that section.

And, generally speaking, the measure of justice thus attainable, is very uncertain and unsatisfactory, depending, as it does entirely, upon the peculiar views on this subject, of the judge before whom the question may be brought. It often happens, too, that the pecuniary value of the recovery, or claims resisted, on which alone the rate of allowance can be based, may bear a most trifling ratio to the real value of the matter in controversy, and a still more trifling one, to the labor and expense of evolving the real question at issue, and submitting it to the decision of the court or jury.

It has been held, however, that the provisions of the Code, as to allowances, do not affect the powers of the court, sitting in equity, to grant counsel fees, out of a common fund belonging to the parties, not by way of allowance, under section 309, but as part of the general relief awarded, on the final disposition of the cause by the judge who tried it. See *Hotaling vs. Marsh*, 14 Abb., 161 (164).

The law upon the subject has been liable to continual fluctuation since the original passage of the Code, as shown above, in section 330, where the sections are cited.

In 1848, the allowance was discretionary, but limited to actions for the recovery of money, or real, or personal property. It was confined to difficult and extraordinary cases.

In 1849, a power was added to grant it, in cases where the prosecution, or defence, was unreasonably or unfairly conducted, and the class of cases now comprised in section 308, was added to those comprised in the previous authority.

In both years, the value of real or personal property in question, was required to be determined by the jury, court, or referees.

This state of affairs continued till 1857. In that year, the power of granting discretionary allowances was wholly taken away.

But, at the same time, the power of granting an allowance, as of right, to the plaintiff, in the cases specified in section 308, was inserted as it now stands.

From 1857 to 1858, the court possessed no power to grant any allowance whatever to a defendant, however hard his case might be. Nor could the plaintiff have one, except as of right, and in the cases specified.

And the power of granting an allowance, in cases where the prosecution or defence has been unreasonably or unfairly conducted, stricken out upon the amendment in the former year, has never been restored.

In 1858, the power of granting discretionary allowances to either party, was restored generally. In 1859, it was limited as it now stands, except as regards proceedings for partition. In these, a discretionary allowance may be applied for, in addition to the statutory one provided by section 308.

There seems to be no restriction on the granting an allowance, as against the people, on the failure of a suit instituted on their behalf. *The People vs. Clarke*, 5 Seld., 349; affirming *same case*, 11 Barb., 337.

A defendant, entitled to tax his costs as against a plaintiff, who has failed to obtain a more favorable judgment, than the amount offered under section 385, could not, it was held, claim an extra allowance.

As to the judgment, he was not the prevailing party. *McLees vs. Avery*, 4 How., 441 ; 3 C. R., 104.

(a.) ALLOWANCE OF COURSE.

Since the amendment of 1857, the plaintiff is entitled to claim an allowance, of course, upon the recovery of judgment by him, in any of the following classes of cases :

- In any action, for partition ;
- For foreclosure of a mortgage ;
- In which a warrant of attachment has been issued ;
- For an adjudication upon a will, or other instrument in writing ;
- In proceedings to compel the determination of claims to real property ;



From 1849 to 1857, allowances might be moved for in the same classes of cases, but they then rested in discretion, and might be made to either party.

Now, the plaintiff alone can claim the benefit of the provision ; a defendant, though prevailing, is remediless under it, save only in the single case of partition, in which he may invoke the discretionary powers of the court.

And the plaintiff, though entitled, as of right, can only claim to the extent awarded by the section, and according to the decreasing scales of percentage there provided. Sixty dollars is the maximum obtainable, and the holder of a claim of \$1,600, is entitled to the same measure of indemnity, as the holder of another of a hundred times that amount.

Section 309 provides for ascertaining the exact amount taxable, by prescribing, that the value on which it is to be estimated, in the different cases, must be determined by the court, or by the commissioners, in case of actual partition.

Wherever, therefore, the case falls within the limits imposed by section 308, the plaintiff should be careful to obtain a determination as to that value, from the court, at the time of the trial, or from the commissioners in question. And such determination had better be obtained, in all cases, with a view to application for a discretionary allowance, if made. The phraseology, as it now stands, is less strict than in 1849. Under the then provision, an omission to have the value properly assessed, was held fatal to an application. See *Flint vs. Richardson*, 2 C. R., 80.

No particular form of determination is prescribed. As a general rule, it will appear upon the face of the verdict, report, or decision, as an essential part of the adjudication. In such cases, no additional statement seems requisite. But, in that class of cases, in which the

value of the subject-matter, is extraneous to the main points of the controversy, a separate finding or statement should be applied for.

Under section 309, the same rates of allowance are claimable by a plaintiff in foreclosure, in respect of the enforcement of an instalment, falling due after judgment. But he cannot, in such case, claim more than an aggregate allowance to the extent prescribed.

The allowances fixed by section 308, can only be made to the plaintiff, and only to the amount mentioned in the section. The court has no discretion on the subject. Nor can an extra allowance be granted to any other party, in that class of cases. *Williams vs. Hernon*, 13 Abb., 297.

In foreclosure, the plaintiff is entitled to tax the statutory allowance as of right, without any special direction by the court. *Hunt vs. Middlebrook*, 14 How., 300.

A suit for foreclosure of a mechanic's lien, has been held not to be a suit for foreclosure of a mortgage, within the meaning of section 308, and that the plaintiff cannot claim the statutory allowance in such cases. *Randolph vs. Foster*, 3 E. D. Smith, 648; 4 Abb., 262.

And the provisions of the statute, do not extend to an application for the distribution of surplus moneys, in a suit for an ordinary foreclosure. The court has no power in such a case. *New York Life Insurance and Trust Company vs. Vanderbilt*, 12 Abb., 458.

The statutory allowance is claimable by the plaintiff, in an action in which a warrant of attachment has been issued, though no property may in fact have been attached. *Jackson vs. Figaniere*, 15 How., 224.

A suit for an adjudication upon a will or other instrument in writing, must be literally for that purpose, to fall within the scope of the section. It must still be a proceeding, for the construction of such an instrument, as the wording stood in 1849. The change of phraseology in 1857, did not, it was held, change the principle. Such allowance was accordingly held not to be taxable, in an action to restrain the violation of a written agreement, or in proceedings for the enforcement of an instrument in writing, though the construction of that instrument might be collaterally involved. *Gray vs. Robjohn*, 1 Bosw., 618.

A proceeding to set aside a deed, was held not to be an action to compel the determination of a claim to real property. That term is only applicable to the proceedings, authorized by the Revised Statutes, for that direct purpose. *Bridges vs. Miller*, 2 Duer, 683.

Nor, it has been held, does such term apply, to proceedings to enforce a mechanic's lien, *Randolph vs. Foster*, *supra*; or, for the purpose of enforcing an assessment, on lauds held in common. *Powers vs. Barr*, 24 Barb., 142.

(b.) FORMER ALLOWANCE IN SAME CLASS OF CASES.

Prior to 1857, the allowance in the same class of cases rested in the discretion of the court.

In *Austin vs. Lashar*, 2 C. R., 81, it was held that that portion of the then section was governed by the remaining clauses, and that this particular allowance was not claimable under the then provision, as of course, unless the case was difficult or extraordinary, or the prosecution, or defence, unreasonably, or unfairly conducted. See also *Bridges vs. Miller*, 2 Duer, 683, above cited.

But, in *Austin vs. Lashar*, it was held that it was not necessary, in the same class of cases, that there should have been an actual trial, provided the case was brought, in other respects, within the terms of the section, as it then stood.

In *Woodward vs. Grien*, however, 2 C. R., 13, it was held, that an allowance would be made, in all cases, in which an attachment had been issued, without regard to any other circumstances.

In *Davison vs. Waring*, 9 How., 254, it was refused, where the plaintiff had simultaneously commenced eight actions, and the defendant at once made an offer and allowed judgment. This decision is, however, chiefly based on the peculiar circumstances.

But the whole of these distinctions are now immaterial, the original provisions being superseded by the present.

(c.) TENDER OR SETTLEMENT.

The amendment of 1862, settles all question upon this subject, the plaintiff being now entitled to one-half of the rates specified in section 308, on a settlement of any of the actions affected by that section, before judgment.

Prior to that amendment, considerable discussion was had upon the subject. The section, as it stood, gave a right to the allowance only upon the recovery of judgment. Its scope was, however, sought to be extended, by exercise of the discretionary powers of the court, in some few cases of the above description.

In *Brown vs. Safeguard Insurance Company of New York and Pennsylvania*, 7 Abb., 345, it was held, that, where an attachment had been issued, the defendants were liable to pay the statutory allowance, as well as the costs of the plaintiff, on a settlement before judgment. See also, to the same effect, *Gelpeck vs. Leather Cloth Company*, 12 Abb., 361, note.

Brace vs. Beatty, 5 Abb., 221, decides to the same effect, as to a tender before judgment, not being good, unless the statutory allowance was comprised. This case stands, however, reversed at general term.

and, it is held that, the allowance being only given on the recovery of judgment, the direct language of the statute must control. *Brace vs. Beatty*, 7 Abb., 445. And this seems to have been the safer, though the less equitable construction.

Pratt vs. Conkey, 15 How., 27, was to the same effect. It held, that the effect of a tender of debt and ordinary costs before judgment, was to deprive the plaintiff of his right to an allowance, on a subsequent recovery. The same was held in *Bostwick vs. Tioga Railroad Company*, 17 How., 456, which laid down also, that the case was directly within the scope of section 322, which limits the costs, on a settlement before judgment, to those taxable under section 304. See also *Pratt vs. Ramsdell*, 16 How., 59; 7 Abb., 340, note.

But, it was also held, that the above doctrine as to a tender, was, in strictness, confined to common-law actions, leaving the award of an allowance in equity cases, within the discretion of the court, exercisable on an application for adjustment after tender, by allowing the plaintiff to go on and take judgment, notwithstanding the tender, when the equities of the case demanded it. *Pratt vs. Ramsdell*, 16 How., 59; 7 Abb., 340, note. In that case, however, this relief was refused, and the plaintiff confined to strict costs, under section 304, on a settlement before judgment, on the basis of a tender made, but without prejudice as to the plaintiff's claim for an allowance.

N. B.—The above decision was made at the time when the plaintiff's claim to an allowance on foreclosure rested, as now, solely in right, where judgment was recovered. The same principles were applied in *Bartow vs. Cleveland*, 16 How., 364; 7 Abb., 339, decided in 1859, at the time when the court had power to grant an additional allowance in discretion.

In *New York Fire and Marine Insurance Company vs. Burrell*, 9 How., 398; 12 L. O., 252, it was held, that the defendant, by tender of debt and ordinary costs before judgment, could not defeat the plaintiff's right to ask for an extra allowance. The statutory provisions as to tender applied, it was held, to common-law actions only. See also *Connecticut River Banking Company vs. Voorhies*, 3 Abb., 173.

N. B.—At the time of these two decisions, the allowance rested in discretion, and not in right. As to the statutory provisions as to tender being inapplicable to equity cases, see likewise *Thurston vs. Marsh*, 14 How., 572; 5 Abb., 389.

It may be remarked, that the provision in section 322, confining the costs of a settlement before judgment, to those prescribed by the Code, is confined to common-law actions, *i. e.*, those mentioned in section 304, and does not extend to that class of cases in which the costs rest in the discretion of the court.

(d.) ALLOWANCE IN DISCRETION OF COURT.

The last subdivision but one falls, in strictness, under this head, but inasmuch as the subject-matter in those cases, was the same, in substance, as that in respect of which an allowance is now claimable by the plaintiff, as of course, and as the former regulations are now merged in the present, it seemed more convenient to anticipate its consideration.

The class of cases now to be considered, includes all, which do not fall within the scope of section 308.

Those which are comprised within that section, with the single exception of partition, are now wholly taken out of the scope of section 309. It is no longer within the power of the court to grant any allowance whatever, in cases of that class. Whatever the nature of the suit, however equitable the claim of the successful party to relief of this nature, it cannot be extended. The mere fact that he has issued an attachment at the commencement of the action, will, for instance, disentitle a plaintiff to maintain a motion of this nature, however large may be the amount in controversy, or however complicated the nature of the controversy itself. This is clear, from the terms of the section as now amended. See also *Williams vs. Hernon*, 13 Abb., 297, and *Hotaling vs. Marsh*, 14 Abb., 161; reversing *same case*, 13 Abb., 297, note. See likewise, as to the period from 1857 to 1858, *Hunt vs. Middlebrook*, 14 How., 300; *Burnett vs. Westfall*, 15 How., 420 (425), carrying out the same principle. From 1858 to 1859, however, the power existed.

Where the verdict was rendered, before the suspension of the power in 1857, an order for an allowance was made afterwards, it being held that the powers of the court had reference, not to the time of application, but to that of the adjudication itself, at which time, the right of the successful party to relief actually accrued. *Cook vs. New York Floating Dry Dock Company*, 1 Hilt., 556.

(e.) LIMITATIONS OF POWER OF THE COURT.

But, under the section, as it stands, the power of the court can only be exercised, in cases where a trial has been had, and the case must, in itself, be difficult and extraordinary.

Before 1857, an allowance might also be made, in cases where the prosecution or defence was unreasonably or unfairly conducted; but this authority was taken away, upon the amendment of that year, and has not since been restored. The allowance, when granted, must also be based upon the amount of the recovery or claim of the party, or of the subject-matter involved.

It is proposed to enter upon the consideration of these different conditions, in the above order, and then to pass on to the circumstances attendant on the application itself.

(f.) TRIAL HAD.

In all cases where an application is now made to the court, a trial must have been had, by the terms of the section.

An allowance was held awardable, in a case where the plaintiff voluntarily submitted to a nonsuit, after evidence given. *Allaire vs. Lee*, 4 Duer, 609; 1 Abb., 125; *Woods vs. Illinois Central Railroad Company*, 20 How., 285.

So also, on the decision on a demurrer, on which final judgment was rendered. *Small vs. Ludlow*, 1 Hilt., 307.

Not so, however, on the decision on a frivolous demurrer. *Same case*; *Beers vs. Squire*, 1 C. R., 84. See, however, *per contra*, *Fowler vs. Houston*, 1 C. R., 51.

So likewise, an allowance may be made, on a default taken upon the call of the cause. *Rogers vs. Degan*, 4 Bosw., 669; 19 How., 119; 10 Abb., 313.

But an assessment before a sheriff's jury, on a default to answer, is not a trial, within the meaning of the section. *Randolph vs. Foster*, 3 E. D. Smith, 648; 4 Abb., 262. Nor are proceedings, for distribution of surplus moneys in foreclosure. *New York Life Insurance and Trust Company vs. Vanderbilt*, 12 Abb., 458.

The trial referred to in the section, is the original trial of the cause. The provision is not applicable to judgment on appeal. *Van Rensselaer vs. Kidd*, 5 How., 242; 3 C. R., 224; *Wolfe vs. Van Nostrand*, 2 Comst., 570; 4 How., 208; 2 C. R., 130; *Martin vs. McCormick*, 3 Sandf., 755; 1 C. R. (N. S.), 214. And, in the last case, it was held to be too late to move then for an allowance in respect of the original trial.

And the trial must be the final disposition of the case, at the circuit or special term. Where a new trial is granted, on payment of costs, an allowance, though actually made, cannot be enforced as part of them. *McQuade vs. New York and Erie Railroad Company*, 5 Duer, 613; 11 How., 434; *Hicks vs. Waltermire*, 7 How., 370. See, however, *per contra*, *Ellsworth vs. Gooding*, 8 How., 1, as to a new trial granted as a matter of favor, and not for error of law.

Nor does it form part of costs, to be paid as a condition, on leave to amend after trial, where the judgment has been actually reversed. *Troy and Boston Railroad Company vs. Tibbets*, 11 How., 168.

And, where a second trial was had, it was held that the allowance could only be based on the recovery on that occasion, without regard to

any other amount given on the previous trial. The allowance can only be made once. *Steight vs. Hancox*, 4 Abb., 245.

(g.) DIFFICULT AND EXTRAORDINARY.

To come within the present provision in section 309, the case in which an allowance is asked for, must be difficult *and* extraordinary. This wording dates from 1858. Prior to 1858, the corresponding provision in section 308 was, in difficult *or* extraordinary cases.

It has been considered that this slight verbal difference, has a great influence in abridging the discretion vested in the court, and that, to authorize an allowance to be made in it, the case must now be both difficult, and also extraordinary, instead of its being, as before 1857, in the power of the court to grant one, in either contingency. See *Fox vs. Fox*, 22 How., 453. See, however, this view disputed, and the power to grant relief, under either state of circumstances, asserted, in *Woods vs. Illinois Central Railroad Company*, 20 How., 285.

In several decisions, attempts have been made to limit, or to define the precise meaning of these two terms. See in particular *Fox vs. Fox*, and *Woods vs. Illinois Central Railroad Company*, *supra*; *Fox vs. Gould*, 5 How., 278; 3 C. R., 209; *Gould vs. Chapin*, 4 How., 185; 2 C. R., 107.

But these, and numerous other cases, each enouncing and supporting some view, of detached or partial application, all fall short of establishing any definite or reliable canon, as to the precise extent and effect of the two terms in question. The reported decisions oscillate, between the extremes, of liberality on the one hand, and of strictness of construction on the other. The real state of the case is well expressed in *Sackett vs. Ball*, 4 How., 71; 2 C. R., 47, where the learned judge (Harris) sums up his examination of the subject thus: "After all, I am obliged to leave the question where I commenced with it; each case to be determined by its own peculiar circumstances, and the peculiar views of the judge before whom the application is made, on the subject of costs." See likewise similar *dictum*, in *Fox vs. Gould*, 5 How., 278; 3 C. R., 209.

In the following cases, chiefly in the country districts, the provisions of the sections, from time to time, have been strictly construed. Even the fact that the trial has been long and protracted, does not, it has been held, render the case difficult or extraordinary. *Fox vs. Fox*, 22 How., 453; *Powers vs. Wolcott*, 12 How., 565; *Fox vs. Gould*, 5 How., 278; 3 C. R., 209; *Sands vs. Sands*, 6 How., 453; *Gould vs. Chapin*, 4 How., 185; 2 C. R., 107; *Hall vs. Prentice*, 3 How., 328; 1 C. R., 81; 7 L. O., 138; *Howard vs. Rome and Turin Plank Road Com-*

pany, 4 How., 416; *Dexter vs. Gardner*, 5 How., 417; 1 C. R. (N. S.), 80.

The nature of the trial, and the fact that the ordinary expenses have been increased, without necessity, have also formed grounds for the refusal of this relief. *Sackett vs. Ball*, 4 How., 71; 2 C. R., 47; *Mathewson vs. Thompson*, 9 How., 231; *Tillman vs. Powell*, 13 How., 117. See also, as to a claim, materially reduced by the defence, *Fish vs. Torrance*, 5 How., 317. Nor, it has been held, will it be proper to make an order, pending a long litigation, before there is a chance of its being terminated. *Vide Powers vs. Wolcott*, 12 How., 565.

The nature of the defence may, on the other hand, weigh materially with the court, in favor of granting an allowance to a plaintiff, when a case, not otherwise difficult, has been made so, by that means. *Fort vs. Gooding*, 9 Barb., 388.

In *Rice vs. Wright*, 3 How., 405, it was laid down that, in no case, ought an allowance to be granted, as against a surety, defending properly, and in good faith, his case being one of hardship.

In the first and second districts, a more liberal construction of the section has generally prevailed, and the principle of granting an allowance, as a rule, rather than as an exception, has, in all really contested cases, been carried out; a practice which was, in fact, temporarily established by a rule of court, in the second district. See *Schwartz vs. Poughkeepsie Mutual Insurance Company*, 10 How., 93; *Dyckman vs. McDonald*, 5 How., 121; *Niver vs. Rossman*, 5 How., 153; 3 C. R., 192; *Woods vs. Illinois Central Railroad Company*, 20 How., 285. See likewise suggestion in *Graham vs. Milliman*, 4 How., 435. And it has been made, even in a judgment taken by default. *Rogers vs. Degan*, 4 Bosw., 669; 19 How., 119; 10 Abb., 313. The power of the court was there considered to have a wider application than to the mere trial, and to have general reference to the character of the case; *Vide McQuade vs. New York and Erie Railroad Company*, 5 Duer, 613; 11 How., 434, there cited. See likewise, as to making an allowance on an inquest, on the principle of giving a moderate counsel-fee, *Sheldon vs. Allerton*, 2 Sandf., 630.

The court is not fettered in its discretion, by the nature of the action, but may grant an allowance, in a case, partly legal and partly equitable, where the recovery of money is in fact sought. *Davis vs. Glean*, 14 How., 310.

(h.) UNREASONABLE OR UNFAIR CONDUCT OF CASE.

Since 1857, this has ceased to be a ground on which an allowance can be specifically based. A short notice of the decisions prior to that year may, however, be convenient, especially as the fact, if existent,

may possibly still have some influence upon the court, in awarding relief of this nature, upon the other still subsisting grounds. Unreasonable conduct, on one part, may possibly be held as rendering the case difficult or extraordinary, as respects the other, or at least dispose the court to give a wider construction to those terms. See this view taken, as to the powers of the court, under the Code of 1848, the provision in which was substantially the same as at present. *Fowler vs. Houston*, 1 C. R., 51. It is disapproved, nevertheless, in *Hall vs. Prentice*, 3 How., 328; 1 C. R., 81; 7 L. O., 138; and *Beers vs. Squire*, 1 C. R., 84. The latter was, however, a case of judgment upon motion.

Under the power conferred by the amendment of 1849, it was not necessary that an actual trial should have been had. It was sufficient, if the case made by the pleadings, presented the characteristics mentioned in this part of the section. An allowance on this ground was granted, accordingly, on a default to answer a complaint, amended after a demurrer which prevailed. *Hauselt vs. Taussig*, 3 C. R., 236. So also, where a false answer had been put in, and, after the case had been thrown over a circuit, the defendants, on the case being reached, did not appear. *Willard vs. Andrews*, 4 How., 65. See likewise *McQuade vs. New York and Erie Railroad Company*, 11 How., 434 (438); 5 Duer, 613.

Where, in an action on a promissory note, the defence consisted of a mere denial, it was held that an allowance should be granted, on slight evidence of unreasonable and unfair conduct, beyond what appeared on the pleadings, being adduced. *Anonymous*, 12 How., 317. See, however, *per contra*, *Goodyear vs. Baird*, 11 How., 377.

A discontinuance by the plaintiff, on the cause being ready for trial, has also been considered as sufficient evidence of unreasonableness, to support an order for allowance. *Moffatt vs. Ford*, 14 Barb., 577. It is a confession that the suit is groundless. See *Danenhover vs. March*, 4 Abb., 254; *Moore vs. Westervelt*, 1 C. R. (N. S.), 131 (135); 3 Sandf., 762.

Any conduct of the plaintiff, antecedent to the action, cannot be taken into account, as bearing upon the question of an unreasonable prosecution. *Burnett vs. Westfall*, 15 How., 420 (424).

A defendant, entitled to costs, as against a plaintiff, recovering less than the amount offered, could not, it was held, claim an allowance. Though so entitled, he was not the prevailing party. *McLees vs. Avery*, 4 How., 441; 3 C. R., 104. See, however, *per contra*, as to an allowance made, to a defendant reducing the plaintiff's claim below fifty dollars, *Brady vs. Durbrow*, 2 E. D. Smith, 78.

(i.) VALUE TO BE ASCERTAINED.

But, in order to grant any order whatever for an allowance, there must be some ascertained value, of the amount of the recovery or claim of the successful party, or of the subject-matter involved in the suit. Without such ascertained value, there is no basis whatever on which to calculate the percentage, to which the power of the court is limited by the section. See, on this point, *Sprong vs. Snyder*, 6 How., 11; 1 C. R. (N. S.), 178; *Osborne vs. Betts*, 8 How., 31; *Powers vs. Wolcott*, 12 How., 565; *Gray vs. Robjohn*, 1 Bosw., 618; *Weeks vs. Southwick*, 12 How., 170; *Buchanan vs. Morrell*, 6 Duer, 658; 13 How., 296; and *The People vs. Hagg*, 25 Barb., 652; 15 How., 36, cited at the commencement of the present section.

Where the allowance is made to the plaintiff, it can only be properly grounded on the amount of his actual recovery, irrespective of what his claim may have been. *Vide Wilkinson vs. Tiffany*, 4 Abb., 98. When granted to a defendant, in respect of a successful defence, the amount of the plaintiff's claim will, for the most part, form a proper criterion. See *Brady vs. Durbrow*, 2 E. D. Smith, 78; *Wilkinson vs. Tiffany*, *supra*. The case of judgment for the defendant, on a counter-claim, exceeding the amount of the plaintiff's demand, will, however, be an exception to this rule. The former may then claim, upon that amount, as being a recovery on his part.

But, where the action was for damages, for taking property, it was held that the value of the subject-matter involved, rather than that of the plaintiff's demand of damages, ought to govern, in fixing the allowance to a successful defendant. *Saratoga and Washington Railroad Company vs. McCoy*, 9 How., 339.

As to the consequence of a failure to determine the value of the subject-matter, at the trial, under the more restricted form of the power, prior to 1858, see *Flint vs. Richardson*, 2 C. R., 80; *Van Rensselaer vs. Kidd*, 5 How., 242; 3 C. R., 224.

But, even under that more restricted state of the powers of the court, the objection that the value had not been properly ascertained, though tenable, if taken in due season, was held waivable, if omitted to be raised on the original application. *Dresser vs. Jennings*, 3 Abb., 240.

Where the case has been twice tried, an allowance can only be based upon the last, without regard to the measure of the former recovery. *Sleight vs. Hancox*, 4 Abb., 245.

An allowance, for an amount exceeding the statutory percentage, is void, and the order granting it, is reviewable upon appeal. *Wilkinson vs. Tiffany*, 4 Abb., 98.

(j.) APPLICATION FOR.

The motion for this purpose can only be made to the court, before which the trial is had, or the judgment rendered. Rule 52 (81).

Where the trial is by jury, the usual and proper time to make the application, will be on the rendition of the verdict, whilst both parties are present in court, and the facts are fresh in the mind of the judge. In this case, no moving papers will be necessary. *Vide Saratoga Railroad Company vs. McCoy*, 9 How., 339. The same rule will, of course, apply to a case, where the decision of the court is rendered in the presence of the parties.

It has been held, that the application may be made *ex parte*, before the judge who tried the cause, if made during the same term at which the trial was had. *Mitchell vs. Hall*, 7 How., 490. But, whether this doctrine is sustainable, seems doubtful. In all cases, the adverse party should be heard, and, unless the application is made at the trial, as above, he ought to have notice. See *Howe vs. Muir*, 4 How., 252; 3 C. R., 21.

It has been held, that the application must be made, during the term at which the trial was had, and before the judge who then presided, and a motion, made before another judge, has been denied on that ground. See *Sackett vs. Ball*, 4 How., 71; 2 C. R., 47; *Flint vs. Richardson*, 2 C. R., 80; *Dyckman vs. McDonald*, 5 How., 121; *Osborne vs. Betts*, 8 How., 31.

Provision was made to the same effect, and other regulations instituted on the subject, by a general rule of the second district, issued on the 13th of January, 1852; but those regulations are now wholly repealed, by the subsequent general rules of the same district, adopted on the 24th of October, 1856.

There is no doubt whatever, of this being at once the most proper and the more expedient course, wherever practicable. There can be as little doubt, however, but that the rule is too strictly laid down in the above cases, and that the application is, in fact, cognizable, before any other judge of the court in question. Only, in that case, the circumstances on which the claim for an allowance is based, must be shown by affidavit, and the motion noticed in due course; and the motion itself must be made at special term, and not at chambers, except in the first district, under section 401. *Vide Main vs. Pope*, 16 How., 271. It is the court, not the judge, in which the power is vested. See *Mann vs. Tyler*, 6 How., 235; 1 C. R. (N. S.), 382; *Saratoga and Washington Railroad Company vs. McCoy*, 9 How., 339. (N. B.—Opinion, not head-note.)

In *The People vs. Clarke*, 11 Barb., 337, the allowance appears also

to have been made, on special motion, though whether to the judge who tried the cause, or to another, does not appear.

And, in a case tried by a referee, an application by motion, founded on proper evidence, is the only course admissible. The referee himself has no power to pass upon the question. *Howe vs. Muir*, 4 How., 252 ; 3 C. R., 21.

The proper course, under these circumstances, will be to obtain and present to the court, the referee's certificate of the facts which occurred at the trial. This is the most convenient course, but, in that certificate, the referee must not assume to pass upon the question of right. That question rests, not with him, but with the court. *Main vs. Pope*, 16 How., 271 ; *Howe vs. Muir*, *supra* ; *Gould vs. Chapin*, 4 How., 185 ; 2 C. R., 107.

In all cases, such certificate should be procured, as being the best means of arriving at a just conclusion. *Fox vs. Gould*, 5 How., 278 ; 3 C. R., 209. In *Sackett vs. Ball*, however, 4 How., 71 ; 2 C. R., 47 ; the question seems to have been presented on affidavit only.

An application of this nature, in a suit against executors, will be premature, if made, before they are adjudged to be chargeable with costs.

But both applications, if made, may be brought on together. *Mersereau vs. Ryerss*, 12 How., 300. See, as to such an allowance, *Fort vs. Gooding*, 9 Barb., 388.

An order of this description is reviewable on appeal, on a question of right, as where the statutory limit has been exceeded. *Wilkinson vs. Tiffany*, 4 Abb., 98. Or by a motion to vacate, but, on such application, the moving party must show that the objection was raised in due season. *Dresser vs. Jennings*, 3 Abb., 240.

But, as regards the exercise of discretion, such an order is not reviewable. *The People vs. Clarke*, 5 Seld., 349 ; *Decker vs. Gardiner*, 4 Seld., 29 ; *Cook vs. Dickerson*, 5 Sandf., 663 ; *Dickson vs. McElwain*, 7 How., 138 ; *Dresser vs. Jennings*, *supra* ; *Dana vs. Fiedler*, 1 C. R. (N. S.), 224.

In this last case, however, it was considered, that an order made, on special affidavit, on grounds extraneous to the actual trial, as for unreasonable or unfair conduct of the cause, might be reviewable.

The application resting purely in discretion, costs are not usually allowed. See *Schwartz vs. Poughkeepsie Mutual Fire Insurance Company*, 10 How., 93 (94).

When granted, the award may either be of a fixed sum, not exceeding the amount of percentage allowed by the section (*Vide Wilkinson vs. Tiffany*, *supra*), or of a percentage, as such. In the former case, the gross amount will be specified in the order itself ; in the latter it

will be calculated by the clerk, on taxation, on the principle fixed by the order.

When obtained, the order should be entered and filed with the clerk, in the usual manner, when the application is made upon motion, and it will be proper to serve a copy upon the adverse party. When made upon the actual trial, and entered upon the clerk's minutes, that entry will be sufficient, and no formal order need then be made. After taxation, the original order, if entered, ought properly to be annexed to, and filed with the bill of costs, as evidencing the clerk's authority to tax the allowance as granted.

§ 338. *Disbursements.*

The prevailing party is also entitled to tax, as part of his costs, his necessary disbursements. Section 311.

They include:

The fees of officers allowed by law;

The fees of witnesses;

The reasonable compensation of commissioners, in taking depositions;

The fees of referees;

And the expense of printing the papers for any hearing, when required by a rule of the court.

These disbursements must be stated in detail, and verified by affidavit. Same section.

A very extended meaning is given to the term "disbursements," as used in the Code, and it is held to be no longer fettered by the strict rules of the Revised Statutes, but to extend to all necessary expenses incurred, in prosecuting or defending the action, by way of indemnity to the successful party, in *Finch vs. Calvert*, 13 How., 13. See also, *Case vs. Price*, 17 How., 348 (351); 9 Abb., 111.

The right to recover disbursements, follows that to recover costs, and the amount forms part of them. Where, therefore, the defendant is entitled to tax costs, as against the plaintiff, in respect of an insufficient recovery, the latter cannot claim his, but those of the former are taxable. *Peet vs. Warth*, 1 Bosw., 653. See, likewise, numerous other cases, above cited, in section 332, under subdivision of limitation of costs to amount of damages.

The statement of disbursements must be made on the face of the costs, as submitted for taxation. It is not sufficient for them to appear upon the affidavit. *Shannon vs. Brower*, 2 Abb., 377. See, however, *per contra*, *Hager vs. Danforth*, 8 How., 448.

The disbursements being thus stated, a general affidavit of their cor-

rectness will be sufficient, save only as regards the fees of witnesses. On that subject the affidavit must be specific, and is often separately presented. Either may be, and usually is made, by the attorney for the prevailing party, or by his managing clerk.

It will be convenient to consider :

- 1st. The classes of disbursements specified in the section ;
2. Such others as are taxable ;
3. The nature of the statement and affidavit required.

(a.) FEES OF OFFICERS ALLOWED BY LAW.—CLERK'S FEES.

The fees of this officer are specifically prescribed by section 312.

He receives, on every trial, from the party bringing it on, \$1 ;

On entering a judgment, by filing a transcript, six cents ;

On entering judgment, where the record is filed in his office, fifty cents, in courts where he is not, and \$1 in courts where he is, a salaried officer ;

And, for copies of papers, if taken, five cents per folio.

Beyond these, he is entitled to no fee whatever, for services in a civil action.

But, in Kings county, he is also authorized to charge six cents per folio, for recording every notice of *lis pendens* filed ; under special statute, chapter 212 of 1859, p. 475, section 2.

The judgment-fees of the clerks in the first district are \$1, not fifty cents, they being all salaried officers. So also, in many of the other districts.

The section of the Code above cited, repeals the provisions of the old fee-bill, in relation to the clerk's fees, and he can make no other charge than those now authorized. *People vs. Supervisors of Monroe County*, 15 How., 225.

His trial-fee of \$1, embraces every service connected with the trial, including the putting the cause on the calendar. But the printing of such calendar, when directed by the rules, is a county charge. *Same case*.

A full definition of the duty of the clerk, and the fees claimable by him, will be found *In re The Clerk of Albany County*, 5 How., 11 ; 3 C. R., 102. This decision lays down the following principles :

1. That the clerk is not entitled to charge, for entering any rule or order in the rough minutes, or in the books ;
2. He may charge for the copy of any paper required by either party, at the rate prescribed in section 312 ;
3. There can be no additional charge for the certificate, or the signature to it ; and this provision extends to every entry made, and to every paper filed ;

4 The fee of \$1 is payable, on every trial of an issue, either of law or of fact, and also on every appeal to the general term, from a judgment, whether of the same or of an inferior court ;

5. The court thought that it extended also to inquests, and judgments by default, taken on the call of the calendar, whether at special or general term ; and this has become the general practice ;

6. But it does not extend to causes on the calendar, which are not tried or argued, or to trials before referees. "The meaning of the statute evidently is, that the fee is only to be paid to the clerk, where he attends and acts as clerk, on the trial." *Vide Benton vs. Sheldon, infra.*

7. Nor does it extend to an appeal from an order, or for any services on special motion, or appeal therefrom.

8. And the allowance, on a trial on appeal, is confined to cases commenced under the Code. No fee is chargeable, on arguments at general term in old causes. They are motions, not trials.

9. The fee on entering judgment, is not chargeable till the perfecting of the judgment.

See also generally, as to the clerk of the court, his right to insist upon prepayment of his fee, before rendering any service required, but his duty to perform each service, on payment of the fee for it, without power to insist on payment for previous services, for which he may have given credit, *Purdy vs. Peters*, 23 How., 328.

The trial-fee is not chargeable, till the cause is actually called on to be heard. *Malcomb vs. Jennings*, 1 C. R., 41. See *People vs. Supervisors of Monroe County*, 15 How., 225, *supra*.

He is not entitled to any trial-fee, on a cause, referred at the circuit, when called, but only on a cause actually tried. *Benton vs. Sheldon*, 1 C. R., 134.

The fee for a trial, is payable on the argument, at general term, of a verdict subject to the opinion of the court. *Wilcox vs. Curtiss*, 10 How., 91.

He cannot claim any such fee, on the dismissal of a complaint on special motion. *Tillspaugh vs. Dick*, 8 How., 32. Nor, on the entry of an order for judgment, in proceedings grounded on service by publication. *Chapman vs. Lemon*, 11 How., 235.

It is competent for the clerk to refuse his fee, on entering judgment, if he choose to do so. It belongs to him, and his refusal forms no ground for a retaxation. *Schermerhorn vs. Van Voast*, 5 How., 458 ; 1 C. R. (N. S.), 400.

The clerk's fee cannot be taxed by the wrong party. It was accordingly disallowed, as part of the costs of a defendant, entitled to tax subsequent costs against the plaintiff, after service of an offer. The item

was chargeable against the latter, and should have been inserted in his prior costs. *Burnett vs. Westfall*, 15 How., 420.

In addition to the above, if a transcript of a judgment be required, the clerk's fee on it must be paid. Properly it would seem to be five cents, as being a copy required by the party. The former charge was six cents. *Vide* 2 R. S., 633, section 24, amended by chapter 273 of 1844, section 5.

Where there are several defendants, resident in different counties, this fee, and that for docketing the transcript, will be taxable, as regards each. But not so, in respect of any county, in which such docketing is unnecessary. *Toll vs. Thomas*, 15 How., 315.

The fee paid to the clerk, for a certified copy order of reference, is taxable by the prevailing party. *Same case*.

(b.) SHERIFF'S FEES.

The sheriff's fees are still regulated by the provisions of the Revised Statutes. Those payable to him for the execution of process, will be found at 2 R. S., 644, section 38. A large portion of those fees do not, however, form the subject of allowance on taxation, being payable, either by way of poundage on an amount collected by him, or in respect of specific services, demandable at the time such services are rendered.

The only law regulating the fees of sheriffs is the above. Many of the services there provided for have become obsolete, but sheriffs must now be allowed similar rates, for similar services, rendered under the altered provisions of the Code. *Benedict vs. Warriner*, 14 How., 568.

It may be convenient to notice some few of the principal items which may be taxable.

For service of summons: The fee allowable to the sheriff, is fifty cents for each defendant served. For travelling in making such service, six cents per mile for going only, to be computed from the courthouse of the county; and, for returning the summons, twelve and a half cents. But only one travel-fee can be allowed on the same process, and the fee for returning will be allowed, as the equivalent for the certificate required by section 138 of the Code. *Benedict vs. Warriner*, 14 How., 568. See also *Gallagher vs. Egan*, 2 Sandf., 742.

The service of a notice of object of action, though not provided for in the old fee-bill, has been held to be a subject of allowance. It is, however, an unofficial act, and the sheriff stands on the same footing with respect to it as any other person. The following was allowed, in *Benedict vs. Warriner*, *supra*: Twenty-five cents, for service on each defendant, being half the allowance for service of the summons, but no charge for certificate. In *Gallagher vs. Egan*, thirty-seven and a half

cents was allowed, for each defendant, but twelve and a half cents of that sum, being the allowance for a copy under the old fee-bill, was disapproved of, in *Benedict vs. Warriner*. Otherwise, the doctrine of both cases is the same. The allowance is one, however, which seems to rest in discretion, no specific fee being provided, and the only guide being the analogy with the former practice.

No fee is claimable, for taking and delivering property. *Moore vs. Cockroft*, 9 How., 479.

The fee allowed, for bringing up a person on a *habeas corpus ad testificandum*, would seem clearly taxable, as a disbursement, when paid.

The sheriff's calendar fee of fifty cents a term, for summoning a jury, is payable, in all cases placed on the circuit or trial calendar. *Case vs. Price*, 17 How., 348; 9 Abb., 111.

This was a case of foreclosure; when however the cause is placed on a separate special term calendar, for trial by the court, it is clear that this fee cannot be taxed, as the service for which it is allowed is not rendered.

Sixty-nine cents is taxable, in all cases, as the sheriff's fee on execution, being nineteen cents, for return and mileage, and the additional sum of fifty cents for postage, entering, &c., allowed by chapter 225, of 1850, p. 404, sections 1 and 2.

The sheriff's poundage, is not taxable in the first instance, but collectable as against the defendant, when the execution is effective.

For making and serving an attachment, the sheriff is entitled to charge, exclusive of his poundage, if subsequently realized, fifty cents for service, "with such additional compensation, for his trouble and expenses, in taking possession of and preserving the property attached, as the officer issuing the warrant shall certify to be reasonable." See Code, section 243. As to the conclusiveness of such an assessment, see *Birkbeck vs. Stafford*, 23 How., 236; 14 Abb., 285.

If these latter amounts have been paid before judgment, by the prevailing party, they will of course be taxable.

Considerable discussion has arisen upon this subject. In the following cases it is laid down that, on a settlement before judgment, the sheriff is entitled to have his additional compensation assessed, at a percentage of five per cent. on the amount of the property attached, besides disbursements, according to the scale of compensation, provided for trustees under an attachment, by 2 R. S., 46, section 29. See *Mayhew vs. Wilson*, 10 Abb., 289; *Trenor vs. Fachiri*, 20 How., 405; 12 Abb., 136.

But this view is wholly ignored, and it is held that the sheriff, in such a case, is confined to the statutory fifty cents, and possibly to twelve and a-half cents for returning the writ, and nineteen cents for a copy,

making eighty-two cents, as of right, and to a reasonable allowance for his trouble and expenses, having regard to the expenses actually incurred, and to no more, and also that he cannot claim any poundage whatever, under such circumstances, in *Alburtis vs. Dudley*, 21 How., 456; 12 Abb., 361. See also *Hoge vs. Page*, 11 How., 207.

(c.) WITNESSES' FEES.

These fees are still regulated by the Revised Statutes. *Vide* 2 R. S., 649, section 49, chapter 386 of 1840; section 8.

The allowance is as follows:

For each witness, fifty cents, for each day, while attending any court or officer; and, if the witness resides more than three miles from the place of attendance, travelling fees, at the rate of four cents per mile, going and returning.

Each witness on the trial is, therefore, entitled altogether, to eight cents, in respect of every mile of actual distance, between his place of residence and the place of trial, when such distance exceeds three miles, as above.

The fee of the witness, and his mileage, must be paid to him on serving the subpoena, or his attendance cannot be enforced. See 2 R. S., 400, section 42. He cannot be called upon to refund, unless he fail to attend the court, without reasonable cause, and the payment will be properly chargeable as a disbursement, although the cause be subsequently settled, or put off. *Ford vs. Monroe*, 6 How., 204; 10 L. O., 155. And this, although, being informed of the postponement, he does not actually attend. *Roth vs. Meads*, 20 How., 287.

A witness, subpoenaed at his place of business, is entitled to travel fees from that place, without regard to the county of his permanent domicile. *Mitchell vs. Westervelt*, 6 How., 265; *affirmed*, 6 How., 311; *Clarks vs. Staring*, 4 How., 243. But, when subpoenaed at a place, at which he is temporarily on business, he is entitled to travel fees, as from the place of his residence. *Pike vs. Nash*, 16 How., 53.

In calculating mileage, the law does not regard fractions of a mile, and an affidavit that a witness travelled three miles, may be construed as three miles and over, so as to warrant the allowance. *Shannon vs. Brown*, 2 Abb., 377.

An allowance made to a witness, for distance travelled, outside the boundaries of the state, cannot, however, be taxed. Now, as before the Code, the taxable fees must be estimated, by the number of miles the witness travels, from the boundary line of the state, to the court. *Hinds vs. Schenectady County Mutual Insurance Company*, 7 How., 142; *Moulton vs. Townsend*, 16 How., 306.

And this distance should be estimated, by the nearest travelled route,

due regard being had to the attendant circumstances. *Wheeler vs. Lozee*, 12 How., 446; *Hicks vs. Brennan*, 10 Abb., 304; *Dunham vs. Sherman*, 19 How., 572; 11 Abb., 152.

If a foreign witness has travelled voluntarily, from his residence to the place of trial, for the purpose of being examined, and is then subpoenaed, he will be entitled to his travel fees. But otherwise, when he does not attend for that purpose, but, being found there, is then subpoenaed. *Wheeler vs. Lozee, supra*; *Dowling vs. Bush*, 6 How., 410.

If a witness, when subpoenaed, fails, through his own default, to attend the trial, or departs before his examination, his fees may be recovered back, and cannot be charged, as against the adverse party. So also, where he is allowed to leave before examination, the necessity of his attendance must be shown. *Dowling vs. Bush*, 6 How., 410.

But, where the non-attendance of the witness was occasioned by his being served at too late a period, and he attended, in time to have been sworn, had not the cause been postponed, no *laches* being chargeable against the plaintiff, his fees were allowed. *Clarks vs. Staring*, 4 How., 243.

On the other hand, the witness must not be subpoenaed at too early a period, or his extra fees will not be allowed. The party is entitled to subpoena him, as of the period when the cause was likely to be on the day calendar for the next day, allowing, where his residence is elsewhere, time sufficient for his necessary travel, or within a day or two of that time. His attendance cannot be taxed for, during the whole period, when the cause is on the general, but not on the day calendar. *Curtis vs. Dutton*, 4 Sandf., 719.

When in attendance, the witness is entitled to a fee of fifty cents *per diem*, for the whole period during which he is detained, and so, for each circuit during which he may be necessarily subpoenaed. When, being on the day calendar, the cause was set down for a future day, foreign witnesses were held entitled to this allowance, during the whole of the intermediate period, except days when the court was not actually in session. *Moulton vs. Townsend*, 16 How., 306. But, in the same case, witnesses from the same county, were only allowed, for those days on which they were necessarily in attendance.

In *Vence vs. Speir*, 18 How., 168, it is laid down that the *per diem* allowance is to be restricted, to the days during which the case is actually on the day calendar of the court, sitting for trials, and actually in session, and the witnesses in attendance.

The fact that a witness has not been formally subpoenaed, is not essential. He is equally entitled to his fees, when he attends, at the request of the party. *Vence vs. Speir, supra*; *Wheeler vs. Lozee*, 12 How., 446.

When witnesses attend, either at request or on subpoena, in two causes, they are entitled to the full allowance, in each case, though the parties may be the same. *Vence vs. Speir, supra*; *Hicks vs. Brennan*, 10 Abb., 304.

Where several witnesses have been subpoenaed and paid, and are actually in attendance, their fees may be allowed, although the court may stop the line of testimony to which they depose, before all are examined. But the fees of superfluous witnesses, called beyond the limits of a proper discretion, may be disallowed. *Lowerre vs. Vail*, 5 Abb., 227.

The fees of witnesses cannot be taxed, unless they have been subpoenaed or paid, and have attended, on behalf of the party taxing the costs. *Brown vs. Bowen*, 16 How., 544. See also *Wheeler vs. Lozee*, 12 How., 446.

Witness-fees will not be allowed, for attendance at the circuit, in a case, referable in its nature, and where the attorney knows it must be referred, and has been requested to do so. *Pike vs. Nash*, 16 How., 53.

At the time when the evidence of a party in interest was inadmissible, it was held that no fee could be allowed for his attendance. *Schermerhorn vs. Van Voast*, 5 How., 458; 1 C. R. (N. S.), 400.

And, it has been held that no fee could be charged, for the attendance of a party examined on his own behalf, unless he shows that he attended only as a witness, and not for the purpose of superintending the trial. *Logan vs. Thomas*, 11 How., 160; *Case vs. Price*, 17 How., 348; 9 Abb., 111; *Cornell vs. Potter*, 15 How., 278. And the rule has been extended to a party, examined for his co-defendant. *Walker vs. Russell*, 16 How., 91; 7 Abb., 452, note. See also *Perry vs. Livingston*, 6 How., 404.

But the affidavit of the party may be received, that he attended solely as a witness, and then, his fee will be taxable. *Bronner vs. Frauenthal*, 20 How., 355; 12 Abb., 183; *Logan vs. Brooks*, 17 How., 29; 8 Abb., 127. See also *Walker vs. Russell, supra*. And, when he is made a witness by his adversary, he is clearly entitled to it. *Hewlett vs. Brown*, 1 Bosw., 655; 7 Abb., 74.

In the two following cases, he was held entitled to claim his fees, the same as any other witness: *Querissle vs. Hilliard*, 3 Abb., 31; *Rogers vs. Chamberlain*, 7 Abb., 452. The former is, however, disapproved in *Cornell vs. Potter, supra*.

(d.) EXPENSE OF DEPOSITIONS.

Since 1857, "the reasonable compensation of commissioners in taking depositions," is taxable. Before the amendment in that year, such fee could not be allowed, nor could the fees of witnesses, for attend-

ing before a commissioner out of the state. *Perry vs. Griffin*, 7 How., 263.

Nor can the fee of counsel, on taking the testimony of a witness *de bene esse*, be taxed. *Hare vs. White*, 3 How., 296; 1 C. R., 70.

But, before the amendment, the necessary expenses of executing a commission in a foreign state, had been held to be taxable, as a necessary disbursement. *Finch vs. Calvert*, 13 How., 13. See also *Case vs. Price*, 17 How., 348 (352); 9 Abb., 111.

In *Dunham vs. Sherman*, 19 How., 572; 11 Abb., 152, it was held that, on the execution of a commission in a foreign country, the commissioners' fees were properly taxable, and also proper fees for the attendance of witnesses, to be regulated by the allowance in this state; or, possibly, according to the rate allowed in the country where the commission is executed, if shown that their attendance could not otherwise have been procured; but that the charges of a solicitor, for serving on the execution of the commission, were not taxable.

(e.) REFEREES' FEES.

These are expressly regulated by section 313, which fixes them at \$3 *per diem*, for each referee, but gives the parties power to agree, in writing, upon any other rate of compensation.

The usual practice is, for the referee to make his own charge, with respect to the time actually taken up, in general accordance with the scale here fixed, but without any strict reference to days actually spent; that element of computation being, for practical purposes, very uncertain; a day, even under any mode of calculation, being rarely spent on the reference, on any one occasion; but the business being ordinarily taken up, for shorter intervals at each time, having regard to the general engagements of the referee, and of the parties.

An entry upon the referee's minutes, in the presence and with the consent of the parties, has been held to be substantially such an agreement as is contemplated, and the referees' fees were allowed, as stipulated. *Philbin vs. Patrick*, 22 How., 1.

But the clerk cannot allow more than \$3 a day, if objected to, unless such an agreement is produced; and, if the time actually spent upon the reference is disputed, it must be shown affirmatively, by proof. *Shultz vs. Whitney*, 17 How., 471; 9 Abb., 71.

And, in the same case, it was laid down, that no meeting could be charged for, unless attended by the referee himself, nor could any allowance be made, in respect of the taking of testimony before another person, even by consent. The whole testimony having been taken down in this manner, the only allowance made was, for time spent by

the referee in examining the case and preparing his report, and the rest of his fees, including the whole of his charges for adjournments, were entirely disallowed.

The statement in the affidavit of disbursements, will be sufficient ground for the allowance of the amount paid, unless disputed. See also as to the referee's receipt, *Toll vs. Thomas*, 15 How., 815.

When the referee's fees are disputed, the proper course to pursue, is to require him to have them taxed. *Vide Richmond vs. Hamilton*, 9 Abb., 71, note.

(f.) EXPENSES OF PRINTING. •

These are chargeable, as a disbursement, whenever required by a rule of the court, as, for instance, with regard to cases and points on appeal, or other cases on the calendar of the general term.

A verdict, subject to the opinion of the court at general term, is within the rule, and the printing of the case and points will be allowed as a disbursement. *Wilcox vs. Curtiss*, 10 How., 91.

The allowance of this disbursement, is in full of all services, in relation to the papers, and the party will be confined to that mode of compensation. It is erroneous to charge for copies of the same papers, by the folio, in a case, taxable under the old fee-bill, as a surrogate's appeal. *Brockway vs. Jewett*, 16 Barb., 590.

(g.) OTHER NECESSARY DISBURSEMENTS.

There are other classes of items, taxable under section 311, as necessary disbursements, but which do not fall under the specific enumeration contained in that section.

As to the force and extent of the term "necessary disbursements," when liberally construed, see *Finch vs. Calvert*, 13 How., 13, above cited. See also, *Case vs. Price*, 17 How., 348 (351); 9 Abb., 111.

The payment of the fees of jurors is an allowance of this nature. One shilling is payable to each juror, in New York and Albany, and two shillings elsewhere, on the trial of an issue of fact, and will be taxable as a disbursement. *Vide* 2 R. S., 643, 644; section 37. One shilling only is also allowable to jurors, sworn before any officer, on a special proceeding, or before a sheriff on a writ of inquiry, or claim to personal property.

When the defendant fails to appear on the call, he waives a jury; and, in the case of a mere money demand, there is no necessity for one, and their fees should not be allowed. *Goodyear vs. Baird*, 11 How., 877.

The fees of a stenographer, in the first district, ordered by the court, to be employed, and paid by the parties, under the power conferred, upon the amendment of section 256, in 1860, are individually payable, and cannot be taxed as a disbursement by the prevailing party. *Arnoux vs. Phelan*, 21 How., 88; *Gilman vs. Oliver*, 14 Abb., 174. The contrary principle is, however, maintained, and they have been held taxable in *Reynolds vs. The Mayor of New York*, 14 Abb., 176, note.

The New York Superior Court and Court of Common Pleas are, in these decisions, in conflict with each other. There is no reported decision in the Supreme Court.

If a private person be employed to make a service, in respect of which a fee is allowed to the sheriff, a reasonable compensation may be allowed, not exceeding such fee; but not as a matter of right, or to the full amount, without the reasonableness of the charge being shown. *Case vs. Price*, 17 How., 348; 9 Abb., 111.

But, as appears by the calculation at pages 28 and 31, such a fee seems to have been disallowed altogether, in *Whipple vs. Williams*, 4 How., 28.

The allowance of a sheriff's fee, for serving notice of object of action, is assessed in fact upon this principle, no provision being made for his compensation for this service, as sheriff. See *Benedict vs. Wariner*, 14 How., 568; and *Gallagher vs. Egan*, 2 Sandf., 742, above cited.

Commissioners' fees, on affidavits, have been held not to be taxable, when made for the purpose of a motion, on which no costs were allowed. *Burnett vs. Westfall*, 15 How., 420.

Nor can any fee be taxed, for expenses in service of a subpoena. *Same case*.

Nor are surveyors' fees taxable, unless the survey be part of the regular proceedings in the action, as in partition, or admeasurement of dower. *Haynes vs. Mosher*, 15 How., 216.

(h.) AFFIDAVIT OF DISBURSEMENTS.

As regards ordinary disbursements, the allowance and amount of which are fixed by law, the usual general affidavit, annexed to the bill of costs, will be sufficient. That affidavit should state, that the disbursements have been, or will necessarily be made, so as to cover those charges in the bill, as submitted, which are necessarily prospective:

But, where the item requires any explanation whatever, to show its propriety, or the amount which should be allowed, that explanation must be properly presented, either by way of additional statement in

the general affidavit, or by a separate deposition, or the allowance may be refused.

Of this nature is a charge, for service of process, when performed by a third person, and not by the sheriff. The affidavit should show the reasonableness of the charge, and that it is a fair, just, and proper compensation, for the time employed, and the distance travelled. *Case vs. Price*, 17 How., 348; 9 Abb., 111. N. B.—This was a case of a large charge, for service on numerous defendants, most of them, presumably resident in the same place. For a moderate charge, for a single service, a specific statement would, probably, not be required.

(i.) AFFIDAVIT AS TO WITNESSES.

A specific statement will be proper, in all cases in which witnesses' fees are sought to be taxed, and will be especially necessary, when those fees involve payments in respect of mileage, or for prolonged attendance in court.

The affidavit, in such cases, must state the names of the witnesses; that they were material and necessary, or believed so to be, under the advice of counsel; the number of days they actually attended in court; when travel-fees are paid, the fact that they travelled for the purpose of attending as witnesses, and the distance which they travelled (*vide* 2 R. S., 653, section 7); the place of residence of the witness, or, if subpoenaed elsewhere, or at a temporary residence, the place where he was subpoenaed, and the fact of such temporary residence, should also appear; and, when a witness is subpoenaed out of the state, it should be shown that he travelled by the usual and nearest route, and the point where he crossed the state line, and the distance thence to the place of trial, must be given. These statements must be full and specific, and also separate, as regards each witness. See, as to the above requisites, *Clarks vs. Staring*, 4 How., 243; *Schermerhorn vs. Von Voarst*, 5 How., 458; 1 C. R. (N. S.), 400; *Dowling vs. Bush*, 6 How., 410; *Moore vs. Cockroft*, 9 How., 479; *Logan vs. Thomas*, 11 How., 160; *Wheeler vs. Lozee*, 12 How., 446; *Haynes vs. Mosher*, 15 How., 216; *Toll vs. Thomas*, 15 How., 315; *Hicks vs. Brennan*, 10 Abb., 304.

When a party seeks an allowance, for his own attendance as a witness, the affidavit should also show that he attended, as such, and not as a party. See above, under the head of *Witnesses' Fees*, and decisions there cited.

When witnesses' fees are claimed, for attendance before commissioners in a foreign country, according to the rates there allowed, such rates should be specified, and the fact that they are there allowed by law; and it should be shown, that the attendance of the witnesses could not

have been compelled without such payment. *Vide Dunham vs. Sherman*, 19 How., 572; 11 Abb., 152.

When the fees of witnesses are claimed, who were not actually examined upon the trial, the necessity of their attendance, and the reason why they were not called, must also be stated, to overcome the presumption that, not having been examined, they were not necessary. *Haynes vs. Mosher*, 15 How., 216; *Toll vs. Thomas*, 15 How., 315 (318); *Dowling vs. Bush*, 6 How., 410.

It is not essential to state upon the affidavit, that the fees of the witnesses have been actually paid, provided it be shown, as above, that they are due, and properly taxable. But, when paid, the fact had better always be stated.

§ 339. *Costs of Motion.*

Costs may be allowed, on motion, in the discretion of the court or judge, to an amount, not exceeding \$10.

And they may be so allowed, either absolutely, or to abide the event. Section 315. See such an order granted, that costs to each party abide the event, *Outwater vs. Mayor of New York*, 20 How., 213. See likewise *Ives vs. Miller*, 19 Barb., 196.

This last provision was inserted upon the amendment of 1857. It disposes of the difficulty previously felt upon the subject. See *Johnson vs. Jillitt*, 7 How., 485. But, whether that case was sustainable, even before the amendment, seems doubtful. It seems to have imposed too strict a limit on the discretion of the court.

Under the original Code, the section provided for no costs of a motion, except those of resisting. Under that measure, it was, however, considered that costs might be imposed, as a condition, upon relieving a party in default. *Vide Rider vs. Deitz*, 1 C. R., 82; *Anderson vs. Johnson*, 1 Sandf., 713; 2 C. R., 95. This view was, however, controverted, in *Richmond vs. Russell*, 1 C. R., 85; and *Van Wyck vs. Alliger*, 3 How., 292; 1 C. R., 68. The difficulty was removed upon the amendment of 1849.

Motion-costs, are not taxable by the clerk, under section 311, and none can be recovered, unless the amount be specified in the order, or a special reference be made to the clerk, conferring authority upon him in this respect. *Morrison vs. Ide*, 4 How., 304; 3 C. R., 27; *Eckerson vs. Spoor*, 4 How., 361; 3 C. R., 70; *Mitchell vs. Westervelt*, 6 How., 265; affirmed, 6 How., 311, note; *Nellis vs. De Forest*, 6 How., 413; and *Burnside vs. Brown*, there referred to. *Van Schaick vs. Winne*, 8 How., 5. See also, as to the necessity of the award of costs being expressed upon the order, *Chadwick vs. Brother*, 4 How., 283.

In an appeal to the Court of Appeals, taken prior to the Code, costs of motion were held taxable, under the old practice. Section 315 was not rendered retrospective, by the supplemental act. *Lyme vs. Ward*, 1 Comst., 531; 3 How., 342; 1 C. R., 101; 7 L. O., 10. See also, as to the costs of a rehearing in an old case, *Van Wyck vs. Alliger*, 3 How., 292; 1 C. R., 68. See likewise, as to a motion to dismiss, *Thomas vs. Clark*, 5 How., 375; 1 C. R. (N. S.), 71. Since the amendment of section 459 in 1851, however, this is no longer the case.

But the costs, on an application for a *mandamus*, have been held to be still taxable, under the old fee-bill. *The People vs. Ewen*, 8 Abb., 359, note.

That the only costs allowable, on appeals from orders to the general term, are motion-costs, is now settled, by the amendment in subdivision 5 of section 307. Before that amendment, there was considerable discussion on the subject. See above, section 336, subdivision *Appeals*, and cases there cited.

And the costs on such an appeal have been held, like other motion-costs, to rest in the discretion of the court. *Ives vs. Miller*, 19 Barb., 196. And, in that case, were ordered to abide the event.

But, as regards appeals from orders, sustaining or overruling a demurrer to the whole pleading, the balance of authority seems to be, that either a trial-fee, or the costs of an appeal, will be taxable, and not the costs of a motion. See above, section 336, subdivision *Trial-fee*, and cases cited. But, where the demurrer is partial, only motion-costs can be allowed. *Drummond vs. Husson*, 1 Duer, 633; 8 How., 246.

The costs of a motion, for a new trial, upon a case made, are now taxable, as costs of an appeal. Before the last amendment, the cases were conflicting, some holding a trial-fee, or the costs of an appeal, to be taxable; others, that motion-costs only could be allowed. See above, section 336, subdivision *Trial-fee*, and cases cited. See especially *Jackett vs. Judd*, 18 How., 385, as to the costs of an appeal being taxable, under the wording of section 307, subdivision 5, prior to the recent amendments.

Another controverted point has been, as to whether, on application for judgment, on a frivolous pleading, under section 247, a trial-fee is taxable, or whether all that can be granted is the costs of a motion. The weight of authority seems to be in favor of the latter conclusion. See same section and same subdivision, and cases there cited.

But the dismissal of the complaint, for want of prosecution, is clearly a motion, and only motion-costs can be allowed. *Tillspaugh vs. Dick*, 8 How., 33.

In *Thomas vs. Clark*, however, 5 How., 375; 1 C. R. (N. S.), 71, it was considered that, on a motion of this description, no costs ought

properly to be allowed, section 315 being only applicable to collateral motions, and not to proceedings in the direct progress of the suit. See generally *Foster vs. Agassiz*, 3 C. R., 150. Except that, in such cases, when the motion is denied, for some defect of papers, or irregularity, costs of denial may be allowed. *Thomas vs. Clark, supra*. The rule laid down in that case seems, however, too strict, as to motions in the ordinary progress of the cause. See order, for costs of motion for change of venue to abide the event, *Toll vs. Cromwell*, 12 How., 79 (82). The matter is one eminently resting in the discretion of the court.

In *Thomas vs. Clark, supra*, it was considered that, the judgment applied for, being judgment as in case of a nonsuit, the law, not the court, gave the costs. In *Tillsbaugh vs. Dick*, both ordinary costs, and costs of motion were allowed.

Motion-costs cannot be taxed, in respect of motions made in the ordinary progress of the trial, or applications for judgment, in respect of which a specific fee is taxable. Thus, motion-costs for order of reference, motion to confirm, and motion for judgment, were stricken out of the costs of taking judgment by default in foreclosure, with costs of the motion to strike out. *Balding vs. Anthony*, 13 How., 301.

The general rule is to give costs, on a motion to set aside an irregular proceeding, when successful. *Kellogg vs. Klock*, 2 C. R., 28; *Beech vs. Southworth*, 6 Barb., 173; 1 C. R., 99. See *Blanchard vs. Strait*, 8 How., 83 (86).

Where part of a motion, as noticed, is granted, and part refused, costs will not usually be allowed to either party. *Whipple vs. Williams*, 4 How., 28; *Corbin vs. St. George*, 2 Abb., 465; *Steam Navigation Company vs. Weed*, 8 How., 49 (50); *Penfield vs. White*, 8 How., 87 (88); *McKenzie vs. Hackstaff*, 1 E. D. Smith, 75. So also, as to cross-motions, heard together, and on which neither party is completely successful. *Askins vs. Hearn*, 3 Abb., 184 (190). Nor will costs be given to either party, where a favor is granted to both. *Jones vs. United States Slate Company*, 16 How., 129 (135). Where, however, a party asked too much in his notice, costs of opposing that portion of it to which he was not entitled, were given. *Smith vs. Jones*, 2 C. R., 33.

And, when the defendant made two motions for relief, obtainable by one, costs of opposing were allowed. *Mitchell vs. Westervelt*, 6 How., 265; affirmed, 6 How., 311, note.

And, if allowed to the prevailing party, costs in such a case, should be confined to the costs of one motion. *Hornfager vs. Hornfager*, 6 How., 13; 1 C. R. (N. S.), 180.

Where costs are omitted to be asked for in the notice of motion, they cannot, it seems, be given, nor are they within the common notice of application for further relief. *Northrup vs. Van Dusen*, 5 How., 134;

3 C. R., 140 ; *Saratoga and Washington Railroad Company vs. McCoy*, 9 How., 339 (341).

Where a party asks costs against his opponent, without any foundation, he will be charged with costs of the motion, though otherwise he would not. *Weeks vs. Southwick*, 12 How., 170 ; *Battershall vs. Davis*, 23 How., 383.

A notice of motion cannot be so countermanded by the party giving it, as to deprive the opposite party of the right of attending on the day specified, and having the motion dismissed with costs. *Bates vs. James*, 1 Duer, 668.

§ 340. *Costs on Settlement Before Judgment.*

Under section 322, taxable costs only, are demandable upon the settlement, before judgment, of any of the actions mentioned in section 304.

This includes, as a general rule, the whole class of common-law actions, in which the right to costs follows the judgment, as of course.

But, in others, *i. e.*, the whole class of suits in equity, the costs on a settlement, rest, in like manner as costs in the cause, in the discretion of the court.

There is an evident, and still uncorrected error, in the wording of the latter part of the section. No rates are prescribed by section 304. It is clear that the legislature intended to refer, in this connection, to section 307, by which they are in fact prescribed. *Vide dictum*, in *Wilson vs. Allen*, 4 How., 54 ; 2 C. R., 26.

The questions, as to a discontinuance, and the inability of a plaintiff to discontinue, without payment of the defendant's costs, have been already fully considered, and the decisions in point cited, in book VIII., chapter IV., section 184.

Those, as to the different allowances under section 307, and the periods at which the right to them respectively accrues, have been above treated of, in section 336, in which the scale of costs is considered.

On a tender or settlement before judgment, of cases falling within the scope of section 308, not merely the usual costs, but also one half of the statutory allowance may now be claimed. See above, section 337, subdivision *Tender or Settlement*.

A discontinuance, before the first day of term, saves the costs of that circuit, which cannot then be demanded. *Drew vs. Comstock*, 17 How., 469. See also *Latham vs. Bliss*, 6 Duer, 661 ; 13 How., 416. But not so, if postponed until the cause is reached. *Forbes vs. Locke*, 8 How., 218.

And, if the discontinuance is obtained, without notice to the adverse attorney, or entry of any order, the party will still remain liable for

subsequent costs, till the fact is made known. *Pilger vs. Gow*, 21 How., 155 ; 12 Abb., 244.

The attorney may claim all costs incurred, before service of the order of discontinuance. *Hall vs. Lindo*, 8 Abb., 341.

After a new trial has been granted, on payment of costs by the plaintiff, the latter will not be allowed to discontinue, while the amount of such costs is in dispute and unpaid. *North vs. Sargeant*, 14 Abb., 223.

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APPENDIX OF FORMS.

PRELIMINARY NOTE.

In the forms subjoined, dates are left blank, the names of persons indicated by capital letters, and names of places, either so indicated or left in blank.

When the form is of general applicability, capable of being used by either of the parties, or for more than one purpose, *mutatis mutandis*, such portions of it as consist of convertible terms are distinguished by italics.

The enclosing of a clause, or part of a clause, in parentheses, without breaking the continuity of the sentence, signifies that the use of the precise words employed is not universal, but may require adaptation to the circumstances of the particular application or proceeding.

Directions for the insertion of allegations, to the effect specified in the direction, without prescribing the exact form of words to be employed, are distinguished by brackets, the sentence in these cases being broken, and a fresh line being commenced on giving the directions.

The title of the cause should be prefixed to every paper. That title consists of the style of the court, and the names of the parties. In the Supreme Court, the name of the county of venue should be subjoined to the former.

FORMS OF GENERAL APPLICATION.

I.

NOTICE OF MOTION.

Vol. I., § 76 (a).

Supreme Court,
County of X.

A. B. }
vs. }
C. D. }

Take notice, that upon
(the pleadings and proceedings in this action, and the affidavit, of which a copy is herewith served upon you,) this court will be moved *on the* part of the *plaintiff*, at a *special* term thereof, to be holden at the (specify place), on the *first Monday* of next, at the sitting of the court, or as soon thereafter as counsel can be heard, that
[Here state particulars of the order or relief to be applied for.]

N. B. When the motion is to set aside any proceeding, on the ground of irregularity, the irregularity complained of must be specified on the face of the notice.]

Or for such further or other order or relief as may be just.

[If costs are applied for, add] and that the *defendant* may be ordered to pay the costs of this motion.

Dated this day of 1863.

A. B., Attorney for *Plaintiff*.

To C. D., Esq., Attorney for *Defendant*.

N. B. If the motion be made to a judge, as such, and not to the court, vary thus :

A motion will be made on behalf of the *plaintiff*, to the Hon. E. F., a *judge* of this court, at his chambers, at, &c.

Or, To one of the *justices* of this court, at their chambers at, &c.

The statement of the date and hour of making the motion may also, if thought better, be made specific, instead of general, as in the form given.

II.

ORDER TO SHOW CAUSE.

Vol. I., § 76 (b). Rule 39.

Title, &c.

On, &c.

[Describe the papers on which the motion is made.]

Let the *defendant* or his attorney show cause before me at my chambers at, &c.

(Or before one of the justices of this court, at a special term, to be holden at)

on the day of *instant*, at o'clock in the *forenoon*, why, &c.

[Here state nature of order or relief applied for, as thus :

Why he, the said *defendant*, should not be restrained from, &c. : or, should not be directed to, &c. : or, why an order should not be made that, &c.]

Dated this day of 1863.

(Judge's signature.)

III.

PETITION.

Vol. I., § 77 (b).

Title, &c.

Or, if not presented in a pending action, entitle thus :

In the matter of, &c.

[State short particulars of matter in which such petition is presented.]

To the *Supreme Court of the State of New York*.

[Or, if presented to any other court, or to an individual judge or officer, address petition accordingly.]

The petition of A. B. (the above named *plaintiff*) respectfully sheweth.

[Or, if the petition is presented by a party standing in any particular capacity as regards the application, such as that of receiver, creditor of a lunatic, or the like, describe him accordingly.]

That, &c.

[Here allege, with perspicuity and with sufficient detail, such facts as are necessary to show the nature of the relief applied for, and to substantiate the petitioner's title or claim to that relief.]

Your petitioner therefore prays that—

[Here state the nature of the order applied for, in the terms in which, if granted, it is intended to be taken, in the same manner as on framing the prayer of a complaint, or the demand of relief in a notice of motion.]

Or that such further or other order may be made, or relief granted to your petitioner, in the premises, as may be just.

(A. B., signature of Petitioner.)

Witness, C. D.

The petitioner must, in all cases, sign in the presence of a witness.

Add verification and proof as follows:

VERIFICATION BY PETITIONER.

County of ss. A. B., the above named petitioner, being duly sworn, deposes and says, that he has read the foregoing petition by him subscribed, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

Sworn, &c.

(A. B., Petitioner's signature.)

PROOF BY WITNESS.

County of ss. C. D., of &c., being duly sworn, deposes and says that A. B., in the foregoing petition named, did on the day of duly sign the same petition in the presence of this deponent.

(C. D., Witness's signature.)

Sworn to before me, }
this day of }

(E. F., signature of Commissioner of Deeds.)

If the application on such petition be not *ex parte*, serve, with it, upon the adverse party, a notice of motion in the usual form, stating it to be grounded "on the petition served herewith," and that the order moved for will be "that the prayer of the said petition be granted, and that," &c., proceeding with the usual demand of the particular relief sought.

IV.

ORDER.

Vol. I. § 79 (b).

At a *general* term of the *Supreme Court of the State of New York*, held at (the *City Hall* of the *City of Brooklyn*, in the County of *Kings*), on the day of , in the year of our Lord, 1863.

Present, Hon. A. B., }
C. D., } Justices.
E. F., }

Subjoin or prefix title of the cause.

Or thus, more shortly :

*Supreme Court,
City and County of New York.*

Special Term.
(Date).

A. B. }
vs.
C. D. }

Present,
Hon. G. H.,
Justice.

On reading and filing (the annexed notice of motion and affidavits), and after hearing Mr. R., of counsel for the *plaintiff*, in support of the said motion, and Mr. S., of counsel for the *defendant*, in opposition thereto, It is ordered that—
[State order as made, using the imperative mood throughout.]

ORDER ON DEFAULT.

If the order be taken by default, the preliminary statement may be thus framed :

On reading and filing (the annexed notice of motion) and proof of service thereof upon the *defendant*, and on motion of Mr. R., of counsel for the *plaintiff*, the *defendant* having been first called in court, and not appearing to oppose, It is ordered—

(N. B.—In this case, the order taken must correspond precisely with the notice of motion, unless otherwise directed by the judge who grants it. The counsel who has taken the default must be careful to indorse his name on the paper containing the proof of service. Rule 55.

CHAMBER ORDERS.

No special preface is necessary in the case of a chamber order, beyond the mere title of the cause.

NOTICE OF SETTLEMENT.

If the order is made upon a contested hearing, and requires to be settled by the judge who made it, serve copy of proposed form upon the adverse party, with a notice indorsed upon it, as follows :

Title,

Take notice, that the order of which the within is a copy, will be presented for settlement to the Hon. A. B., the justice who made the same, at the chambers of this court, on the day of instant, at A. M.

Dated,

C. D., *Plaintiff's* Attorney.

To E. F., *Defendant's* Attorney.

SUBSEQUENT PROCEEDINGS.

When finally settled, obtain the judge's signature to the form, as approved by him, or to a fair copy, if necessary.

When made at special term, the judge either indorses or subjoins a direction that the order be entered. If at chambers, he merely affixes his signature.

See text for directions as to entry and service.

V.

PROOF OF SERVICE OF PAPER.

Vol. I., § 66 (*passim*).

N. B.—Not applicable to service of process.

AFFIDAVIT.

Title, &c.

A. B., of, &c., being duly sworn, deposes and says that, on the day of at he served a copy of

[The within notice of motion and affidavit; or,

The notice of motion and affidavits hereunto annexed; or,

The *answer* of the *defendant* in this action;

Or otherwise, describing the paper served with sufficient certainty] upon E. F., the *attorney* for the *defendant* in this action.

Continue affidavit as follows, in the different cases indicated.

When service is made personally upon the attorney,

By delivering the same to the said E. F. personally at, &c. (describe the place of service), and leaving the same with him.

If on a clerk,

By delivering the same to a clerk of the said E. F., at his office, at, &c., the said E. F. being absent at the time, and leaving, &c.

If on a person in charge,

By delivering the same to a person in charge of the office of the said E. F., at, &c., the said E. F. being absent at the time, and leaving, &c.

If left in a conspicuous place,

By leaving the same in a conspicuous place in the office of the said E. F., at, &c., no person being in such office at the time, between the hours of six in the morning and nine in the evening, to wit, at or about the hour of in the forenoon (or afternoon) of the day aforesaid.

If on the attorney at his residence,

By leaving the same at the residence of the said E. F., at No. street, in the city of with a person of suitable age and discretion, he, this deponent, having previously called at the office of the said E. F. at No. street, in the said city, in order to serve the same, and such office not being open at the time, so as to admit of such service.

If the service be upon the party, vary thus:

Alter the first allegation as under: "upon the above-named G. H., known to him, this deponent, to be the *defendant* (or, one of the *defendants*) in this action."

If the service be by leaving the copy at the party's residence,

Conclude as under:

By leaving the same at the residence of the said G. H., at, &c.

[As in form for service at attorney's residence, but omitting the last clause in that form, as to the attempted service at the attorney's office, and adding, between the hours, &c., as in form, where paper left in a conspicuous place.]

ADMISSION.

Or the necessity of the above proof may be saved, by taking from the party or attorney served, an admission, indorsed upon the original paper, a copy of which is served, thus, or to the same effect:

"Due and timely service of a notice, of which the within is a copy, is hereby admitted."

Date and signature.

When signed by the attorney, no further proof will be necessary. If by the party, his signature must be proved by affidavit, before a default can be taken grounded on such admission.

SERVICE TO BRING INTO CONTEMPT.

If service be made upon the party, of a paper, tending to bring him into contempt, add the following, at the close of the affidavit proving it:

And deponent further saith that, at the time of service of such copy upon the said G. H., as aforesaid, he produced and exhibited to the said G. H. the original of the same order, with the signature of the Hon. L. M., a justice of this court, affixed thereto.

Or, where the order has been entered at special term, state that he produced, &c.

an official copy of the same order, duly certified to be correct, by O. P., clerk of the county of _____, in whose office the said order hath been duly entered, with the certificate of the said clerk at the foot thereof.

When Service by Mail.

Conclude, after preliminary statement, thus:

By enclosing the same in a letter, addressed to the said E. F., at [state exact direction] the place of residence of the said E. F., and depositing the same, so addressed as aforesaid, in the post-office of the town of W., the place of residence of C. D. (*attorney for the plaintiff in this action*), the person making such service, between which places there is a regular communication by mail, and paying the postage thereon.

N. B.—For form of proof of service by publication, when admissible, see below, under the head of *Summons*.

See also, under same head, as to proceedings under the statute of 1853, authorizing substituted service in certain cases. The form of certificate there given, in relation to service of summons, is easily adaptable, should occasion happen.

VI.

ORDINARY NOTICE ON PAPERS SERVED.

Indorse as follows, after title of cause:

Sir,

Please take notice that the within is a copy of
"the answer of the defendant in the above entitled action;" or,

"An order this day made in the above entitled action, and of the affidavits on which the same was granted."

Or otherwise, as the case may be, correctly describing the paper.

Yours, &c.

A. B., *Plaintiff's Attorney*
(Add address and date.)

To C. D., Esq., *Defendant's Attorney*.

N. B.—This form, or something analogous to it, is in general use, and is, therefore, advisable in all cases.

VII.

JUSTIFICATION OF SURETIES, ON UNDERTAKINGS OF WHATEVER NATURE.

Vol. I., § 69.

AFFIDAVIT TO BE ANNEXED TO UNDERTAKING.

County of

A. B., one of the sureties named in the foregoing undertaking, being duly sworn, deposes and says, that he is a resident and householder (or, freeholder,) within the State of New York, and is worth the sum of , over and above all debts and responsibilities which he owes or has incurred, and exclusive of property exempt from execution.

Sworn, &c.

Or, if both sureties join in one affidavit, vary accordingly.

ACKNOWLEDGMENT.

County of

ss.

On the day of 186 . Before me came A. B. and C. D., known to me to be the same persons described in, and who executed the foregoing undertaking, and severally acknowledged that they executed the same.

L. M., Commissioner of Deeds.

See rule 9 (71) of Supreme Court.

The form of acknowledgment is, of course, variable by the commissioner, according to the circumstances.

EXCEPTIONS BY ADVERSE PARTY, IF TAKEN.

On Arrest.

Vol. I., § 87

Title, &c.

To the Sheriff of the County of X.

Take notice, that the *plaintiff* does not accept the bail put in by the *defendant* in this action.

Dated, &c.

On Other Undertakings.

Title, &c.

SIR,

Take notice, that the *plaintiff* excepts to the sufficiency of the *defendant's* sureties on the undertaking given by him, on, &c. (describe nature of undertaking), in this action.

Dated,

A. B., *Plaintiff's* Attorney.

To C. D., Esq., *Defendant's* Attorney.

NOTICE OF JUSTIFICATION.

On Arrest.

Vol. I., § 87.

Title, &c.

Take notice, that the bail for the defendant in this action will attend and justify, before the Hon. L. M., a justice of this court (or, before O. R., Esq., County Judge of the County of W.), at, &c. (specify place,) on, &c. (specify date,) at, &c., (specify hour.)

Dated, &c.

C. D., *Defendant's Attorney.*To A. B., Esq., *Plaintiff's Attorney.**Or, where other Bail justify.*

Take notice, that A. B., of &c., and C. D., of &c. (give residences in full), named in the undertaking, of which a copy is herewith served upon you, will attend and justify as bail for the defendant in this action before &c. (as in last.)

A substituted undertaking should accompany this notice. See Code, § 193.

On Other Undertakings.

Take notice, that the sureties named in the undertaking given on the part of the *defendants* on &c. (describe the nature of the undertaking), will attend and justify before &c., (as in above).

VIII.

AFFIDAVITS AND ACKNOWLEDGMENTS.

The ordinary forms of jurat, and acknowledgment, before a commissioner of deeds, are given in the foregoing, and do not need repetition.

The following may, however, be useful in special cases, without professing to give forms for every occasion which may possibly occur.

JURAT AND CERTIFICATE, ON AFFIDAVIT TAKEN BEFORE JUDGE OF A FOREIGN COURT.

Vol. I., § 27 (2 R. S., 396, § 25).

Jurat.

Province of Canada, }
City of Toronto, ss. }

I, A. B., judge of the Court of Common Pleas, one of the superior courts of law in the province of Canada, a court having a seal, do hereby certify that, on the day of , at the city of Toronto, aforesaid, the foregoing affidavit was taken and sworn to, before me, by G. H., the deponent above named.

As witness my hand, this day of , 1863.

A. B., Judge of Court of Common Pleas.

CERTIFICATE.

I, C. D., clerk of the aforesaid Court of Common Pleas, do hereby certify that the signature of A. B., to the foregoing certificate, is the genuine signature of him the said A. B.; that the Court of Common Pleas, above-named, is one of the courts of superior jurisdiction at law, in the province of Canada, and has a seal; that the said A. B. is a judge and member of said court, and that the seal hereto affixed is the seal of the same court.

Given at Toronto, under the seal of the said court, this day of , 1863.

C. D., Clerk of the said Court.

ACKNOWLEDGMENT BEFORE UNITED STATES CONSUL FOR A FOREIGN PORT.

Vol. I., § 27.

Port of A., }
Kingdom of B. }

I, L. M., consul of the United States for, and resident at the port of A., in the kingdom of B., do hereby certify that on the day of , 1863, personally appeared before me X. Y., known to me to be the person described in, and who executed the foregoing instrument, and acknowledged to me that he executed the same.

As witness my hand and seal of office, this day of , 1863.
L. M.

[L. s.]

PRELIMINARIES TO ACTION IN CERTAIN CASES.

IX.

APPLICATION FOR LEAVE TO SUE A LUNATIC.

Vol. I., § 45 (

PETITION.

In the matter of A. B. a lunatic (or idiot, or habitual drunkard, as the case may be).

To the *Supreme Court* of the State of New York:

Or, if addressed to any other court, state title correctly.

The petition of C. D., a creditor of the said lunatic (or state any other capacity in which the applicant stands), respectfully sheweth—

That the said A. B. is a (lunatic) duly found to be such, on the day of , under a commission issued out of this court; and that, by order of this court, E. F. has been appointed and now acts as committee of the person and estate of the said (lunatic), and has possessed himself of and now holds such estate.

That, at the time of his aforesaid lunacy, the said A. B. was and is now indebted to your petitioner in the sum of \$ for

[Here state particulars of indebtedness, sufficient to satisfy the court that it is *bona fide* and subsisting].

That your petitioner has applied to the said E. F., committee of the said (lunatic), as aforesaid, for payment of his aforesaid debt, out of the estate of the

said A. B., in the hands of him, the said E. F., but he, the said E. F., has declined to pay the same.

[Here state grounds assigned by committee for his refusal.]

That your petitioner has fully and fairly stated to G. H., counsellor-at-law, his counsel in this matter, the nature and grounds of his aforesaid claim against the said (lunatic), and is advised by his said counsel, and verily believes that he has a good and substantial claim on the merits against the said lunatic, enforceable against his estate, in the hands of the said E. F.

Your petitioner, therefore, prays that the said E. F. be ordered to pay the debt of your petitioner out of the estate of the said A. B., or that it be referred to some competent person, to be appointed by this court, to examine into the nature and justice of your petitioner's aforesaid claim against the said lunatic, and to report to this court thereon, and as to whether the same ought, or ought not to be paid out of his estate in the hands of the said E. F. Or that the petitioner be allowed to bring an action against the said lunatic, for enforcement of his aforesaid claim, and that this court will give such directions, and grant your petitioner such further or other relief in the premises as may be just.

The above form is applicable to the case of a simple indebtedness, sought to be enforced against the lunatic.

Where the cause of action is of a more complicated description, the allegations as to the nature of the petitioner's claim must be varied accordingly. It must appear, by proper averments, what is the nature of the controversy, what the nature of the relief sought against the lunatic, and that the claim for such relief is meritorious. Each case will of course depend upon its own special circumstances.

Where the lunatic is a mere formal party, the allegations may be shorter. Application to the committee need not be alleged, nor need the statement as to merits be made. It will be sufficient to show the circumstances under which such lunatic is sought to be joined, and that no personal claim is made against him.

And the prayer need only be that the petitioner be allowed to make the lunatic a party to such action; the prior portions, as to payment or a reference, being omitted.

X.

APPLICATION OF RECEIVER FOR LEAVE TO SUE.

Vol. I., § 45 (c).

PETITION.

Title and formal commencement, as in last form.

If the receiver be appointed in a matter, and not in a pending suit, prefix the title of that matter.

If the contrary, then prefix the title of the suit under which he acts.

Allege and pray as follows:

That by an order of this court (or, if another, state the name of the court), made in the above-entitled action (or matter), on the day of , your petitioner was appointed receiver of, &c.

[Here state exact particulars of the petitioner's receivership, in conformity with the order for his appointment]

and security has been duly given by your petitioner, and his appointment as such receiver has been duly perfected, pursuant to such order, and he has since acted, and now acts, in the trusts of such receivership.

That amongst the debts to be collected by your petitioner under the trusts of his said receivership, is a debt due to the said A. B. from C. D., of, &c., for

[Here state particulars of debt, or, if convenient, they may be referred to, as annexed in a schedule to the petition].

That your petitioner, as such receiver, has made application to the said C. D. for payment of the said debt, so due from him, as aforesaid, but the said C. D. has refused to pay the same, and such debt still remains due and unpaid.

That your petitioner has made diligent inquiry in relation to the pecuniary standing of the said C. D., and, from such inquiry, has reason to believe, and does believe, that the said C. D. is solvent, and has sufficient available property to pay the said debt, and that the same debt is collectible, and payment thereof enforceable, by means of an action against the said C. D., if permitted to be brought.

Your petitioner, therefore, prays that an order of this court may be made, allowing him, as such receiver, as aforesaid, to commence an action in this court (or, in one of the courts of record of the State of New York), against the said C. D., for collection of the said debt, and to continue and prosecute the same as he may be advised, or that such further or other order may be made in the premises as may be just.

The above is adapted to the case of a collectible debt. If the controversy be of a different nature, the allegations and prayer must be varied, according to the circumstances of the case.

It may, of course, be competent to present the same facts by way of affidavit, and submit, with that affidavit, a form of order, similar to the prayer above inserted; but petition seems to be the preferable mode.

XI.

APPLICATION FOR LEAVE TO SUE A RECEIVER.

Vol. I., § 45 (c).

Apply by petition to the court as above directed.

The petition should state the claim or interest of the applicant, with all proper allegations to show its nature and existence.

The appointment of the receiver against whom the action is intended to be brought, or whom it is proposed to join, as a necessary party, in a suit brought for any other purpose, must be then stated, as in the last form.

It must then be shown that the suit, proposed to be brought, involves title to property covered by the receivership, or questions the propriety of some act of the receiver, or some other good and sufficient reason must be averred, for suing him or making him a party; and it must also be alleged that such intended suit is meritorious, and is proposed to be brought under the advice of counsel. (See similar allegations in form for leave to bring suit against a lunatic.)

And the prayer should be that the petitioner be allowed to bring an action against the receiver, substantially as at the close of the prayer given in that form.

XII.

APPLICATION FOR LEAVE TO SUE IN FORMÂ PAUPERIS.

Vol. I, § 45 (d).

PETITION.

Title and address as in foregoing forms.

The petition of A. B. respectfully sheweth,

That your petitioner is desirous of bringing a suit in this court, against C. D., for

[Here state the nature of the suit brought, or intended to be brought.] •

That your petitioner is not worth twenty dollars, excepting the wearing apparel and furniture necessary for himself and his family, and excepting the subject-matter of this action, of which your petitioner is not in possession.

(Omit the last portion of the sentence, if the fact be otherwise.)

That your petitioner hath a good and meritorious cause of action against the said C. D., as he is advised by counsel, and believes to be true; but that, by reason of his poverty, he is entirely unable to commence and prosecute the intended action, unless he is permitted to do so as a poor person.

Your petitioner therefore prays that, by an order of this honorable court, he may be permitted to prosecute the said action therein against the said C. D., as a poor person; and that E. F. may be assigned as his attorney and counsel for that purpose.

A. B.

Usual verification, &c., but add, at close of verification, as follows:

And further, that he has not in his possession, or within his power or control, sufficient property or other means, over and above the wearing apparel and furniture actually necessary for himself and his family, to pay the ordinary taxable fees of the officers of this court.

CERTIFICATE OF COUNSEL.

I certify that, at the request of the above petitioner, I have examined the grounds of the claim set forth in the above petition, and am of opinion that the said petitioner has a good and meritorious cause of action against the said C. D., cognizable in this court.

Date, &c.,

E. F., of Counsel.

A direct order may be applied for (see below, *mutatis mutandis*); or, as is more probable, the court may direct a reference. In the latter case, proceed as follows:

ORDER OF REFERENCE.

On reading and filing the petition of A. B., duly verified, and the certificate of E. F., of counsel; and on motion of E. F., of counsel for said petitioner, it is ordered that it be referred to G. H., Esq., a counsellor of this court, to examine into the circumstances of the case set forth in said petition, and to report whether, in his opinion, the said petitioner has a meritorious cause of action against the said C. D., which is cognizable in this court, and is or is not entitled to prosecute the same as a poor person, pursuant to the statute in such case made and provided. And it is further ordered that, if the said referee is satisfied that such petitioner is entitled to prosecute as a poor person, as aforesaid, and has reasonable grounds for bringing an action in this court, he do also report the name of a suitable person, to be assigned as his attorney and counsel to prosecute such action.

REPORT OF REFEREE.

Title, &c.

To the court

I, the undersigned, the referee to whom it was referred, by an order of this court, made the day of , 1862, to

[Here insert terms of order.]

do respectfully report: that I have examined the complaint proposed to be made by the said petitioner, and am of opinion that the said petitioner has a meritorious cause of action, which is cognizable in this court, and has reasonable grounds for bringing an action therein against the said C. D.; and, further, I am satisfied, from the proof produced before me, that the said petitioner is entitled to prosecute such action as a poor person.

And I do further report the name of E. F. as a suitable person to be assigned as attorney and counsel, to prosecute such action on behalf of the petitioner.

G. H., Referee.

ORDER TO PROSECUTE IN FORMÂ PAUPERIS.

At a special term of the Court of held in and for the county
of , at the , in , on the day of , 1863.

Present:

Hon. Y. Z., Justice.

A. B. }
vs. }
C. D. }

On reading and filing the petition of the said A. B., and the report of G. H., referee, made in pursuance of an order of this court, dated the day of , 1862, and on motion of E. F., of counsel for the said A. B.—It is ordered that the said A. B. be, and he is hereby, admitted to prosecute the action against C. D., in the said petition and report referred to, in this court, as a poor person, and that E. F. be assigned to him as his attorney and counsel, for that purpose.

XIII.

APPLICATION FOR LEAVE TO BRING ACTION UPON A JUDGMENT.

Vol. I., § 45 (g); Code § 71.

ON APPLICATION TO THE SAME COURT.

Affidavit.

Title, &c.

A. B., the above-named plaintiff, being duly sworn, deposes and says, that, on the day of , judgment was rendered in the above entitled action by this court, in favor of this deponent, against C. D., the defendant above-named, for the sum of , damages and costs (or, if the judgment be of any other nature, state what that nature is, and its effect).

That no portion of such judgment has ever been paid by the said C. D., but the sum of \$, principal and interest, now remains due thereon to this deponent.

[If any portion has been satisfied, vary statement accordingly.]
That, &c.

[Here allege, in detail, such facts and circumstances as may be necessary to show the position of the matter, and the reasons why relief cannot be obtained by the plaintiff by the ordinary process of execution, either issued as of course, or by leave of the court under section 284.]

That, under the facts and circumstances hereinbefore alleged, deponent is, as he is advised by counsel, and verily believes, remediless in the premises, unless leave be granted to him by this court, to commence an action upon the said judgment against the said C. D., pursuant to the provisions of the Code of Procedure in that behalf.

NOTICE OF MOTION.

Title, &c.

Take notice, that upon the pleadings and proceedings in the above entitled action, and upon the affidavit, a copy of which is served herewith, this court will be moved, &c.

that the plaintiff be at liberty to bring and prosecute an action in this court against the defendant, upon the judgment of this court, rendered in favor of him, the said plaintiff, against the said defendant, for the sum of _____, upon the day of _____, as in the said affidavit mentioned, or that such further or other order be made for the relief of the plaintiff, in the premises, as may be just.

APPLICATION FOR LEAVE TO SUE UPON A JUSTICE'S JUDGMENT.

Present petition to the Supreme Court, or to the county court of the county in which such judgment was rendered.

Aver upon that petition as follows :

The recovery of the judgment, adding to the statement of the date of recovery, to wit, within five years now last past.

Continue averments, substantially to the same effect as in the affidavit given in the preceding form.

But introduce a special allegation, substantiating the existence of one or other of the categories mentioned in section 71, i. e.,

The death of the justice who rendered the judgment.

His incapacity to act, stating the reasons why he is incapable.

His removal from the county.

That the process was not personally served on the defendant, or, if more than one, then that it was not served on one of such defendants, giving his name.

That one or more of the parties is dead, stating which ; or—

That the docket or record of such judgment is lost, or destroyed, stating facts to show its destruction, or, if it be lost, showing that diligent inquiry has been made for the purpose of finding it, but without success.

Pray relief to the same effect, as asked in the notice of motion above given.

Serve petition on the defendant, against whom the action is proposed to be brought, accompanied by notice of motion in the usual form.

XIV.

CONFESSION OF JUDGMENT.

Vol. I, §§ 47, 48; Code, §§ 382 to 384.

STATEMENT FOR JUDGMENT.

Title, &c.

I do hereby confess judgment in this cause, in favor of _____, for the sum of _____, and authorize judgment to be entered therefor against me, (on or after the _____ day of _____, if the entry be suspended for any definite period).

When for debt due, or to become due, continue thus:

This confession of judgment is for a debt justly due to the plaintiff, arising upon the following facts:

(Or "justly to become due," &c., if the fact be so.)

[State facts and circumstances in relation to debt, clearly and concisely, but with sufficient detail, carefully consulting the observations, in relation to different classes of cases, made in the different subdivisions of section 48, as applicable to the particular nature of the indebtedness, in respect of which the confession is proposed to be executed.]

If payable by instalments, add as follows:

The same to be paid and payable, at the times and in the instalments following, to wit:

The sum of _____ dollars, part thereof, on the _____ day of _____, with interest thereon from the date hereof.

The sum of _____ residue thereof, on the _____ day of _____, with interest thereon, as aforesaid.

When for liability, thus:

This confession of judgment is for the purpose of securing the plaintiff against liability arising upon the facts hereinafter set forth, and does not exceed the amount of such liability.

[State facts and circumstances in relation to liability.]

(Defendant's signature.)

County of _____ ss. The defendant, C. D., above named, being duly sworn, says, that the facts, stated in the above confession, are true; and further he says not.

Sworn to before me, this }
day of _____, 186 . }

C. D.

Indorse memorandum to be signed by clerk, as follows:

On filing the within statement and confession, it is adjudged by the court, that the plaintiff do recover against the defendant the sum of _____ dollars, with five dollars costs.

XV.

SUMMONS.

Vol. I, § 50; Code, §§ 127, 128, 129.

In all cases, prefix the correct title of the cause.

FOR MONEY DEMAND ON CONTRACT.

When Complaint Served.

Title, &c.

To the defendant above named,
(Or defendants, as the case may be).

You are hereby summoned and required to answer the complaint in this action [of which a copy is herewith served upon you], and to serve a copy of your answer to the said complaint on the subscriber, at his office, Number _____ street, in the city of _____, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid [the plaintiff will take judgment against you for the sum of _____ dollars, with interest from the _____ day of _____, one thousand eight hundred and _____, besides the costs of this action]. Dated,

A. B., *Plaintiff's* Attorney.

N. B.—The address of the attorney, or party subscribing, or the place within the state at which he requires the copy answer to be served, must be exactly and specifically given.

If the plaintiff sue in person, he should substitute the words, "plaintiff in person," for plaintiff's attorney, after his signature.

If several sums, bearing interest from different dates, be included in the same summons, state each demand separately, as thus:

For the sum of \$3,000 (aggregate claim), with interest on the sum of \$1,000, part thereof, from the _____ day of _____; on the sum of \$1,000, further part thereof, from the _____ day of _____; and on the sum of \$1,000 residue thereof, from the _____ day of _____, besides the costs of this action.

When Complaint not Served.

Substitute for the first clause between brackets, "of which a copy, &c."

In ordinary cases, as follows:

"Which will be filed in the office of the clerk of the county of _____; or, if in a local court, in the office of the clerk of the _____ court, &c., specifying it correctly.

Where service is made by publication, thus (Code, § 135):
which was filed in the office, &c., on the _____ day of _____ (giving date coincident with, or antecedent to date of summons.)

In real estate cases, where service is not by publication, the following may be used instead of the last (Code, § 132).

Which has been filed, &c.

SUMMONS FOR RELIEF.

Substitute for the concluding words between brackets, "the plaintiff will take judgment," &c., the following:

The plaintiff will apply to the court for the relief demanded in the complaint.
In all other respects, follow the directions above given.

SUMMONS TO ENFORCE JUDGMENT IN CERTAIN CASES.

VOL. II, § 271; Code, §§ 375-378.

Against Joint Debtor, not Served with Original Process, under Section 375.

Title, &c.

To the defendant, A. B. (naming him).

You are hereby summoned, and required to show cause, within twenty days after the service hereof, why you should not be bound by the judgment entered in this action on the day of , in the office of the clerk of, &c., in favor of the above-named plaintiff, against all the above-named defendants, for the sum of dollars, debt, damages, and costs, in the same manner as if you, the said A. B., had been originally summoned; and if you fail to show such cause, you will be bound by such judgment, and execution will be issued against you accordingly. Dated, &c.

A. B., Plaintiff's Attorney.

Subscription is essential to the validity of this process, and must be made by the judgment-creditor, his representatives, or attorneys. Code, § 377. If by either of the two former, add proper designation.

Against Heirs, &c., of Deceased Judgment-Debtor, under Section 376.

Court.

A. B.

vs.

C. D. and E. F., Heirs
(or otherwise, as the case
may be) of G. H., a judgment-debtor, deceased.

To the defendants above named:

You are hereby required and summoned to show cause, within twenty days after the service hereof, why the judgment entered in this action against the said G. H., a judgment-debtor deceased, on the day of , in the office of the clerk of, &c., for the sum of, &c., (specify amount) should not be enforced against the estate of the judgment-debtor in your hands respectively; and if you fail to show such cause, the same will be so enforced, and execution issued accordingly. Dated, &c.

A. B., Plaintiff's Attorney.

See last form, as to subscription.

AFFIDAVIT TO ACCOMPANY SUMMONS IN THE LAST TWO CASES.

Code, § 378.

Title, &c.

A. B. (attorney or party subscribing the summons), being duly sworn, deposes and says, that the judgment entered in this action on the day of in the office of the clerk of the county of , at , in the said county [against the above-named defendants], for the sum of dollars, debt, damages, and costs, has not been satisfied, to his, this deponent's knowledge, or information and belief, and that the sum of dollars is now due thereon.

If the judgment is sought to be enforced under section 376, substitute for words between brackets, "against G. H., deceased," and add at the conclusion, "from the estate of the said G. H."

XVI.

NOTICE OF OBJECT OF ACTION, TO ACCOMPANY SUMMONS.

Vol. I, § 53 ; Code, § 131.

Title.

To the Defendant, A. B.

Sir,

The object of the action, in which a summons is herewith served upon you, is
 [Here insert clear and concise statement of the object of the suit.

If property is sought to be affected by it, insert description of such property.]

And no personal claim is made against you.

Dated.

C. D., Plaintiff's Attorney.

The following statements of the object may be adopted in some of the specific cases in which this course is expedient :

IN FORECLOSURE.

To foreclose a mortgage executed by E. F. to G. H., on the day of , for securing the sum of , with interest, upon the following described premises.

[Copy description in full, from mortgage.]

IN PARTITION.

To make partition in due form of law between the parties entitled thereto, of the following described premises.

[Copy in description of property, the same as inserted in the complaint.]

In other actions, vary the statement according to the nature of the case, making any description of property agree with that inserted, or intended to be inserted, in the complaint.

—

XVII.

NOTICE OF LIS PENDENS.

Vol. I, § 60 ; Code, § 132.

Title.

N. B.—The names of all the parties should be given in full.

Notice is hereby given, that an action has been commenced and is pending in this court, upon the complaint of the above named plaintiff, against the above named defendants.

[Here state object of action, and give description of the property in the county in which the notice is filed, intended to be affected thereby.] Dated, &c.

C. D., Plaintiff's Attorney.

The following are forms of statement of the object, &c., for specific cases :

IN FORECLOSURE.

For the foreclosure of a mortgage, bearing date the day of , one thousand eight hundred and , executed by A. B. of , and recorded in the office of the of the county of , on the day of ,

one thousand eight hundred and , in Liber of Mortgages, page ; and that the mortgaged premises in the last-mentioned county affected by the said foreclosure are situate in the [state situation] in the last mentioned county, and are described in the said mortgage as follows, to wit:

[Copy in description from mortgage.]

IN PARTITION.

For the partition in due form of law between the parties entitled thereto, of the premises hereinafter more particularly mentioned and described; and that the premises whereof a partition is sought to be made as aforesaid, are situate at , in the county of , and are known and described as follows:

[Insert full description of property to be partitioned, copied from the last deed under which the premises are held; or, if the description there contained be insufficient, then, a corrected one, according to the circumstances.]

IN EJECTMENT.

To recover the possession of the premises hereinafter more particularly mentioned and described; and that the premises, whereof possession is sought to be recovered as aforesaid, are situate, &c., and are known and described as follows:

[Insert full description. If such a description be contained in the instrument under which the plaintiff claims title, insert it as it there appears; if not, then draw up a full and complete one.]

WHERE AN ATTACHMENT HAS BEEN ISSUED.

[After stating, in general terms, the object of the action, whatever that object may be, continue thus]:

And that a warrant of attachment, under chapter 4, of title 7, part 2, of the Code of Procedure, has been issued in this action, directed to the sheriff of the county of and lodged with such sheriff, which is intended to affect the real estate in the said county, hereinafter described, to wit:

[Here insert sufficient description of property sought to be affected.]

XVIII.

AFFIDAVIT OF SERVICE OF SUMMONS.

Vol. I., §§ 54 and 58 (a); Rule 18.

Title, &c.

County of ss.

A. B. (description of deponent), being duly sworn, deposes and says, that on the day of , at (state place of service) he served the summons in the above entitled action (hereunto annexed) upon C. D., the defendant (or, one of the defendants), therein, by delivering a copy thereof to him, the said C. D., personally, and leaving the same with him. He further saith, that at the time of such service, he knew C. D., the person so served as aforesaid, to be the person mentioned and described in the said summons as C. D., the defendant (or one of the defendants) therein.

Sworn, &c.

A. B.

If, as is very usual, a copy of the complaint is served with the summons, vary thus:

He served the summons in the above entitled action, together with a copy of

the complaint therein (respectively hereunto annexed) upon C. D., &c., "by delivering copies of the said summons and complaint to him," &c.

If, instead of the complaint, a copy of the notice of the object of the action is served simultaneously, vary the allegation accordingly.

Several services may, if convenient, be included in one affidavit, by altering the above form, taking care to make a separate and specific allegation, as to the time and place of each such service.

SHERIFF'S CERTIFICATE.

Is usually annexed to, or indorsed upon, the original of the summons, or other process or paper, a copy whereof is served.

Title.

County of X.

ss.

I, C. D., sheriff of the county of X., in the state of New York, do hereby certify that, on the day of , at W., in the said county, I served the summons in this action, the original whereof is hereunto annexed,

[Or vary statement according to circumstances, the original process or paper being identified as that of which a copy is served.]

upon E. F., the defendant (or one of the defendants,) in the above entitled action, by delivering a copy thereof to him, the said E. F., personally, and leaving the same with him.

C. D., Sheriff.

Dated, &c.

XIX.

SUBSTITUTED SERVICE, UNDER STATUTE OF 1853.

Vol. I, § 49-55.

SHERIFF'S RETURN.

Title, &c.,

I, A. B., sheriff of the county of , duly authorized to serve the process for the commencement of this action, which process is hereto annexed, do hereby return and certify, pursuant to the statute in such case made and provided, that proper and diligent effort has been made by me to serve such process on C. D., the defendant in this action, who resides at X., within my bailiwick, and that the said C. D. cannot be found, so that the same service cannot be made by me personally, by such proper and diligent effort as aforesaid.

Or, if so, "that the said C. D. avoids and evades such service, so that," &c.

N. B. These facts may also be shown by affidavit, and, in cases of evasion, it may be better to state facts showing such evasion a little more fully.

If the sheriff cannot certify as to the residence of the defendant, that fact should also be shown by affidavit.

ORDER TO BE APPLIED FOR.

On reading and filing the annexed return (or affidavit), and on motion, &c., It is ordered, and I do hereby direct that service of the summons in this action be made, by leaving a copy thereof at the residence of C. D., the above-named defendant, at , in the county of , with some person of proper age, if admittance can be obtained, and such proper person found who will receive the same; or, if admittance cannot be obtained, or any such proper person found

who will receive the same, then, by affixing the same to the outer or other door of said residence, and by putting another copy thereof, properly folded or enveloped, and directed to the said C. D., at his place of residence, into the post office in the said city (or town) of _____, where he, the said defendant, resides, and paying the postage thereon.

(Signature of Judge.)

XX.

SERVICE BY PUBLICATION.

Vol. I., § 56; Code, § 135.

AFFIDAVIT.

Title, &c.

A. B., of, &c., being duly sworn, deposes and says that a summons has been issued in this action, that a cause of action on the part of A. B., the plaintiff, exists against C. D., the defendant therein, and that the said defendant cannot, with due diligence, be found within this state.

So far, in all cases; under the first three subdivisions, continue as follows:

Under subdivision 1:

That the said defendants are a foreign corporation, carrying on business at _____, in the state of _____, and not incorporated by the laws of this state, *but they the said defendants have property within this state, to wit (give short particulars of property).

Or after *,

But the above cause of action arose therein (according to circumstances).

Under subdivision 2:

That the said defendant, being a resident within this state, has departed therefrom with intent to defraud his creditors, or, has departed therefrom with intent to avoid the service of the summons in this action, or, keeps himself concealed therein, with intent to avoid the service of the summons in this action.

Here add, in all cases under this subdivision, full particulars, as to inquiries, and attempts made with a view to serve the defendant with process, and their result; giving, in detail, any circumstances tending to show a fraudulent departure, or a fraudulent concealment.

Under subdivision 3:

That the said defendant resides at _____, in the state of _____, and is not a resident of this state, but has property therein, to wit [give short particulars of property].

And this court has jurisdiction of the subject of this action.

Under subdivision 4, model the affidavit as follows:

A. B., &c., deposes and says, that a summons has been issued in this action, which is brought for (state nature of action,) and the subject whereof is real property at _____, in the county of _____, in this state: (or, is personal property in this state.)

That the above-named defendant, C. D., is a proper party to such action, and has or claims a lien or interest, actual or contingent, in the aforesaid property, to wit (state short particulars of claim).

Or, instead, if the fact be so,

That the above-named defendant, C. D., is a proper party to such action, and

that the relief demanded therein consists in wholly (or, partly) excluding him, the said defendant, from any interest or lien in the aforesaid property.

Add, in both cases, that the said defendant cannot, after due diligence, be found within this state.

Subjoin an allegation, either that he is a non-resident, or else that due diligence has been used to serve him, without success; giving circumstances and reasons tending to show such diligence. See *supra*, under subdivision 2.

Under subdivision 5:

A. B., &c., deposes and says that a summons has been issued in this action, which is brought by the plaintiff against the defendant, for a divorce in a case prescribed by law, to wit, on the ground of, &c. (state ground on which divorce is sought, in the words or to the effect of the statute), and that a cause of action in the plaintiff exists against the defendant in respect thereof; that the said defendant cannot, &c. Conclude as under last subdivision.

Under the concluding clause of the section, introduced in 1860, model the affidavit thus:

That a summons has been issued in this action, which is brought for the foreclosure of a mortgage on real estate, to wit, upon certain lands and premises at _____, in the county of _____, within this state, and a certain party (or certain parties), to wit:

[Here insert statement showing the nature of the lien or interest on the premises claimed or claimable by the party or parties sought to be foreclosed.]
have an interest in (or, a lien upon) such mortgaged premises, and such party is (or, and such parties are) unknown to the plaintiff, and the residence of such party (or, parties) cannot, with reasonable diligence, be ascertained by him.

IN ALL CASES AS ABOVE,

Whenever the residence of the defendant is unknown, insert allegation to that effect, and also statements, to show that reasonable diligence has been used to ascertain his address, but without success.

ORDER FOR PUBLICATION.

Title, &c.

It appearing to my satisfaction, by the affidavit of S. T., that the above-named defendant, C. D., cannot, after due diligence, be found within this state, and that a cause of action in favor of the plaintiff exists against him, the said defendant (Or, and that the subject of this action is real property within this state, and the defendant, C. D., is a proper party thereto, and has or claims a lien or interest actual or contingent therein).

[Or vary this statement otherwise, so as to bring the case exactly within the terms of the subdivision, whichever it may be, under which relief is sought to be invoked.]

And, it also appearing by affidavit, as aforesaid, that the said defendant (is a foreign corporation and has property within this state).

[Or, if relief be invoked under any other branch of the provisions of the section, recite in conformity with the affidavit, so as to bring the case within the proper subdivision, using the exact wording of that subdivision.]

Now, therefore, on motion of R. S., attorney for the plaintiff, I do hereby order that service of the summons in this action be made upon the said defendant, C. D., by the publication thereof in two newspapers, to wit, in the _____ and the _____, published in the county of _____, and which I do hereby designate as most likely to give notice to the said defendant, and that such publication be continued in such newspapers once in each week for six successive weeks. And I do hereby further direct a copy of the summons and complaint in this action to be forth-

with deposited in the post-office in the city of , directed to the said defendant at his place of residence, as stated in the said affidavit, and the postage paid thereon.

If under the concluding clause of the section, vary the order thus:

I do hereby order that service, &c., be made upon the defendants.

[Insert statement of the character in which such unknown defendants are sought to be joined, in accordance with the description given in the affidavit.]

And order the publication as follows:

In the state paper, and in the , a newspaper printed in the county where the aforesaid premises are situated, &c.

If the name of the defendant be known, but his residence is unknown, insert in the recital, after the words, "cannot be found within this state," the following: "and that his, the said defendant's, residence, is neither known to the party making this application, nor can the same with reasonable diligence be ascertained by him."

Whenever the residence of the defendant is unknown, the order may be confined to the first clause, omitting the direction at the close, as to deposit of a copy of the summons and complaint in the post-office.

PROOF OF PUBLICATION OF SUMMONS.

Title, &c.

A. B., of, &c., printer (or, C. D., foreman or principal clerk of A. B., printer) of the newspaper called , published at , in the county of , being duly sworn, deposes and says, that the summons in the above action, a copy whereof is hereto annexed, was published in the aforesaid newspaper, called, &c., once a week for six weeks, commencing on the day of , 186 , and ending on the day of , 186 .

Sworn, &c.

A. B.

A copy of the advertisement must be annexed.

N. B. This form of affidavit may be used, *mutatis mutandis*, for the proof of publication of any other legal notices, when required.

PROOF OF POSTING COPIES.

Title, &c.

A. B., &c., being duly sworn, deposes and says, that, on the day of , he, this deponent, deposited in the post-office, in the city of , copies of the summons and complaint in this action, enclosed and directed to the defendant, C. D., at [insert exact direction], the same being the place of residence of the said defendant, and he, this deponent, prepaid the postage thereon.

Sworn, &c.

A. B.

XXI.

PROCEEDINGS FOR APPOINTMENT OF GUARDIAN AD LITEM.

BY OR ON BEHALF OF INFANT PLAINTIFF.

Vol I., §§ 63, 64; Code, §§ 115, 116.

APPLY ON PETITION AS UNDER.

When Infant is Fourteen and upwards.

The petition of A. B., of, &c., an infant of the age of fourteen, but under the age of twenty-one years, to wit, of the age of years, or thereabouts, respectfully sheweth:

That your petitioner is about to commence an action in this court
 [Or, where the application is to a county judge, state the court in which the action is intended to be brought],
 against C. D., for, &c.

[Here give short particulars of cause of action.]

But as your petitioner is an infant, as above stated, he prays that E. F., of, &c., a competent and responsible person, may be appointed to prosecute the said suit, for your petitioner, as his guardian, according to the statute in such case made and provided.

N. B.—In common-law actions, the above form is sufficient.

In equity cases, add to the name of the proposed guardian, one of the following qualifications:

1. The general guardian of your petitioner; or,
2. A person fully competent to understand and protect the rights of your petitioner.

Where Infant under Fourteen.

If the infant be under fourteen, then the petition to be that of either A. B., of, &c., general guardian of C. D., an infant, under the age of fourteen years, to wit, of the age of years, or thereabouts,

Or A. B., of, &c., testamentary guardian of C. D., an infant, &c., appointed by the last will and testament of E. D., father of the said C. D.

Or A. B., a relative, to wit [state relationship], of said C. D., an infant, &c.

Or A. B., a friend of C. D., an infant, &c.

If the petition be that of a relative or friend, insert after the first clause:

That notice of the intention of your petitioner to make such application on behalf of the said C. D., was, on the day of , duly given to E. F., of, &c., the general (or, testamentary) guardian of the said infant.

But, if the infant have no guardian, then allege as follows:

That the said C. D. has no guardian, general or testamentary. That the said C. D. resides with G. H., of, &c., and that notice of the intention of your petitioner to make this application on behalf of the said C. D., was, on the day of , duly given to the said G. H., the person with whom such infant resides.

In all cases, the petition to be signed and verified by the petitioner in the usual form. See Form III.

For consent of guardian and affidavit of witness, see below.

BY OR ON BEHALF OF INFANT DEFENDANT.

Petition of the Infant Himself.

The petition of the above-named G. H., of, &c., an infant of the age of fourteen, but under the age of twenty-one years, to wit, of the age of years, or thereabouts, respectfully sheweth:

That the above action has been commenced in this court against your petitioner by the above-named A. B. (plaintiff), for, &c. [Give short particulars of cause of action.] That the summons in such action was served upon your petitioner, within twenty days now last past, to wit, on the day of .

But as your petitioner is an infant, as above stated, he prays that, &c. [as in first branch of form], may be appointed to defend the said suit for your petitioner, as his guardian, according to the statute in that case made and provided.

Add consent and affidavit. See below.

Of a Relative or Friend.

The petition of I. M., a relative, to wit, the [or, of O. P., a friend] of the above-named G. H., an infant under the age of fourteen years, to wit, of the age of years, or thereabouts, respectfully sheweth:

That the above action has been commenced against the said G. H. by the above-named A. B., for, &c.

[Give short particulars, as above.]

That R. S., of, &c., is the general (or the testamentary) guardian of the said G. H., and resides at , within this state. That on the day of , notice of the intention of your petitioner to make this application was given to the said R. S.

That as the said G. H. is an infant, as above stated, your petitioner prays that E. F., &c. (as in above form), may be appointed to defend the said suit for the said G. H., as his guardian, according, &c.

Add consent and affidavits. See below.

If the application be made, on the ground that the infant defendant, though fourteen and upward, has neglected to apply within twenty days, vary form, but insert at the close of the first allegation as follows: That the said G. H. hath neglected to apply for the appointment of a guardian to defend this action on his behalf, within twenty days after the service of the summons therein upon him.

If the infant have no general or testamentary guardian, allege in substitution for the above, as follows:

That the above-named G. H. has no general or testamentary guardian within this state; adding,

When the Infant is over Fourteen, and within the State,

That on the day of , notice of the intention of your petitioner to make this application was duly given to the said G. H., who resides at , within this state.

When the Infant is under Fourteen, and within the State,

That on the day of , notice of the intention of your petitioner to make this application was given to X. Y., of, &c., with whom the said infant G. H. resides, the said G. H. being under the age of fourteen years, as above stated.

When the Infant, of whatever Age, resides out of the State,

That the said G. H. is not within this state, but resides at , in the state of .

PETITION OF ANOTHER PARTY TO THE ACTION.

The petition of A. B., the above-named plaintiff, respectfully sheweth,

That the above action has been commenced by your petitioner against the above-named C. D. for, &c. [Give short particulars as above.]

That the said C. D. is an infant under the age of twenty-one years, to wit, of the age of years, or thereabouts.

[If the infant be fourteen and upward, add: That the said C. D. has neglected to apply for the appointment of a guardian to defend this action on his behalf, within twenty days after the service of the summons therein upon him.]

Then add allegation, according to circumstances—

Of there being, or not being, a general or testamentary guardian, and of notice to such guardian in the former case.

Of notice to the infant, if over fourteen and within the state, and of notice to the person with whom that infant resides, if under fourteen and within the state.

Or, of the non-residence of the infant.

Using such one or more of the clauses in the foregoing portions of this form, as may be requisite to give the exact state of the matter, and to comply with the requisitions of the statute. Continue thus :

That as the said C. D. is an infant, &c. [Conclude, as in petition by relative or friend.]

PETITION OF PLAINTIFF IN PARTITION OR FORECLOSURE, IN CASE OF A NON-RESIDENT INFANT DEFENDANT.

Allege,

That an action hath been commenced by your petitioner in this court. For the partition of real property, to wit: [Give short description], or For the foreclosure of a mortgage. [Describe mortgage.]

That C. D., of, &c., an infant under the age of twenty-one years, is a necessary party to such action, and he, the said C. D., resides out of this state, to wit, at , in the state of , with one G. H., a relative, to wit, *uncle* (or a friend) of him, the said infant.

[Allege fitness of guardian proposed, as in petition by a relative or friend, of an infant defendant.]

Your petitioner, therefore, prays that an order be made designating the said E. F., or some other suitable person, to be the guardian of the said infant defendant for the purpose of this action, unless he, the said infant defendant, or some one in his behalf, shall, within days after the service of a copy of this order, procure to be appointed a guardian for the said infant, and giving special directions for the manner of the service of such order. Or that such other order or relief may be granted to the petitioner in the premises as may be just.

CONSENT OF GUARDIAN.

The consent of the proposed guardian to serve, must be subjoined as follows, in all cases, except that last specified :

I consent to become the guardian of C. D., in the prosecution (or, in the defence) of the action mentioned in the above (or "the annexed") petition.

Witness,

X. Y.

E. F.

AFFIDAVIT OF WITNESS.

To petition and consent, in all cases except the last, annex following affidavit:

County of ss.

X. Y., of , &c., being duly sworn, deposes and says, that C. D., in the annexed petition named, did, on the day of , duly sign the said petition, in the presence of this deponent; and deponent further says, that E. F., in the prayer of the said petition named, did, at the same time, sign the consent or agreement thereunder written, to become the guardian of the said A. B., in the presence of this deponent. And this deponent further says, that he knows the said E. F., and that the said E. F. is a competent and responsible person.

Sworn, &c.

In equity cases add, after "he knows the said E. F.:"

And that the said E. F. is

[add, if the fact be so, the general guardian of the said infant, and is] fully competent to understand and protect the rights of such infant; and that the said E. F. has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And deponent lastly saith that the said E. F. is, in this deponent's belief, of sufficient ability to answer to the infant for any damage which may be sustained by his negligence, if any, in the defence (or, in the prosecution) of this suit.

Rule 60, under which these last particulars are required, does not apply to actions for the recovery of money only, or of specific real or personal property. *i. e.*, ordinary common law-actions triable by a jury, and therefore it is unnecessary to add them to the petition in such cases. It will not be improper, however, and, in important cases, may be more satisfactory to the judge.

If one person cannot speak to the whole of the above facts, divide the affidavit accordingly. They must all, however, be proved by one or more affidavits, as the case may be.

ORDER.

Title, &c.

On reading and filing the petition of , (add, "an infant under the age of twenty-one years," if the infant be petitioner) hereunto annexed, It is ordered that E. F., in the said petition mentioned, be, and the said E. F. is hereby, appointed guardian of the said petitioner (or of A. B., an infant in the said petition mentioned), in the prosecution (or, in the defence) of this suit, according to the statute in such case made and provided.

Dated, &c.

(Judge's signature.)

ORDER, IN PARTITION OR FORECLOSURE,

Where an Infant Defendant is Non-resident.

After title and preface, continue

It is ordered that E. F. (in the said petition named, if the fact be so) be, and he, the said E. F., is hereby, designated and appointed guardian of the said infant defendant C. D., for the purposes of this action, unless he the said infant defendant, or some one in his behalf, shall within days after the service of a copy of this order, procure to be appointed a guardian for him, the said infant, for the purposes of this action as aforesaid. And it is hereby further ordered and directed, that this order be forthwith served upon the said infant defendant, and that the manner of service thereof be by service,

[Upon the said infant personally; or

Upon the said G. H., the relative (or friend) with whom the said infant resides; or

Upon the said infant by mail, by enclosing the same in a letter addressed to him, the said infant, at, &c. (give direction), and paying the postage thereon.

Or otherwise, as the judge may direct.

XXII.

REMOVAL FROM JUSTICES' COURTS, OF CONTROVERSY,
WHERE TITLE TO REAL ESTATE IN QUESTION.

Vol. I., § 24; Code, §§ 55-58.

ANSWER OF TITLE.

Title, &c.

The defendant, for answer to the plaintiff's complaint, saith:

Allege facts, showing the nature of the action, and that the title to real property really comes into question, and forms the main subject of the action, stating, in particular, the seizin of the defendant, or the claim made by him to such property, if the plaintiff be in possession, and the circumstances under which the controversy has arisen.

Having thus laid ground for the proceeding, conclude :

And this defendant saith that, under the facts and circumstances hereinbefore alleged, the title to real property comes in question in this action, and he hereby claims the benefit of the provisions of the Code of Procedure, with reference thereto, and that this action be discontinued by the plaintiff, and brought in the proper court.

N. B.—To be signed by the defendant or his attorney, and delivered to the justice. To be then countersigned by the latter, and delivered to the plaintiff.

See Code, § 55.

UNDERTAKING COLLATERAL THEREWITH.

Title, &c.

Whereas the above-named defendant has put in his answer in this action, showing that the title to real property comes in question therein, and claiming the benefit of the provisions of the Code of Procedure with reference thereto.

Now, therefore, we the undersigned, C. D., of, &c. (N. B. the defendant), and E. F., of, &c. (surety), do hereby undertake and become bound to the plaintiff in the sum of one hundred dollars, that if he, the said plaintiff, shall, within twenty days thereafter, deposit with L. M., Esq., of , the justice before whom this action is brought, a summons and complaint, in an action in the Supreme Court of the State of New York for the same cause, the above-named defendant will, in such case, within twenty days after such deposit as aforesaid, give an admission in writing of the service thereof.

If the defendant have been arrested, continue thus:

And also that he, the said defendant, will at all times render himself amenable to all process of the said Supreme Court, during the pendency of the said action to be brought therein, as aforesaid, and to such as may be issued to enforce the judgment therein.

Add affidavits and acknowledgment, as in form No. VII.

XXIII.

REMOVAL OF CAUSE INTO FEDERAL COURT.

Vol. II., § 159.

PETITION.

Prefix title of cause, and address petition to the court in which the action is brought.

See general form No. III.

Allege,

That a suit has been brought in this court against your petitioner by A. B. (a citizen of this state), for recovery of the sum of \$

[Or, state, otherwise, the nature of the suit and the value of the matter in dispute. N. B.—If the applicant be an alien, the allegation that the plaintiff is a citizen of this state will not be necessary.]

That the matter in dispute in such suit exceeds, as aforesaid, the sum or value of five hundred dollars, exclusive of costs.

That your petitioner, at the time of filing this his petition, has entered his appearance in this court, in the said suit.

(That your petitioner is an alien, to wit, a subject of the king of , and is not a citizen of the United States of America.)

Or,

That your petitioner is not a citizen of the state in which the above entitled action is brought, but is a citizen of another state, to wit, of the state of .

That he, your petitioner, has procured and herewith offers good and sufficient surety for his entering in such court, on the first day of its session, copies of the process against him in said cause, and, also, for his there appearing and entering special bail in the said cause, if special bail was originally requisite therein, pursuant to the statutes of the United States in such case made and provided.

Your petitioner, therefore, prays that the said cause may be removed for trial into the next Circuit Court to be held in the district where the same is pending, to wit, into the next Circuit Court for the *Southern* District of the State of New York, pursuant to the provisions of the said statutes of the United States, in such case made and provided, and that this court do accept the surety offered by your petitioner, as aforesaid, and do proceed no further in the said cause.

(and, if so, that the bail originally taken from your petitioner in the said cause, be discharged.)

And that this court would give all proper directions, and grant to your petitioner such further or other order or relief in the premises as may be just.

SECURITY.

Know all men by these presents: That we the undersigned, C. D., of , &c., and E. F., of , are hereby held and firmly bound unto A. B. (plaintiff in the action), his executors, administrators, and assigns, in the sum of *one hundred* dollars, lawful money of the United States of America, to be paid to the said A. B., his executors, administrators, or assigns, for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, and every of them, forever, by these presents.

Sealed with our seals this day of , in the year of our Lord 1863.

Whereas the above-named A. B. hath commenced a suit, in the *Supreme Court of the State of New York*, against the above bounden C. D., (or, against C. D., of, &c., in cases where the petitioner does not join in the bond),
for recovery of

[Here state nature of action, in accordance with the petition.]
and the matter in dispute in such suit exceeds, as aforesaid, the sum of five hundred dollars, exclusive of costs.

And whereas the said A. B., the plaintiff in the said suit, is a citizen of the state of New York, and the said C. D., the defendant therein, is a citizen of another state, to wit, the state of
(or, where the defendant is an alien, simply allege,

And whereas the said C. D., the defendant in the said suit, is an alien, and is not a citizen of the United States of America,)

And whereas the said C. D. hath entered his appearance in such suit in the said *Supreme Court*, and hath filed his petition in the same Court for the removal of the said cause for trial into the next Circuit Court to be held in the District where the said suit is pending, to wit, into the next Circuit Court to be held in the *Southern* District of the State of New York, pursuant to the Statutes of the United States in such case made and provided.

Now, therefore, the condition of the above written obligation is such, that if the above bounden C. D.

(or, if the said C. D., when the defendant does not join in the bond),

shall enter in the said Circuit Court, on the first day of its next session, copies of the process against him in the aforesaid cause, and shall also then and there appear, and enter special bail in the said cause, if special bail was originally requisite therein, then these presents and the above written obligation shall be void, but otherwise to be and remain in full force and virtue.

To be executed by the obligors.

Should be acknowledged, and affidavit of justification annexed.

Having filed the above petition, and an entry of the defendant's appearance, serve upon the plaintiff's attorney copies of the petition, notice of appearance, and security, with the following notice of motion:

NOTICE.

Take notice, that upon the petition and appearance of the defendant, now on file in this court, and also upon the surety bond on behalf of the said petitioner, copies of which petition, notice of appearance, and surety bond are served herewith, this court will be moved on the part of the defendant at, &c., that the prayer of the said petition be granted, and that this cause be removed for trial unto the next Circuit Court to be held in the *Southern* District of the state of New York, as thereby prayed, and that this court do accept the surety offered by the petitioner, and do proceed no further in the said cause, (and, if so, that the bail originally taken from the petitioner, in the said cause, be discharged.)

And for such other or further order or relief as may be just.

Or, the matter may, if preferred, be brought on by order to show cause to the same effect.

ORDER.

See 11 How., 481 (485).

Title, &c.

A petition having been filed by the defendant in this cause at the time of entering his appearance herein, on the day of *instant*, praying for the removal thereof into the Circuit Court for the *Southern* District of New York, pursuant to the statutes of the United States in such case made and provided, and the said petitioner having offered good and sufficient security, pursuant to the directions of, and as required by the said statute; now, on motion of Mr. W., of counsel for the petitioner, and after hearing Mr. H., of counsel for the plaintiff, in opposition thereto, it is declared that it is made to appear, to the satisfaction of this court, that the present suit is commenced in this court by a citizen of the state of New York against a citizen of another state, (Or, that the present suit is commenced in this court against an alien), and that the matter in dispute exceeds five hundred dollars, exclusive of costs. And it is hereby further declared and ordered, that this court doth accept the surety offered by the petitioner, and that the said cause be removed for trial into the next Circuit Court to be held in the *Southern* District of the state of New York, pursuant to the said statutes; and that this court do proceed no further therein, and that all proceedings in this court in the said cause be and the same are hereby stayed.

XXIV.

APPEARANCE.

Vol. I., § 59; Vol. II., § 160; Rules 10, 11.

COMMON APPEARANCE.

Title, &c.

Sir,

Take notice that I appear (as attorney for the defendant) in the above-entitled action, and I request that all notices and papers therein be served upon me, at my place of (business) No. , street, in the city of .

Dated.

A. B., Attorney for the Defendant.

To C. D., Esq., Attorney for Plaintiff.

Where the party himself appears, substitute the words "personally" for as "attorney for the defendant," and "residence" for "business," if the party has no such place.

QUALIFIED APPEARANCE.

Title, &c.

Take notice that I appear as attorney for the defendant, C. D., for the purposes of a motion to [state object of motion proposed to be made], but not for any other purpose.

Date, signature, and address, as above.

APPEARANCE AND DEMAND OF COPY COMPLAINT.

Vol. II., § 160 (a); Code, § 130.

Title, &c.

Take notice that I appear (as attorney for the defendants, C. D. and E. F.,) in the above-entitled action, and demand a copy of the complaint therein, to be served upon me, at, &c.

Conclude as in foregoing forms.

XXV.

PROCEEDINGS ON ARREST.

UNDERTAKING BY PLAINTIFF.

Vol. I., § 83 (b).

Title, &c.

Whereas A. B., above named, has made application to one of the of the above-named court, to arrest the above-named C. D., in the above-entitled action, on the ground that the said defendant is arrestable therein, pursuant to the provisions of the Code of Procedure.

Now, therefore, we, the above-named A. B., of No. , street, in the city of , and E. F., of No. , street, in said city, do hereby, pursuant to the statute in such case made and provided, undertake, that if the defendant in the said action shall recover judgment therein, the plaintiff in said action will pay all costs which may be awarded to the said defendant, and all damages which he may sustain by reason of the arrest in said action, not exceeding the sum of hundred dollars.

Dated,

18

Add affidavit of justification by sureties, and acknowledgment, as in No. VII.

The plaintiff need not justify, when sureties are joined in the undertaking, but, where the undertaking is executed by him alone, he must do so. It is usual and proper to join him as a party to the undertaking, in all cases where that course is not attended with inconvenience.

ORDER OF ARREST.

Vol. I., § 83 (c).

Title, &c.

To the sheriff of the county of

You are required forthwith to arrest the defendant in this action, and hold him to bail in the sum of (double the plaintiff's claim in general, but the amount rests with the judge), and to return this order to C. D., the plaintiff's attorney, at , on the day of , one thousand eight hundred and

Dated,
C. D., Plaintiff's Attorney.

(Judge's signature).

MOTIONS TO VACATE ORDER OF ARREST, OR TO REDUCE THE AMOUNT OF BAIL.

Vol. I., § 85 (a).

Motion to Vacate.

Title, &c., and formal notice as in No. I.

[Grounded on the pleadings and proceedings in this cause (and on the "affidavits, copies of which are herewith served"). If the motion is grounded on the plaintiff's papers alone, omit words in parentheses.]

That the order for the arrest of C. D., the above-named defendant, granted on the day of , by the Honorable , a justice of this court, on the application of A. B., the above-named plaintiff, be vacated, or for such further or other order as may be just.

N. B.—If the motion is to vacate, on the ground of irregularity in the plaintiff's papers, the irregularities must be specified on the face of the moving papers. Rule 39.

Motion to Reduce Bail.

Notice, &c., as in last.

That the amount of bail to be given, on the arrest of C. D., the above-named defendant, on the application of A. B., the above-named plaintiff, as the same is fixed by an order of this court, made the day of , by the Honorable , a justice thereof, may be reduced, or for such further or other order as may be just.

UNDERTAKING ON GIVING BAIL.

Vol. I., § 86 (b).

Title, &c.

Whereas the above-named defendant, C. D., has been arrested in the foregoing action, by the sheriff of the county of , at the suit of the above-named A. B.

Now, therefore, we, E. F., of, &c., and G. H., of, &c. (state places of residence and occupation), do hereby, pursuant to the statute in such case made and provided, undertake that C. D., the defendant above named, shall at all times render himself amenable to the process of this court, during the pendency of this action, and to such as may be issued to enforce the judgment therein.

[So far in ordinary cases.]

If the defendant be arrested under subdivision 3 of section 179, add as follows :

And we do hereby further undertake and become bound to the said plaintiff in the sum of (N. B.—Double value of property as sworn to by plaintiff), for the delivery to the said plaintiff of the property claimed by him in this action, if such delivery shall be adjudged; and for the payment to him of such sum as may for any cause be recovered against the said defendant, C. D., in this action.

Add affidavits of justification and acknowledgments, as in No. VII.

See same form, as to justification of sureties, or others in their stead, if excepted to.

XXVI.

PROCEEDINGS ON REPLEVIN.

AFFIDAVIT.

Vol. I., § 95 (b).

Title, &c.

County of

ss.

A. B., the above-named plaintiff, being duly sworn, deposes and says : Firstly, That he is owner of the property, to recover the possession of which this action is brought, and that the description of said property is as follows, to wit :

[Insert correct description.]

Or,

Firstly, That he is lawfully entitled to the possession of the property, to recover the possession of which this suit is brought, by virtue of a special property therein, the facts in respect to which are hereinafter set forth, and that the description of said property is as follows, to wit :

[Insert correct description.]

That, &c.

[Insert statement of facts and circumstances, showing nature of special property claimed.]

Secondly,

That the said property is wrongfully detained by the said defendants, above named.

Thirdly,

That the alleged cause of the detention thereof, according to his, this deponent's best knowledge, information, and belief, is as follows, to wit :

[State alleged cause of detention.]

Fourthly,

That the said property has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or attachment against the property of the said plaintiff.

Or, if the fact be so,

That the said property has not been taken for a tax, assessment, or fine, pursuant to a statute.

That the said property has been seized under an execution (or, attachment), against the property of him, the said plaintiff, but the same is, by statute, exempt from such seizure, inasmuch as, &c. (state shortly, grounds on which exemption claimed).

Fifthly,

That the actual value of said property is the sum of dollars.

Sworn to before me, this }
day of , 186 }

A. B.

C. D.,

Commissioner of Deeds.

N. B.—If the affidavit be not made by the plaintiff himself, but by some one on his behalf (§ 207), insert, in the description of such party, the character in which he acts, and make an allegation at the outset, showing why the affidavit is not made by the plaintiff himself, and the competency of the party making it to speak to the facts deposed to, altering the form throughout in all necessary particulars.

INDORSE REQUISITION TO SHERIFF, AS FOLLOWS :

Sir,

I require you to take the property claimed by the within affidavit, from the defendant, and deliver it to the plaintiff.

Date.

Yours,

{ Signature of plaintiff,
 { or of his attorney.

To the sheriff of the county of

UNDERTAKING BY PLAINTIFF'S SURETIES.

Vol. I., § 95 (c).

Title, &c.

Whereas the plaintiff in this action (or A. B., on behalf of the plaintiff in this action) has made an affidavit that the defendant therein wrongfully detains certain personal property, in the said affidavit mentioned, of the value of ; and the plaintiff claims the immediate delivery of such property, as provided for in the second chapter of the seventh title of the second part of the Code of Procedure : Now therefore, and in consideration of the taking of said property, or any part thereof, by the sheriff of the county of , by virtue of the said affidavit and of the requisition thereupon indorsed, We, the undersigned, A. B., of No. street, in the city of , and C. D., of No. street, in the city of , do hereby undertake and become bound to the defendant in the sum of [double amount stated on affidavit] for the prosecution of this action, and for the return to the defendant of the said property, or so much thereof as shall be taken by virtue of the said affidavit and requisition thereupon indorsed, if a return thereof shall be adjudged ; and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff in this action.

Dated, &c.

• Add affidavit of justification and acknowledgment, as in No. VII.

If sureties excepted to by the defendant, the exception must be served within three days. Code, § 210.

MOTION TO SET ASIDE.

Vol. I., § 96 (a).

Notice of Motion.

See form I.

Move,

That the affidavit made by the plaintiff in this action, and the requisition to the sheriff of the county of , indorsed thereon, and all proceedings taken by the plaintiff, or by the said sheriff by virtue thereof, respectively, may be set aside as void and irregular, for that, &c. (specify irregularity complained

of), and that the property taken by the said sheriff, under color of the said affidavit and requisition respectively, may be restored by him to the said defendant, and that the plaintiff may be ordered to pay the costs of this motion, or that such further or other order may be made for the relief of the defendant in the premises, as may be just.

To be grounded "on the affidavit of the plaintiff in this action, and the requisition to the sheriff of the county of _____ indorsed thereon." If the complaint have been served, refer to it also. If any affidavit be necessary to show irregularities extraneous to the papers, serve a copy with the notice.

If the proceeding be by order to show cause, alter the form, *mutatis mutandis*.

UNDERTAKING ON PART OF DEFENDANT, IN ORDER TO RETAIN PROPERTY.

Vol. I., § 96 (c).

Title, &c.

Whereas the plaintiff in this action has claimed the delivery to him of certain personal property, specified in the affidavit made on behalf of the plaintiff for that purpose, of the alleged value of _____, and has caused the same to be taken by the sheriff of the county of _____, pursuant to the second chapter of the seventh title of the second part of the Code of Procedure, but the same has not yet been delivered to the plaintiff. And whereas the defendant hath required to have the said personal property returned to him. Now, therefore, we, the undersigned, A. B., of No. _____ street, in the city of _____, and C. D., of No. _____ street, in the city of _____, for the procuring of such return, and in consideration thereof, do hereby undertake and become bound to the said sheriff in the sum of (double the amount stated in plaintiff's affidavit) for the delivery of the said property to the plaintiff, if such delivery shall be adjudged, and for the payment to him, the said plaintiff, of such sum as may, for any cause, be recovered against the defendant in this action.

Add affidavit of sureties, and acknowledgment as in foregoing.

A notice of justification of such sureties, of not less than two or more than six days, must also be subjoined to the above undertaking, in the first instance, and without waiting for any exception on the part of the plaintiff. Vol. I., p. 446. See form VII.

CLAIM BY THIRD PARTY.

Vol. I., § 96 (g).

Affidavit.

Title, &c.

County of _____, ss.

E. F., of, &c., being duly sworn, deposes and says, That he claims to be the lawful owner of, &c. (describe property), heretofore taken by the sheriff of the county of _____, from C. D., the above-named *defendant*, on the requisition of A. B., the above-named *plaintiff*, and now in the possession of him, the said sheriff, on behalf of the said *plaintiff*. [If the defendant have given counter-security, vary allegation accordingly.] That he, this deponent, has title to and right to the possession of the aforesaid property, and that the grounds of such right and title are as follows, to wit. [State circumstances, and grounds, showing title and right of claimant, and that such title and right are paramount to those of either plaintiff or defendant.]

Indorse requisition as follows:

To the Sheriff of the County of _____:

I hereby require you to deliver the property in the within affidavit mentioned to me, and not to the plaintiff, or to the defendant in the within entitled action.

UNDERTAKING BY PLAINTIFF, TO OBTAIN DELIVERY TO HIM.

Title, &c.

Whereas E. F., &c., has made affidavit, and claims title to certain property now in possession of the sheriff of the county of _____, by virtue of an affidavit, &c., on requisition of the above-named plaintiff. And whereas the said plaintiff is desirous of obtaining the delivery of such property to him. Now therefore, &c. [undertaking as above, by two sureties], do hereby undertake and become bound to the said sheriff of the said county of _____, to indemnify him the said sheriff, against the said claim so made by the said E. F., as aforesaid, and to pay to him, the said sheriff, all sum or sums of money whatsoever, if any, which may at any time be recovered against him by the said E. F., in respect of such claims so made as aforesaid, and all costs and charges whatsoever of any proceedings to be taken against him by the said E. F., for the recovery thereof.

[Add justification and acknowledgment, as usual.] The sureties must be freeholders and householders of the county. Code, § 216.

XXVII.

INJUNCTION.

BOND ON OBTAINING INJUNCTION TO STAY PROCEEDINGS IN A PERSONAL ACTION AFTER VERDICT OR JUDGMENT, AS PROVIDED BY REVISED STATUTES.

Vol. I., § 102 (d).

Know all men by these presents, that we, A. B., of No. _____ street, in the city of X., and E. F., of No. _____ street, in the said city, are held and firmly bound unto C. D., of the said city, in the sum of *one hundred dollars*, lawful money of the United States of America, to be paid to the said C. D., his executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, and each of our executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated the _____ day of _____, 186 _____.

Whereas the above-named A. B. has applied to the *Supreme Court of the State of New York* for an injunction against the above-named C. D., to stay proceedings at law in a certain personal action pending in the said Court, wherein the said C. D. is *plaintiff* and the said A. B. is *defendant* [after judgment therein]: Now, the condition of this obligation is such, that if the above-bounden A. B. and E. F. shall well and truly pay unto the said C. D., his executors, administrators, and assigns, all such damages and costs as may be awarded to them by the court at the final hearing of the cause,* then this obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in the presence of Y. Z.

A. B. [L. s.]
E. F. [L. s.]

Usual acknowledgment, and the following special affidavit of justification by the surety or sureties:

County of P. ss. E. F., the surety (or, *one of the sureties*) in the within bond named, being duly sworn, doth depose and say, that he is a householder, resident within this state, and is worth the sum of (*the amount of the penalty of the bond*) over and above all debts and demands against him.

E. F.

Sworn, &c.

If the application be to stay proceedings, after verdict and before judgment, substitute in the bond, for the words within brackets (after verdict in said action, and before judgment thereupon).

If the court dispenses with a deposit, under the power conferred by section 191, insert at * (and shall also pay the sum of [the amount of the verdict and costs of the suit, or the amount of the judgment, including costs, if judgment has been entered], whenever ordered by the *said Supreme Court*).

In such case, the penalty of the bond must of course be proportionately enlarged.

UNDERTAKING ON OBTAINING INJUNCTION IN ORDINARY CASES.

Vol. I., § 102 (e).

Title, &c.

The above-named plaintiff, A. B., having applied to this court; or, "to a judge of this court;" or, "to the county judge of the county of X.," for an injunction restraining the defendant, C. D., from [state, as in order], as therein particularly mentioned, we, the undersigned E. F., of No. street, in the city of Y., and G. H., of No. street, in the said city of Y., do undertake on the part of the plaintiff, that the said plaintiff will pay to the defendant so enjoined, such damages, not exceeding the sum of dollars [insert some reasonable amount, having regard to the value of the matter in controversy, and the probable exercise of discretion on the part of the judge in fixing it], as he may sustain by reason of such injunction, if the court shall finally decide that the said plaintiff was not entitled thereto.

Dated, , 188 .

Add justification and acknowledgment as usual.

Note. If the injunction be to restrain the general and ordinary business of a corporation, it is *necessary* that there be two sureties in the undertaking. See Vol. I., § 102 (f).

FORM OF ORDER.

Vol. I., § 102 (h).

Title, &c.

It appearing satisfactorily to me, by the affidavit of A. B., the plaintiff, that sufficient grounds for an order of injunction exist; I do hereby order, that the defendant, C. D., refrain from [particularize acts sought to be restrained], until the further order of this court.

ORDER TO SHOW CAUSE.

Code, § 221-223.

On the (complaint in this action, and the) affidavits, copies of which are herewith served, let the defendant show cause, &c. [as in Form No. 11], why an injunction should not be granted, restraining him, the said defendant, from [specify acts sought to be restrained]. And in the mean time, and until the return of the said order, let the said defendant be, and he hereby is restrained accordingly.

MOTION TO VACATE INJUNCTION.

Vol. I., § 105 (b).

Notice, on part of defendant, or order to show cause, as in Form II., stating the papers on which the motion is grounded.

That the injunction granted in this cause by the Honorable A. B., a judge of this court (or, by C. D., Esq., county judge of the county of X., as the case may

be), by order bearing date the day of , and made without notice to him the said defendant, be vacated or modified, or for such further or other order as may be just.

NOTICE OF MOTION FOR REFERENCE TO ASCERTAIN DAMAGES OCCASIONED
BY INJUNCTION.

Vol. I, § 106.

Apply, upon the pleadings and proceedings, and on proof of judgment rendered in favor of the defendant, or of some other decision of the court, of a final nature, that the plaintiff was not entitled to the injunction as granted.

Notice motion, as in form No. I.

That it be referred to a referee, to be appointed by this court, to ascertain and report what amount of damages the defendant has sustained by reason of the injunction granted in this action by the Honorable A. B., a judge of this court (or by C. D., Esq., county judge of the county of X., as the case may be), by order bearing date the day of , and for such further or other order or relief as may be just.

XXVIII.

PROCEEDINGS ON ATTACHMENT.

AFFIDAVIT.

Vol. I, § 110 (a); Code § 227, 229.

Title, &c.

A. B., of , being duly sworn, deposes and says, that he is the plaintiff in the above-entitled action.

(Or, if made by an attorney or agent, state the fact of his agency, the amount of his knowledge, and the reasons why it is not made by the party.)

That this action is brought for the recovery of money, and a summons has been issued therein. That a cause of action exists in favor of (him) the said plaintiff against the said defendant for the sum of \$ (with interest from the day of , if so), which is the amount of the plaintiff's claim in this action, and that the grounds of such claim are as follows, to wit:

[Here insert short but sufficient statement of the nature and grounds of the plaintiff's cause of action.]

That the said defendant, &c.

Here make statement bringing the case within one of the categories prescribed by the Code, as, for instance, thus:

When against a Foreign Corporation.

That the said defendants are a foreign corporation, created by or under the laws of another state, to wit: the state of M., having property within this state, to wit: [Specify nature and location of property.]

When against a Non-resident.

That the said defendant is not a resident of this state, but resides at O., in the state of P.

Against Absconding or Concealed Debtor.

That the said defendant has departed from this state with intent to defraud his creditors ;

Or, has departed from this state with intent to avoid the service of a summons ;
Or,

That the said defendant keeps himself concealed within this state with intent, &c. [State intent as above, in the words of the statute ; or, if the fact be so, both intents may be alleged.]

And, in all cases of this class, allege distinctly and positively, the facts and circumstances attendant upon such concealment or departure, and which show or tend to show that it is fraudulent in its nature, and with one or other or both of the intents referred to in the section, with sufficient detail to establish a clear *prima facie* case by competent proof.

Against Defendant Fraudulently Disposing of Property.

That the said defendant has removed certain of his (or, its) property from this state, to wit [give specification], with intent to defraud his (or, its) creditors.

Or, That the said defendant is about to remove, &c.

Or, That the said defendant has assigned certain of his (or, its) property, to wit [give specification], with intent, &c.

Or, is about to assign, &c.

Or, has disposed of, &c.

Or, is about to dispose of, &c.

Or, has secreted, &c.

Or, is about to secrete, &c.

And, in all this class of cases, subjoin distinct and detailed allegations, as above directed, showing the facts and circumstances of such removal, assignment, disposition, or secreting, and proving or tending to prove that it has taken place with the fraudulent intent stated in the section.

UNDERTAKING.

Vol. I, § 110 (b).

Title, &c.

Application having been made to the Honorable B. F., one of the justices of this court, by A. B., the above-named plaintiff, for an attachment against the property of C. D., the above-named defendant, a
[Describe class under which defendant falls].

Now, therefore, we, the undersigned [names and description of plaintiff and surety, as in prior forms], do hereby undertake, pursuant to the statute in such case made and provided, that if the said C. D., the defendant above named, recover judgment in this action, or if the said attachment be set aside by the order of the court, the said plaintiff, A. B., will pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the said attachment, not exceeding the sum of *two hundred and fifty dollars*.

Add usual affidavits and acknowledgment.

If the property to be attached is valuable, it may be prudent, with a view to save trouble, to increase the amount specified in the undertaking, the fixing of which rests in the discretion of the judge.

WARRANT OF ATTACHMENT.

Vol. I., § 110 (d).

The People of the State of New York,

To the Sheriff of the County of X., greeting:

Whereas, an application has been made to the officer signing this warrant by A. B., plaintiff for an attachment against the property of C. D., defendant, in an action in the *Supreme Court of the State of New York*, and, upon such application, it duly appearing by affidavit, that a cause of action exists in said action, in favor of the said plaintiff against the said defendant, for the recovery of dollars and cents (with interest thereon from the day of , 18), and the said affidavit specifying the amount of the said claim, and the grounds thereof, and that the said defendant, C. D., is a foreign corporation;

[Or, that the said defendant is not a resident of this state; or allege otherwise in conformity with affidavit, in precise words of section 229,]

and the said plaintiff having also given the undertaking required by law:

Now you are hereby commanded, that you attach and safely keep all the property of the said defendant, C. D., within your county, or so much thereof, as may be sufficient to satisfy the plaintiff's said demand of \$, with interest as aforesaid, together with costs and expenses, and that you proceed hereon, in the manner required of you by law.

Given under the hand of E. F., one of the justices of the said *Supreme Court*, at the *City Hall*, in the city of Y., this day of , in the year one thousand eight hundred and sixty-two.

G. H., Plaintiff's Attorney.

E. F., Justice, &c.

ORDER TO EXAMINE PERSON HOLDING PROPERTY OF DEBTOR IN ATTACHMENT.

Vol. I., § 111 (d); Code, §§ 234, 236.

Title, &c.

It appearing to me by the affidavit of P. Q. (or, the certificate of R. S., sheriff of the county of X.), that the sheriff of the county of X. (or said sheriff), with a warrant of attachment against the property of C. D., the defendant in this action, has applied to * N. O., for the purpose of attaching property of said defendant, held by said N. O. (or a debt owing to the defendant by said N. O.), and that said N. O. refuses to furnish said sheriff with a certificate designating the amount and description of the property held by said N. O. for the benefit of the defendant, (or the amount of the debt owing by said N. O., to the defendant.) * Now I do hereby order and require the said N. O. to attend before me at , on the day of , 1863, at M., and be examined on oath concerning the same.

Dated, &c.

Y. Z., Justice, &c.

In the case of an Officer of a Corporation or Association.

Substitute from * to * as follows:

N. O., *President of the K. Association*, for the purpose of attaching the rights or shares which such defendant may have in the stock of such *association (or corporation)*, together with the interest and profits thereon, and that the said N. O., *President of the said K. Association*, refuses to furnish said sheriff with a certificate, designating the number of rights or shares of the defendant in the stock of such *association (or corporation)*, with and dividend or encumbrance thereon.

MOTION TO DISCHARGE ATTACHMENT.

Vol. I., § 112 (b, c); Code, § 241.

Notice motion as in No. I., grounded on the pleadings and proceedings in this action (and the affidavits, copies of which are herewith served).

If the motion is on the plaintiff's papers alone, omit words in parentheses.

That the warrant of attachment issued in this action on the day of , 186 , by the Hon. E. F., a justice of this court, to the sheriff of the county of X., and all the proceedings thereunder, be vacated and discharged.

If the motion be on the ground of irregularity, add for irregularity on the ground that, &c., and specify irregularity complained of.

Add usual demand for further relief, to which, if on the ground of irregularity, may be added a demand of the costs of the motion.

On ground of Neglect to file Undertaking.

Specify irregularity as follows :

On the ground that the undertaking given upon procuring said attachment was not filed with the clerk of *this court*, within five days after said attachment was granted : and demand costs of the motion.

UNDERTAKING BY DEFENDANT, SEEKING DISCHARGE OF ATTACHMENT, UNDER SECTIONS 240, 241.

Vol. I., § 112 (d).

Title, &c.

An attachment having been issued in the above-entitled suit, to the sheriff of the county of X., and the above-named defendant having appeared in such action, and being about to apply to the officer who issued such attachment (or to the above-mentioned court), for an order to discharge the same ; We, A. B., of No. street, in the city of , and C. D., of No. street, in the said city, do hereby, pursuant to the statute in such case made and provided, undertake, that we, the above-named sureties, will, on demand, pay to the above-named plaintiff the amount of judgment that may be recovered against the above-named defendant in this action, not exceeding the sum of [N. B., double the amount stated by the plaintiff in his affidavit].

Usual affidavit of justification and acknowledgment.

N. B.—There must be two sureties, at least, to this undertaking, and both of them must be resident and freeholders or householders, in this state.

Order Thereupon.

Title, &c.

The above-named defendant, C. D., having appeared in this action, and having applied to me for an order to discharge the warrant of attachment issued by me in this cause, on the day of , 186 , to the sheriff of the county of X., and having delivered to me an undertaking, in the form prescribed by law, and such undertaking having been approved by me:—I do hereby order that the said warrant of attachment be, and the same is hereby, discharged, and that the said sheriff do forthwith, upon the service of a certified copy of this order, deliver or pay to the defendant, or his agent, all the proceeds of sales and moneys collected by him, under or by virtue of said attachment, and all the property attached, remaining in his hands, and that the same be absolutely released from said attachment.

Dated, &c.

E. F., Justice, &c.

XXIX.

APPOINTMENT OF RECEIVER.

NOTICE OF MOTION.

Vol. I., § 117 (a, b); Code, § 244.

Grounded "upon the pleadings in this action, and the affidavit, with a copy of which you are herewith served," or, otherwise, according to circumstances.

That a receiver may be appointed of the rents and profits of the estate (or, of the estate, property, and effects) of the defendant, C. D. (referred to in the pleadings of this cause), with the usual powers, and upon the usual directions; or for such further or other order as may be just.

ORDER OF REFERENCE.

Title, &c., and commencement of order, as in No. IV.

That it be referred to P. Q., Esq., of *the city of New York*, counsellor-at-law, as referee, to appoint a receiver of [state property of which a receiver is sought], with the usual powers, and upon the usual directions; and that the said referee take from such receiver the necessary and usual security for the performance of his trust, and file the same in the office of the clerk of this court; and that, upon the filing of the report of the referee, and of such security, such receiver be vested with all his rights and powers as such receiver, according to the rules and practice of this court.

PROPOSAL OF NAMES FOR RECEIVER AND HIS SURETIES, BY MOVING PARTY.

Title, &c.

The *plaintiff* hereby proposes to the referee, herein, the name of R. S., of the city of X., as a suitable person to be appointed receiver in this action. And the said R. S., hereby, proposes T. U., of, &c. (give address), and V. W., of, &c. (give address), both of the said city, as his sureties as such receiver.

X. Y., *Plaintiff's* Attorney.

Dated, &c.

BOND OF RECEIVER.

Bond by the sureties, in the usual form, conditioned as follows:

Whereas, by an order made on the day of , 186 , by the *Supreme Court of the State of New York*, in a certain action pending in said court, wherein A. B. is plaintiff and C. D. is defendant, it was, among other things, ordered that it be referred to P. Q., Esq., of *the city of New York*, counsellor-at-law, as referee, to appoint a receiver of [state property as in order], and to take from such receiver the requisite security for the faithful performance of his duties. And, whereas, R. S. has been appointed such receiver by said referee. Now, therefore, the condition of the above obligation is such, that if the said R. S. shall and do, as required by the rules and practice of this court, duly file an inventory, and annually, or oftener, if thereunto required, duly account for what he shall so receive or have in charge as receiver in the said action; and pay and apply what he shall so receive, or have in charge, as he may, from time to time, be directed by said court; and obey such orders as said court may, from time to time, make in relation to said trust; and, in all respects, faithfully discharge the duties of said trust; then the above obligation to be void, otherwise to remain in full force and virtue.

Signatures, &c., as usual

Acknowledgment and justification as in No. VII.

REPORT OF REFEREE.

Title, &c.

To the *Supreme Court of the State of New York*.

Under, and in pursuance of an order made in this action, on the day of , 186 , whereby it was referred to me, as referee, to appoint a receiver of [state property as in order], and to take from such receiver the requisite security,

I, P. Q., the referee, in and by said order appointed, do respectfully report that I have proceeded with the matters so referred, and have been attended on such reference by the counsel for the *respective parties*. That R. S., of the city of X., was proposed by the *plaintiff* to be receiver in this action, and L. M., of the said city, was proposed by the *defendant* to be such receiver (or, and that no objection was made by the *defendant* to said R. S.); and that, after hearing the proofs and allegations of the parties, I deem the said R. S. a suitable and proper person therefor, and have appointed him such receiver, and have taken from him the requisite security, which is hereto annexed, being the bond of said receiver, with T. U. and V. W. as his sureties, in the penal sum of dollars. All which is respectfully submitted.

Dated, &c.

P. Q., Referee.

XXX.

VERIFICATION OF PLEADING.

Vol. I, § 126 (*f, g*); Code, § 157.

ORDINARY VERIFICATION.

County of ss.

A. B., the *plaintiff* above named, being duly sworn, deposes and says, that the foregoing *complaint* is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters, he believes it to be true.

Sworn, &c.

N. B.—When by officer of a corporation, commence thus: A. B., *President* of the H. Company, the *plaintiff* above named, &c.

BY ATTORNEY OR AGENT.

When Founded on General Instructions.

C. D., attorney of A. B., the above-named *plaintiff*, being duly sworn, deposes and says, that the said *plaintiff* is not within the county wherein this deponent resides, and is not capable of making the affidavit of verification of the foregoing complaint. (That all the material allegations of such complaint are grounded, either on documents in the possession of him, this deponent, as attorney for the said A. B., or on information given, and communications made to him by the said A. B., personally or in writing, and which communications he believes to be true.) That the knowledge and the grounds of the belief of him, this deponent, on the subject of the said *complaint*, and the reasons why the affidavit of verification thereof is not made by the said A. B., are such as are above stated. And deponent says that he has read the foregoing *complaint* and believes the same to be true.

The above sentence, within parentheses, may be modified according to the nature and extent of the knowledge of the person verifying in each particular case.

A similar verification may be used by an agent, the facts in relation to, and the nature of his agency, and the extent of his knowledge of the matters in question, being averred with precision, and sufficient detail, so as to show clearly that he verifies with knowledge of the averments made.

On Possession of Written Instrument.

Substitute for sentence in the foregoing, commencing, "That all the material allegations," and ending, "which communications he believes to be true," the following:

That this action (or, that the defence in this action) is founded upon a written instrument for the payment of money only, and such instrument is in the possession of this deponent, as such attorney (or agent), as aforesaid.

On Personal Knowledge.

Substitute for same sentence,

That all the material allegations of the aforesaid *complaint* are within the personal knowledge of this deponent, as such attorney (or agent), as aforesaid.

XXXI.

MOTIONS TO CORRECT PLEADINGS.

BY ADVERSE PARTY, UNDER SECTION 160.

VOL. I., §§ 133, 134.

For Irrelevancy or Redundancy.

Ground application on the pleadings and proceedings in this cause.

Move,

That the matter contained in the portions of the *answer* of the *defendant* in this action, hereinafter specified, to wit:

[Here give definite and clear specification of the precise portions objected to.] be stricken out of the said *answer* as irrelevant or redundant; and that the said *defendant* may be ordered to pay the costs of this motion, or for such further or other order or relief as may be just.

For Uncertainty.

Ground application as above.

Move,

That the *plaintiff* may be required and ordered to make his *complaint* in this action definite and certain by amendment, so that the precise nature of the *charge* sought to be made thereby may be apparent, and that the said *plaintiff* may, &c. (as in last).

In moving on an answer, substitute the word *defence* for charge.

N. B.—If the objection, on the ground of uncertainty, is not to the pleading, as a whole, but to portions of it, specify those portions, and the mode in which the objection arises in relation to them, so as to point out each specific objection clearly and unmistakably.

By Party Pleading, for Leave to Amend.

Vol. I., § 129.

Apply on affidavit, showing that an amendment is necessary, and giving excuse why it was not made, as of course, within the time allowed for that purpose.

Move, on the pleadings and affidavit, that the *plaintiff* be allowed to amend his *complaint* in the matters in the said affidavit mentioned, or otherwise as he may be advised; or that such further or other order may be made in the premises as may be just.

XXXII.

PLEADINGS—OBSERVATIONS ON.

COMPLAINT.

In the former editions, a few forms of this pleading were given, which, in the present, the author has decided upon omitting. Being few, an imperfect treatment of the subject was necessarily involved, whilst an attempt on the other hand to exhaust the field thus opened, and to give a precedent for every specific case, would involve the composition of at least an additional volume.

After all, the attempt must, in any case, be to a certain degree, unsatisfactory, inasmuch, as regards the averments of fact necessary to substantiate the existence of a cause of action in the plaintiff, it is rare indeed to find two cases which absolutely coincide. Each individual instance demands of necessity its individual mode of allegation, to the due framing of which the attention of the pleader must be specially directed.

The complexity of the subject rests, nevertheless, in the framing of these averments. The elementary parts of the pleading are of the simplest nature. They consist merely of the formal commencement, preceding those averments, and the prayer for judgment or relief, which follows them, and concludes the pleading. In the text, ample directions are given upon these subjects, generally, in the first chapter of book VI., and specifically, as regards individual cases, in the second chapter of book VII., to which, therefore, the reader is referred. Mr. Abbott's forms of pleadings may also be advantageously consulted, in which the subject is treated in the fullest detail.

See especially as under.

As to the formal requisites of the pleading, book VII., chapter II., section 139.

As to the joinder of causes of action, and the necessity of each cause of action so joined, being separately stated, *Ibid.*, section 140, *passim*. See especially, as to the latter subject, subdivision *d*, p. 683, and decisions cited.

As to the proper mode of framing averments of facts, Book VI., chapter I., sections 122, 123, *passim*. Consult also section 124.

As to the prayer for judgment or relief, Book VII., chapter II., section 157.

XXXIII.

DEMURRER.

Vol. II., §§ 168-170; Code, § 144.

Title, &c.

The *defendant* (or, the defendant, C. D.), demurs to the *complaint* in the above-entitled action,

(Or, to the *first cause of action* stated in the complaint, &c., if so),
for that it appears upon the face thereof,

[State grounds of objection in the precise terms of each subdivision invoked, adding, in the case of specific objections, such statements, or drawing such distinctions, as may be necessary to make the objection clearly apparent, as thus]:

1. That this court has no jurisdiction of the person of the said defendant;
(or, of the subject of this action;)

2. That the plaintiff has no legal capacity to sue; for that, &c.

[State shortly the reason why he is incapable.]

3. That there is another action pending between the same parties for the same cause;

4. That there is a defect of parties *defendant* therein, to wit: that E. F., in the said complaint mentioned, is not joined as a *defendant* in this action;

5. That several causes of action have been improperly united in the said complaint, to wit:

[Here state the precise objection as to misjoinder, using the precise terms employed in section 167 of the Code.]

6. That the said complaint does not state facts sufficient to constitute a cause of action.

E. F.,

Attorney for the *Defendant*.

Or state so many of such objections as are applicable to the specific pleading impeached.

DEMURRER BY ANSWER.

Vol. II., § 175; Code, § 147.

Allege, by way of separate defence, such facts as show, or tend to show, the existence of an objection, in respect of which, had those facts appeared upon the face of the complaint, demurrer would have lain under section 144.

Add as follows:

And, forasmuch as the matters hereinbefore in this defence stated, do not appear upon the face of the complaint in this action, the defendant, by this, his answer, objects and demurs to the said complaint, for that, &c.

Here state objection, following the words of section 144, precisely as on an ordinary demurrer.

DEMURRER TO ANSWER.

Vol. II., § 186; Code, § 153.

Title, &c.

The plaintiff demurs to the answer of the defendant, the same containing new matter,

For that, upon the face of the said answer, the same, and the new matter therein alleged, does not constitute a counter-claim or defence to the claim of the plaintiff in this action.

If the demurrer be partial, alter, by referring to the specific clause in the answer which is demurred to.

DEMURRER TO REPLY.

Vol. II, § 189 (a); Code, § 155.

Use similar form as in demurrer to complaint, demurring to the reply "for the insufficiency thereof," and substituting "ground of reply" for "cause of action."

XXXIV.

ANSWER.

Vol. II, Book VIII, Chap. III.

The observations above made, in No. XXXII., on the subject of complaint, are equally pertinent to the case of answer, so far as allegation of new matter, or the pleading of defences founded on such new matter are concerned. Few controversies, if any, will be found exactly to coincide, and to attempt to give precedents for each individual case would, for the reasons there alleged, be equally impracticable.

See generally, as to the statement of new matter, section 177.

As to special and statutory defences, section 178.

As to defences in specific cases, section 179.

And, as to set-off and recoupment, section 180 (b. c.).

A counter-claim being, to all intents and purposes, a cross-action, the same rules are to be followed in framing it as in an original complaint, save only as to the title of the cause and the statement of venue, which are, of course, unnecessary. It must contain similar averments, and likewise a similar demand or prayer for relief, section 180 (a. d.).

It may be prefaced thus, being, of course, separately stated and numbered :

And this defendant, by way of counter-claim to the claim of the plaintiff in this action, *avers* as follows, to wit, &c.

As to denials, see section 176.

To attempt to give precedents for specific denials of specific facts, would be nugatory. They must be direct, and should, in general, follow the specific words of the plaintiff's allegation.

A general denial may be thus :

This defendant denies each and every allegation made, and each and every fact, matter, and thing stated in the (second clause of the) said complaint.

Or thus, in conclusion, following after partial admissions, or qualified denials, as the case may be :

And, save as aforesaid, and as hereinbefore admitted, or specifically traversed or denied, this defendant denies each and every allegation, &c.

The qualified denial allowed by section 149, should follow the precise words of the section, as thus :

And as to whether, &c.

[Refer to the matters intended to be denied, in the terms employed in the complaint, using the alternative, did or did not, or otherwise, according to the circumstances.]

this defendant denies any knowledge or information thereof, sufficient to form a belief.

Or the same form may be subjoined to a general or partial traverse.

The answer may, in all cases, be prefaced thus :

The defendant answers the plaintiff's complaint, as follows, to wit :

Where more than one ground of defence is stated, care must be taken to make each ground the subject of a separate statement, separately numbered.

XXXV.

R E P L Y .

Vol. II, § 187; Code, § 153.

Title, &c.

The plaintiff, for reply to the new matter constituting a counter-claim in the defendant's answer contained, alleges as follows:

First. Traverse the new matter, according to the directions given under head of *Answer*.

Second. Allege any new matter, not inconsistent with the complaint, and constituting a defence to such new matter in the answer, precisely as if setting it up as a ground of defence.

XXXVI.

APPLICATIONS BY DEFENDANT AT OUTSET OF ACTION.

MOTION TO DISMISS, FOR OMISSION TO SERVE COPY COMPLAINT.

Vol. II, § 161 (b).

Apply, on proof of service of demand under section 130, and that a copy has not been served within twenty days therefrom.

Move, That the complaint of the plaintiff in this action be dismissed with costs, no copy of such complaint having been served upon the attorney for the defendant, though duly required.

MOTION TO SET ASIDE SUMMONS OR COMPLAINT.

Vol. II, § 161.

Apply, in all cases, on the particular process or pleading impeached, and other the pleadings and proceedings in this action, adapting the demand in the notice of motion to the particular relief sought; taking care, when the application is on the ground of irregularity, to specify upon its face the particular irregularity or irregularities complained of.

XXXVII.

APPLICATION FOR INTERPLEADER.

Vol. II, § 161 (g); Vol. I, § 40; Code, § 122.

Apply upon the summons and complaint, and on an affidavit, framed according to the specific directions given in Vol. II, pp. 16, 17, prefacing the statement of the facts and circumstances under which the application is made, by an allegation in the precise words of section 122, as there pointed out. Also aver on the face of the affidavit that the defendant applying *has not answered* the complaint.

Add at the close:

That he (this) defendant is ready and willing, and hereby offers, to deposit in court the amount of the debt claimed by the plaintiff in this action.

Or, to deliver the property in question in this action (or the value of the property in question, &c.) to such person as this court may direct.

Move,

That an order be made substituting G. H., in the said affidavit named, as defendant in this action, in the place of him, the said defendant, C. D., and discharging him, the said defendant, from all liability to either party in respect of the matters in question in this cause, upon his, the said defendant's, depositing in court the debt claimed by the plaintiff therein.

(Or, upon his, the said defendant's, delivering the property in question therein, or its value, to such person as this court may direct.)

And that the said defendant may be at liberty to retain, out of the sum to be so deposited by him, as aforesaid, his costs in this action, and of this application, to be adjusted by the clerk of this court, if the parties differ about the same. And that such further or other order may be made, or relief granted, to the said defendant in the premises, as may be just.

If the property, or its value, be delivered over, vary concluding demand, thus:

And that upon such delivery of the said property, or its value, by the said defendant, as aforesaid, his, the said defendant's costs in this action, and of this application (to be adjusted by the clerk of this court, if the parties differ about the same), be paid to the said defendant by the said parties, or one of them, as this court may direct. And that such further, &c.

XXXVIII.

APPLICATIONS TO BRING IN PARTIES.

Vol. I, § 39; Code, § 122.

BY PARTY TO ACTION.

Apply on pleadings and proceedings, and on affidavit, showing the nature of the interest of the party proposed to be brought in, and the facts and circumstances which show, or tend to show, that a complete determination of the controversy cannot be had without his presence.

Move, That the said L. M. may be made a party (*defendant*) to this action, and that for such purpose the plaintiff may be at liberty (or, may be directed) to amend the summons and complaint in this action accordingly, and to serve the same on the said L. M., according to the course and practice of this court, or that such further or other order may be made as may be just.

Or, where a new plaintiff is brought in, vary thus:

And to serve the same upon all necessary parties, according, &c.

BY THIRD PARTY.

Apply by petition, entitled in the action.

State existence and condition of the action, and show, by allegation, giving all necessary details, the nature of the controversy, the existence and nature of the applicant's interest in that controversy, and the facts and circumstances which show, or tend to show, that a complete determination of it cannot be had without his presence. Also, if so, that injury will accrue to him, unless he be brought in.

Pray that your petitioner may be made a party (*defendant*) to the said action, and that the plaintiff may be directed to amend the summons and complaint therein, and to serve the same upon your petitioner, and upon all other necessary parties, according to the course and practice of this court; (and that your petitioner be declared entitled to the benefit of all proceedings heretofore taken in such action.) And

that this court would give such further and other directions, and grant to your petitioner such further and other order and relief in the premises as may be just.

N. B.—The above prayer to be varied, if necessary, according to the circumstances.

If the petitioner seeks to be brought in as a co-plaintiff, the prayer may be framed more shortly, as thus :

That your petitioner may be joined, as a co-plaintiff, in the said action, and that the summons and complaint therein may be amended accordingly, and served upon all necessary parties, according, &c.

XXXIX.

DEMAND OF ACCOUNT OR PARTICULARS.

Vol. II., § 162 ; Code, § 158.

DEMAND OF COPY ACCOUNT.

Title, &c.

Sir,

Take notice, that I hereby demand a copy of the account referred to in the *complaint* in this action, duly verified, in pursuance of the provisions of section 158 of the Code of Procedure.

Dated , 1863.

E. F., *Defendant's Attorney.*

To G. H., *Plaintiff's Attorney.*

OF BILL OF PARTICULARS.

If a bill of particulars be required, demand, instead of a copy account, "an account in writing of the particulars of the plaintiff's demand, in respect of which this action is brought."

If the demand is for particulars of a counter-claim, it may be varied thus: "an account in writing of the particulars of the defendant's demand, in respect whereof a counter-claim is made by him, in opposition to the plaintiff's demand, to recover which this action is brought."

APPLICATION ON DEFAULT TO SERVE.

Show, by affidavit, service of demand and non-compliance with it for more than ten days after that service.

Move, on pleadings and proceedings, demand already served, and copy affidavit as above.

That the *plaintiff* be ordered forthwith, or within a reasonable time after service of a copy of the order to be made upon this motion, to deliver to the *defendant*, by service thereof upon his attorney, a copy of the account so required of him as aforesaid, pursuant to the said demand, or that, in default thereof, he the said *plaintiff* be precluded from giving evidence of the said account, or of any of the items thereof, upon the trial of this action. And that the said *plaintiff* be ordered to pay the costs of this motion, or for such further or other order or relief as may be just.

If for bill of particulars, substitute for words, "a copy of the account," the following: "a bill of particulars of his, the said *plaintiff's*, demand in this action so required."

And state demand for preclusion thus: "Or that, in default thereof, he, the said

plaintiff, be precluded from giving evidence of his aforesaid demand, or in support thereof, or of any of the items thereof, upon the trial," &c.

APPLICATION FOR FURTHER PARTICULARS.

Show, by affidavit, the insufficiency of any account or bill of particulars actually served by the adverse party, specifying precisely in what that insufficiency consists.

Move, on pleadings and proceedings, on particulars already served, and on affidavit as above,

That the *plaintiff* be ordered to deliver to the *defendant*, a further and more correct account of the particulars of his demand, for recovery of which this action is brought, within a reasonable time, to be fixed by this court, or in default, &c.

As in foregoing, varying the demand, if necessary, according to the circumstances of the case.

XL.

SECURITY FOR COSTS.

Vol. I., § 163.

AFFIDAVIT.

Title, &c.

C. D., the above-named defendant, being duly sworn, deposes and says, that the above-entitled action hath been commenced against deponent in this court by A. B., the plaintiff above named. That the said A. B. does not reside within the jurisdiction of this court, but resides at M., in the state of S.

Sworn, &c.

C. D.

Or the affidavit may be made by the attorney, or any other person, varying the allegation accordingly.

Where there are several plaintiffs, modify thus: "That A. B. and E. F., the several plaintiffs above named, are all non-residents, and do not any of them reside within the jurisdiction of this court, but reside as follows:" (specifying their residences).

If the application be made on other grounds than that of non-residence, modify concluding allegation according to circumstances, as under.

That the above-named A. B. and E. F. are trustees for G. H., a debtor, and this action is commenced for and in their name as such trustees.

That the above-named A. B. is insolvent, and has been discharged from his debts, and this action is brought for, or in his name, for the collection of a debt contracted before the assignment of his estate.

Or vary thus: "and his person has been exonerated from imprisonment, pursuant to a certain law, to wit: (specify law under which he is so exonerated) and this action," &c.

That the above-named A. B. was, on the day of , committed to the state prison, in execution for the crime of , and now stands so committed, and this action is commenced for, or in his name.

That the above-named A. B. is an infant under the age of twenty-one years, and this action is commenced in his name. That the next friend of the said infant has not given security for the costs thereof.

The above forms of affidavit provide for all cases of application, made in

respect of matters existing at the commencement of the suit. If that application be grounded on matters subsequently accruing, vary thus :

After first allegation, continue in one of the following forms :

That, after the commencement of this suit, to wit, on or about the day of , the above-named plaintiff (or, all and singular, the above-named plaintiffs) has become a non-resident (or, have become non-residents), and now resides at , in , &c. (or, and now reside respectively, &c., giving particulars), and not within the jurisdiction of this court.

That after, &c., to wit, &c., C. D., the above-named plaintiff, has become insolvent, and has been discharged from his debts (or, and his person has been exonerated from imprisonment, pursuant to law), and this action was heretofore so commenced for, or in the name of him, the said C. D., for the collection of a debt, contracted before the assignment of his estate.

That after, &c., to wit, &c., the above-named plaintiff was sentenced to the state prison for a term less than life, to wit, for the term of years, and is now undergoing such sentence.

ALTERNATIVE ORDER.

Title.

On reading and filing the affidavit of W. Z., let the above-named C. D., the plaintiff in this action, file security for the costs thereof, within days after service of a copy of this order, or show cause before, &c. (as in order to show cause, Form II.), why he should not file the same, and let all proceedings in this cause on the part of him, the said plaintiff, be stayed, until cause be shown by him as aforesaid ; or if he, the said plaintiff, shall file such security, then until the sureties therein named shall justify, if excepted to by the defendant.

PEREMPTORY ORDER.

To be grounded on affidavit of service of the former order, and that search has been made in the office of the clerk of the court, and that no security has been filed.

On reading and filing the annexed order, and proof of due service thereof, and the plaintiff having been duly called on the return thereof, but not appearing to show cause, as thereby directed, and on the affidavit of S. T. [of search, as above]: It is ordered that all proceedings in this action, on the part of the plaintiff, be stayed, until security for the costs of this action be filed by him, as in and by the said order directed, and until the sureties therein named shall justify, if excepted to.

BOND.

Know all men by these presents, that we, A. B., of, &c. (plaintiff), and L. M., of, &c. (surety), [if more than one, insert additional names and descriptions, or, if plaintiff does not join, bond to be given by two sureties], are jointly and severally held and firmly bound unto C. D., of, &c. (defendant), in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid unto the said C. D., his executors, administrators, or assigns, for which payment, to be well and truly made, we jointly and severally bind ourselves and our respective heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, this day of , in the year .

Whereas, the above-named A. B. (or A. B., of &c.) hath commenced an action against the above-named C. D., in [describe court], and an order hath been made in such action that he, the said C. D., do file security for the costs thereof [or if so, state instead, in lieu of the last sentence, "and he the said plaintiff being"] (here state ground on which security could be required), whereby the said defendant, C. D., is entitled at the commencement of the said action to re-

quire security for costs, and the said A. B., being desirous of discharging his attorney in the said action from liability therefor, by filing security, without being required to do so by the said defendant, pursuant to the statute in such case made and provided.

Now, therefore, the condition of the above written obligation is such, that if the above bounden A. B. and L. M. (or, "if the said A. B., or, the above bounden L. M. and O. P.," where plaintiff does not join), or one of them, do pay to the said defendant, on demand, all costs that may be awarded to him, the said defendant, C. D., in such action, then this obligation to be void, but otherwise to remain in full force and virtue.

Sealed and delivered in } (To be signed and sealed by
the presence of } obligors, and attested.)

The above bond to be acknowledged, and to be filed in the office of the clerk of the court in which the action is brought; the following notice being given to the defendant:

NOTICE OF FILING.

Title, &c.

Sir:

Please take notice, that security for the costs of this action has this day been filed by the plaintiff in the office of the clerk, &c. (describe), pursuant to the order made in this action for that purpose.

Yours, X. Y., Plaintiff's Attorney.

To R. S., Defendant's Attorney.

Or, if the security be filed by the plaintiff in the first instance, vary notice accordingly.

AFFIDAVIT OF JUSTIFICATION BY SURETIES.

County of X. ss.

L. M., one of the sureties in the foregoing bond, being duly sworn, deposes and says, that he is worth double the penalty of such bond, over and above all debts.

Sworn, &c.

L. M.

Or, if the affidavit be not subjoined to the bond, describe it in the jurat.

XLI.

CHANGE OF VENUE INTO PROPER COUNTY.

Vol. II, § 163 (b); Code, § 126.

DEMAND.

Title, &c.

Sir:

I hereby demand that the trial of this action be had in the proper county, to wit: in the county of W.

E. F., Defendant's Attorney.

To G. H., Plaintiff's Attorney.

IF CONSENT BE REFUSED.

Move, upon the complaint, and upon an affidavit, proving that the county named by the plaintiff is not, and that the county proposed to be substituted by the defendant is, a proper county. [See Code, sections 123, 125.]

That this action be tried in the proper county, to wit: in the county of W., and not in the county of X., the county designated in the complaint.

XLII.

OFFER TO COMPROMISE.

Vol. II, § 164; Code, § 385.

Title, &c.

Sir :

Take notice, that the defendant hereby offers to allow judgment to be taken against him by the plaintiff *for the sum of \$ with costs, pursuant to section 385 of the Code of Procedure. (Date.)

To C. D., Plaintiff's Attorney.

A. B., Defendant's Attorney.

* Or, "to the effect following, to wit: " (state effect of judgment offered, and conclude as in foregoing).

NOTICE OF ACCEPTANCE.

Sir :

Take notice, that the plaintiff hereby accepts the offer of the defendant to allow judgment to be taken against him, and that I shall enter up the same accordingly. Yours,

To A. B., Defendant's Attorney.

C. D., Plaintiff's Attorney.

OFFER UNDER CODE, SECTION 386.

Frame offer as above, thus :

Take notice, that the defendant hereby offers, pursuant to section 386 of the Code of Procedure, that if he fail in his defence in this action, the damages therein be assessed at the specific sum of *one thousand* dollars.

Frame notice of acceptance accordingly.

XLIII.

APPLICATION FOR LEAVE TO DEFEND, WHERE
SERVICE BY PUBLICATION.

Vol. II, § 165 (b); Code, § 135.

AFFIDAVIT.

Title, &c.

C. D., the above-named defendant, being duly sworn, deposes and says, that service of the summons in the above-entitled action, has not been personally made on this defendant, but an order hath been made for the service thereof by publication. That, &c.

[Here swear to merits, in the usual form. See below, Form LXVIII.] Allege in addition the nature of the proposed defence, and any special circumstances tending to show hardship, or the good faith of the defence proposed.

Move on the summons, complaint, and affidavit,

That the defendant, C. D., be allowed to defend this action, and to answer the complaint therein, according to the course and practice of this court, and that all proper directions be given in the premises, and that the said defendant may have such further or other order and relief as may be just.

If the time at which the plaintiff can enter up judgment be approaching, obtain separate stay of proceedings, or apply by order to show cause, making a stay a part of the order.

XLIV.

EXTENSION OF TIME TO PLEAD.

Vol. II., § 166 (b); Code, § 405; Rule 22.

AFFIDAVIT OF ATTORNEY OR COUNSEL.

Title, &c.

E. F., of, &c. deposes and says, that he is attorney and counsel (or one of them, as the case may be) of the above-named defendant, C. D., retained to defend this action. That the summons in this action (or a copy of the complaint in this action, demanded by the defendant) was served upon him, the said defendant, on [state date of service], and his, the said defendant's time to answer or demur therein will expire on, &c. That the case in this action has been stated to him, this deponent, by the said defendant, and from such statement thereof, so made to him by the said defendant, as aforesaid, he, this deponent, verily believes that the said defendant, C. D., has a good and substantial defence upon the merits to the cause of action set forth in the complaint in this action, or to some part thereof. That no extension of the said defendant's time to answer or demur therein has been granted, by stipulation or order.

[Or if there has been any extension, state the particulars of it, and when and how granted.]

Add to the above an allegation of the facts under which, and the reasons for which, the extension is asked, sufficient to satisfy the officer applied to that the application is made in good faith and without *laches*.

If the affidavit is made by the party himself, an affidavit of merits in the usual form (see below, No. LXVIII.) must be either made separately, or incorporated in the above, instead of the statement by the attorney. The other allegations may be to the same effect, *mutatis mutandis*.

The above form is easily adaptable to an application for further time to reply.

EX PARTE ORDER.

On the foregoing affidavit, let the defendant have *twenty* days further time to answer the complaint in the above-entitled action.

If the application be for an extension beyond twenty days, apply on notice, in the usual form, grounded on the pleading and affidavit. See text.

XLV.

MOTIONS ON DEFECTIVE PLEADING.

ON SHAM ANSWER, UNDER SECTION 152.

Vol. II., § 181 (c).

Title, &c.

Move, on the complaint in this action, and the answer of the defendant.

That the answer of the defendant, C. D., may be stricken out as sham and irrelevant, and that the said defendant may be ordered to pay the costs of this application, or for such further or other order or relief as may be just.

Or, if the application be to strike out a defence, move,
That the defence of the said defendant, C. D., contained in the *second* clause of his answer, be stricken out, &c.

FOR JUDGMENT ON FRIVOLOUS PLEADING.

Vol. II., § 181 (d); Code, § 248.

Title, &c.

Take notice, that upon the complaint in this action, and the *answer* of the defendant, C. D., I shall apply, &c.

[Give five days' notice of motion before a judge, either in or out of court, in the usual manner. See Form No. I.]

That the *answer* of the said defendant, C. D., may be declared to be frivolous, and that judgment may be given for the plaintiff on such answer, or for such other judgment, order, or relief, as may be just.

N. B.—It will be easy to adapt this form to an application on a frivolous demurrer or reply.

MOTION TO ELECT.

Vol. II., § 181 (f).

Move, on the pleadings,

That the defendant, C. D., be compelled to elect between the defence stated in the *first*, and the defence stated in the *second* clause of his answer, and state by which he will abide; and that, on such election, the other of such defences be stricken out. Or, in default of such election, then that the said defence stated in the said *second* clause of such answer, be stricken out, as inconsistent with the said other defence; and that the said defendant may be ordered to pay the costs of this motion; or, that the plaintiff may have such further or other relief as may be just.

XLVI.

MOTION TO SATISFY ADMITTED DEMAND.

Vol. II., § 182; Code, § 244.

On the pleadings in this action, and on the answer of the defendant, admitting part of the plaintiff's claim to be just, and that the sum of _____ dollars is due to him from the defendant,

Move,

That the defendant do satisfy that part of the plaintiff's claim, and do pay to the plaintiff the said sum of _____ dollars, so admitted by him, in his answer, to be due to the plaintiff as aforesaid; or, that the plaintiff may have such other order or relief as may be just.

TO DEPOSIT TRUST PROPERTY.

On the pleadings and proceedings in this action, and on the *answer* of the defendant,

(Or, on the examination of the *defendant*, if so),
admitting that he has in his possession, or under his control, the sum of _____ dollars,

(Or, if the motion be in respect of specific property, give short description),

which, being the subject of the litigation in this action, is held by him as trustee for the *plaintiff*.

(Or, "which belongs and is due to the *plaintiff*.")

Move,

That the said defendant may be ordered to deposit in this court, or to deliver to the *plaintiff*, the said sum of dollars

(Or, the said, &c., describing property),

so admitted by him to be in his possession, or under his control, as aforesaid, with or without security, and subject to the further direction of the court, or that such further or other order may be made in the premises as shall be just.

If disobeyed, apply, on proof of disobedience, for an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it in conformity with the direction of the court, modifying the notice according to the particular circumstances of the case.

XLVII.

DISCONTINUANCE.

Vol. II, § 184.

NOTICE.

Title, &c.

Take notice, that the plaintiff hereby discontinues the above-entitled action, and offers to pay the defendant's costs thereof.

Serve, and pay costs to which defendant entitled. Obtain consent, and enter order for discontinuance, and dismissal of complaint, without costs.

If consent be refused, apply as follows :

On affidavit, proving service of notice of discontinuance, and tender, and payment or refusal of costs, or any other circumstances that may have occurred.

Move,

That the plaintiff be at liberty to discontinue this action, and that ("on payment by him of all costs justly due to the defendant," if costs still unpaid) the same may be discontinued, and the complaint in this action dismissed accordingly, and that all proper directions may be given in relation thereto.

Or, if the plaintiff does not move after service of a notice, the defendant, on proof of that service, and non-entry of an order, may apply for an order dismissing the complaint, either with or without costs, according to circumstances ; perfecting judgment, in the former case, according to the order, if granted.

XLVIII.

MOTION TO COMPEL A REPLY.

Vol. II, § 185 ; Code, § 153.

Move, upon the complaint and answer,

That the plaintiff be required to reply to the new matter constituting a defence, by way of avoidance in the said answer contained.

[Or, if practicable, specify such matter, as thus : "To the new matter consti-

tuting such a defence, by way of avoidance, as set forth in the *third* defence, in the said answer stated."]

Within *twenty* days after service of a copy of the order to be made upon this motion.

Or, that such further or other order be made, or relief granted, to the defendant in the premises as may be just.

XLIX.

MOTION FOR JUDGMENT, FOR WANT OF A REPLY.

Vol. II., § 188; Code, § 154.

Apply, upon the complaint and answer, when the new matter constitutes a counter-claim.

When the default is to reply to new matter, constituting a defence by way of avoidance, apply also upon the order requiring a reply.

To which, in both cases, add an affidavit that no reply has been received, stating the date of service of the answer in the former, and, in the latter case, that of service of the order on which the application is grounded, so as to show the plaintiff in default.

Move in the former case,

That such judgment may be given for the defendant, as he is entitled unto, upon the statement of new matter constituting a counter-claim in his, the said defendant's, answer contained, and whereto the plaintiff has failed to reply or demur within the time prescribed by law; or, for such further or other judgment, order, or relief, as may be just.

In the latter, vary thus:

"Upon the statement of new matter, constituting a defence by way of avoidance in his, the said defendant's, answer contained, and whereto the plaintiff has failed to reply within the time limited by the order of this court, requiring a reply thereto, as aforesaid."

"Or, for such further or other judgment, &c."

L.

PROCEEDINGS TO CONTINUE OR REVIVE ABATED SUIT.

Vol. II., § 192 (b); Code, § 121.

PETITION.

Title, &c.

The petition of A. B., the plaintiff above named, respectfully sheweth,
[State facts and circumstances showing abatement, the exact parties against whom a continuance is sought, and the interests of such parties.]

And your petitioner further shows that, before any further proceedings can

be had in this action, it is, as he is advised, necessary that the same should be continued against the above-named A. B., C. D., &c.

Your petitioner, therefore, prays that this action may, by an order of this court, be allowed to be continued against the said A. B., C. D., &c.; and that such of them as are not now parties to this action, may be made parties thereto: or that he may have such other relief as may be proper.

If the application be on the part of a defendant, vary the prayer thus:

After "parties thereto," insert as follows:

And that the plaintiff may be directed to amend his summons and complaint in this action accordingly, and to serve the same upon all necessary parties. Or, that your petitioner may have, &c.

Or, the same facts may be presented, and the application brought on, on affidavit and notice of motion, in the usual manner.

MOTION TO COMPEL CONTINUANCE.

Apply upon petition or affidavit, showing abatement, the interests of the different parties to the controversy, and that the applicant is aggrieved by the continuance of the suit without a revivor.

Obtain an *ex parte* order on this affidavit, directing the parties to whom notice of the application is to be given.

Move, at special term, on the pleadings, petition, or affidavit, and order as above,

That an order be made and entered in this action, declaring that the same be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the court, pursuant to the provisions of the Code of Procedure in that behalf. Or, that such further or other order be made, or relief granted in the premises as may be just.

See that a time of not less than six months, nor more than one year, is fixed by the order, and that it is served upon all parties.

ORDER FOR ABATEMENT ABSOLUTE.

If not duly continued within the period fixed as above, then, upon affidavit of service of the foregoing, and of non-continuance within the period named, apply for and enter an order,

That this action be, and the same is hereby, declared to be absolutely abated.

To this may be superadded the following clause, in a case calling for that remedy:

"And it is further ordered and directed, that the notice of *lis pendens*, in this action filed and now of record in the office of the clerk of the county of X., be removed from record, and the said clerk is hereby directed to take the same from off the files of his said office, and remove the same from record accordingly."

In this case, the existence of such notice must be shown on the applicant's affidavit.

LI.

SUGGESTIONS ON RECORD.

Vol. II., § 192.

OF DEATH OF PARTY BEFORE JUDGMENT.

Of Death of a Plaintiff or Defendant, by his Co-Plaintiff or Co-Defendant.

Title, &c.

A. B., one of the *plaintiffs* above named, suggests, and gives this court to understand and be informed, that, after the commencement of this action (and after the joinder of issue therein), (or, after a verdict therein), and before this day, to wit, on or about the day of , 186 , at [state place,] the said C. D., the other of the *plaintiffs* above named, died, and the said A. B. there survived him.

Dated, &c.

X. Y., *Plaintiff's* Attorney.*Of Death of a Plaintiff, by the Defendant ; or of a Defendant, by the Plaintiff*

Title, &c.

A. B., the *defendant* above named, suggests, and gives this court to understand and be informed, that, after the commencement of this action (and after the joinder of issue therein), (or, after verdict therein), and before this day, to wit, on or about the day of , 186 , at [state place], C. D., one of the *plaintiffs* above named, died, and E. F., the other of said *plaintiffs*, there survived him.

Dated, &c.

X. Y., *Defendant's* Attorney.

LII.

MOTION FOR LEAVE TO MAKE SUPPLEMENTAL PLEADING.

Vol. II., § 193 ; Code, § 177.

AFFIDAVIT.

Affidavit, of party or attorney, to state facts material to the case, which render a supplementary pleading necessary, showing when those facts arose, and, in particular, that they arose subsequent to the service of the former pleading of the applicant, or that he was ignorant thereof when such former pleading was made.

NOTICE OF MOTION.

Move,

On the pleadings and proceedings in this action, and on the affidavit of , of which a copy is served herewith.

- That the *plaintiff* may be allowed to make a supplemental *complaint* (or

answer, or reply), *alleging facts material to the case in this action, occurring after the former *complaint* (or answer, or reply) of him the said *plaintiff* in this action, as in the said affidavit stated. (Or, &c., see below).

Or, if so,

*Alleging facts material to the case in this action, of which he, the said *plaintiff*, was ignorant when his former pleading was made, as in the said affidavit stated.

Or, that such further or other order may be made in the premises as shall be just.

LIII.

MOTION TO CONSOLIDATE.

Vol. II., § 195.

Where causes all in same court, entitle papers in all the cases.

Make short affidavit, showing the pendency of the proceedings in question, that they are all by the same plaintiff, against the same defendant, and that they are all for causes of action which may be joined, showing this, by short statement of the nature of the actions in question.

On the pleadings and proceedings in the foregoing actions respectively, and on the affidavit of _____, a copy of which is served herewith,

Move,

That the foregoing actions respectively be consolidated into one action, and that all usual and proper directions be given in reference thereto, or, that such further or other order may be made as shall be just.

WHERE SUITS IN DIFFERENT COURTS.

State facts on affidavit, *mutatis mutandis*.

Move,

That the aforesaid action, prosecuted in the _____ Court, be consolidated with the said action in the Supreme Court, and that all usual and proper directions may be given in reference thereto. And that all proceedings in the said action in the said _____ Court be stayed. Or, that such further or other order may be made in the premises as shall be just.

ORDER.

On, &c.,

It is ordered, that the above-entitled actions, respectively, be consolidated into one action, and be prosecuted as such, and that the recovery to be had, and the judgment to be entered in such consolidated action, do stand as a recovery and judgment in all such actions, respectively. And it is further ordered that all proceedings in the others of such actions be stayed.

[Or, otherwise, according to the terms which the court may impose.

Among which may be, "that the costs in each of said actions, up to this time, be costs in said consolidated action."]

LIV.

MOTION TO ELECT.

Vol. II, § 196.

NOTICE.

Title, &c., and notice as in No. I.

Apply on the pleadings and proceedings in both of the actions, where they are in the same court; if they are in different courts, show the pendency and nature of the other action by affidavit.

Move,

That the *plaintiff* may be ordered and compelled to elect between said two actions, and to signify his election in writing, within such time as the court may direct; and that, upon such election, all proceedings in the action in which he shall not elect to proceed be stayed, and that the *defendant* may have such further or other order or relief as to the court may seem meet.

ORDER.

Title, &c.

Usual form of order, as in No. IV.

That the *plaintiff* do elect between said two actions, and do signify his election, and give notice thereof in writing to the *defendant*, within days after the service of a copy of this order. And, it is further ordered, that, upon such election being made, as aforesaid, by said plaintiff, all proceedings in the action in which he shall not elect to proceed, be stayed; and that, until such election, all proceedings in both of said actions be stayed.

LV.

PROCEEDINGS ON MOTION FOR A REFERENCE.

Vol. II, § 197 (c).

AFFIDAVIT.

That on or as of the day of , an issue of fact was joined (or, issues of fact were joined) in this action. That the trial of the issue (or issues), so joined, requires the examination of a long account, and does not involve or require the decision of any difficult question of law, as this deponent is advised by C. D., of , Esq., his counsel in this action, and verily believes. (If made by party; if by attorney, omit last part of allegation, after "question of law.") That this deponent (if made by party; if by the attorney, that the above-named plaintiff) is desirous that this cause, and the issue so joined therein as aforesaid, should be referred to a referee or referees, to hear and decide the same, pursuant to the statute in that case made and provided.

If reference desired to one referee only, vary allegation accordingly.

NOTICE OF MOTION.

Title and notice, &c., as in No. I.

grounded "on the affidavit, a copy whereof is herewith served."

That this cause, and the whole of the issues joined therein, whether of law or

of fact, may be referred to a referee or referees, to be appointed pursuant to the statute in that case made and provided, to hear and decide the same.

ORDER.

That this cause, and the whole of the issues joined therein, be referred unto A. B., of, &c., C. D., of, &c., and E. F., of, &c., (giving professions as well as residences), as referees, to hear and decide the same.

Or, to A. B., &c., a counsellor of this court, as sole referee, to hear and decide the same.

Or otherwise, as the order is actually made.

OATH OF REFEREE OF WHOLE ISSUE.

Title and venue.

I, A. B., the referee (or one of the referees), appointed to hear and decide this cause, and the issues joined therein, do hereby swear faithfully and fairly to hear and examine the same cause, and to make a just and true report therein, according to the best of my understanding—So help me God.

Sworn, &c.

A. B.
Signature, &c.

N. B.—If all the referees join in one affidavit, modify thus: We, &c., “do hereby, and each of us doth severally swear,” &c., and conclude, “according to the best of our, and each of our understanding severally.”

LVI

MOTION TO DISMISS.

Vol. II, § 198.

Show facts on affidavit, bringing the case within one of the following categories:

Unreasonable neglect to serve summons on other defendants.

Unreasonable neglect to proceed against the defendants served. § 274 of Code.

Or,

Failure, on the part of the plaintiff, to bring his case to trial, according to the course and practice of the court.

Move, on pleadings and proceedings, and on the affidavit, &c.

That the plaintiff's complaint in this action be dismissed (as against the defendant, C. D.), with costs, in favor of the said defendant, and that judgment of dismissal of such complaint be entered accordingly, and that the plaintiff may be ordered to pay the costs of this motion, or that such further or other order may be made in the premises as shall be just.

ORDER.

Title, &c., and order as in No. IV.

That the plaintiff's complaint in this action be dismissed (as against the defendant, C. D.), with costs, in favor of the said defendant; and that judgment of dismissal of said complaint be entered accordingly; and that the plaintiff pay to said defendant ten dollars costs of this motion.

LVII.

SETTING DOWN CAUSE ON SPECIAL CALENDAR IN FIRST OR SECOND DISTRICT OF SUPREME COURT, AND IN NEW YORK SUPERIOR COURT AND NEW YORK COMMON PLEAS.

Vol. II, § 199.

AFFIDAVIT.

Title, &c.

County of X, ss. E. F., of Y., in said county, being duly sworn, saith that he is the (attorney for) the plaintiff in this action; that said action is on contract, and is founded on [state briefly the cause of action]; that the answer [state briefly the nature of the defence]; that this deponent has reason to believe, and verily believes that the defence, so made as aforesaid, is made only for the purposes of delay, and that the reasons for such his belief are as follows, to wit: [state reasons and circumstances on which such belief is grounded]; that this deponent (*is advised by his counsel in this action and*) verily believes that the trial of this action, if placed on the special circuit (or trial) calendar of this court, is not likely to occupy more than one hour. (State nature of evidence, and number of witnesses, and any other circumstances tending to show that the case can be tried within an hour.)

N. B.—In the Supreme Court, both in the first and second district, if the answer merely denies the allegations in the complaint, without setting up any new matter, it is not *necessary* to serve affidavits. It is, however, more prudent to do so, for the purpose of showing that the trial is not likely to occupy more than an hour. In the first district of the Supreme Court, *any action* which shall appear by affidavit to be triable within an hour, may be placed on the special circuit calendar, whether it be on contract or not. The affidavit in such case should be substantially the same as the above, omitting, if necessary, the allegation that the action is on contract, or that the defence is for delay, and stating the circumstances which show that the case can be tried within an hour, with fullness and particularity.

NOTICE OF MOTION.

Title and notice as in No. I.
grounded on the pleadings and proceedings and on the affidavit; notice to be of four days in the New York courts and first district, and to accompany the notice of trial in the second district.

That this cause be placed on the special circuit (or trial) calendar of this court for *Friday*, the day of *instant*, then and there to be tried as a short cause.

LVIII.

PROCEEDINGS ON APPLICATION FOR CHANGE OF
VENUE, AFTER ISSUE JOINED.

Vol. II, § 200 (b, c, d).

AFFIDAVIT ON MOTION.

Title, &c.

County of ss.

E. F., the above-named defendant, being duly sworn, deposes and says, that the above-entitled action is brought by the plaintiff against the defendant for, &c. [state short particulars of action.] That the said defendant by his answer thereto [give short particulars of defence, and make like mention as to reply, if any put in.]

That issue was joined in this action by the service of the said *answer* (or reply), on the day of .

That both the cause of this action and the defence thereof arose in the county of ; and C. D., one of the plaintiffs, and also this defendant, are resident in the said county.

[Vary this allegation, according to the circumstances. If only part of the facts in question arose in the county sought for, allege this state of circumstances with sufficient particularity, showing the ground of convenience as strongly as possible.]

That, notwithstanding the venue in this action has been laid by the plaintiff in the county of , the same cannot, without great inconvenience and expense, be tried in such county.

That he, this deponent, has a good and valid defence on the merits in this action, as he is advised by his counsel, hereinafter mentioned, and verily believes, and that [state names], who reside at [state places of residence respectively], and each and every of them, are material witnesses for this deponent, in order to his defence in this cause, as he is also advised by his said counsel, and verily believes.

That said, &c., [state the occupation of the witnesses, the nature of the facts to be proved by them respectively, and any other necessary details, tending to show the materiality of their testimony, and the inconvenience of their attendance elsewhere].

(That in his, this deponent's belief, many, if not all, of the witnesses for the plaintiff reside in the said county of , inasmuch as the whole contest in this action relates to facts which occurred in the said county. If any circumstances of this nature exist, allege them as above, or otherwise, with all necessary particularity.)

That A. B., who resides at , in the county of , is his, this deponent's counsel in this cause, and that he has fully and fairly stated the case in this action to his said counsel, and disclosed to him the facts which he expects to prove by each and every of the aforesaid witnesses, and he saith that he cannot proceed safely to the trial of this cause, without the benefit of the testimony of each and every of the aforesaid witnesses, as he is advised by his said counsel, and verily believes to be true.

Of course the foregoing affidavit is only calculated to give a general idea of that which will be requisite in each case, according to its special circumstances. It will be easy to adapt that form, where the affidavit is not made by a single defendant, but by one of several; or where it is made by the plaintiff, after a previous change into the technically proper county; or, where the attorney swears to the necessary particulars instead of the party; in which latter case, the reason why the affidavit is made in that form, had better be shortly given, as in the case of a verification.

NOTICE OF MOTION.

Title and notice, &c., as in No. I., grounded "on the affidavit, a copy whereof is herewith served, and upon the pleadings in this cause."

That the place of trial of this cause may be changed from the county of A., to the county of B., or for such further or other order as may be just.

ORDER, TO STAY PROCEEDINGS TILL DECISION OF MOTION.

Rule 58; Vol. II., p. 247.

On the annexed affidavit and notice of motion, let all proceedings on the part of the plaintiff, in relation to the trial of this action, or the preparations therefor, be stayed, for twenty days from the service of this order, or until after the hearing and decision of the said motion, if heard and decided within such twenty days.

ORDER REVOKING THE ABOVE.

To be grounded on affidavit, showing facts which will entitle the plaintiff, according to the settled practice of the court, to retain the place of trial. Rule 58; Vol. II., p. 247.

On reading and filing the annexed affidavit, let the order made in this cause, on the day of , whereby the plaintiff's proceedings in relation to the trial of this action have been stayed, be revoked, and let him, the said plaintiff, be at liberty to proceed therein as he may be advised, notwithstanding such order.

ORDER TO CHANGE VENUE.

Title, &c.

On reading and filing the affidavit of E. F., and on the pleadings in this cause, and after hearing A. B., Esq., of counsel for the defendant, and G. H., Esq., of counsel for the plaintiff: It is ordered that the place of trial of this action be, and the same hereby is changed, from the county of A. to the county of B., and that the pleadings and proceedings on file in the said county of A., be transferred by the clerk of the said county to the clerk of the county of B. accordingly. And that the costs of this motion, amounting to *ten* dollars, do abide the event of this action.

N. B.—In an action pending in the New York Superior Court or New York Common Pleas, the motion to change the venue into another county, must be made in the Supreme Court, first district. Vide section 33 of the Code.

LIX.

PROCEEDINGS TO COMPEL DISCOVERY OF BOOKS OR PAPERS.

Vol. II., § 202.

PETITION BY PARTY, TO ENABLE HIM TO PLEAD.

Title and address of court, &c., as in No. III. [Insert No. of "petition."]

The petition of C. D., the above-named, &c.

That this action is brought, &c. [state nature of action,] and that, &c. [state stage at which proceedings have arrived.]

Then state circumstances, showing some right on the part of the applicant to the production of the books or papers sought to be discovered, or some interest

therein; or else, showing that they, or entries in them, contain material information, essential to be known, with a view to the due preparation of the applicant's pleading.

That various books, papers, or documents, containing evidence in relation to the matters hereinbefore stated, and to the merits in this action (or to the defence of your petitioner in this action), and in particular, the books, papers, and documents, hereinafter specified, to wit: [describe those required to be produced] are in the possession or under the control of A. B., the above named, and that the production and discovery thereof is necessary to enable your petitioner to ("frame his complaint in the said action," or, "to answer the complaint of the plaintiff in this action," or, "to frame his reply to the answer of the said defendant," as the case may be), as he is advised by his counsel in this action and verily believes.

Your petitioner therefore prays, that the said A. B. may be ordered to produce and discover to your petitioner, the aforesaid books, papers, and documents,* and to deliver to your petitioner sworn copies thereof, or of any part or parts thereof respectively, when thereto required; and that your petitioner, his attorneys, agents, or counsel, may be at liberty to inspect and peruse the same, at all reasonable times, and to take copies thereof or extracts therefrom, from time to time, as he may be advised; or, that such further or other order may be made in the premises as to this court shall seem just;

If papers required to be deposited, substitute as follows from *: and to deposit the same with the clerk of the county of

(N. B., the county of venue), (or, "with the clerk of this court," if in a local jurisdiction), and that your petitioner, his attorneys, &c., as in last.

PETITION BY PARTY, TO ENABLE HIM TO PREPARE FOR TRIAL.

Substantially the same as the last. After statement of nature of action, state nature of defence, and continue, "and that issue was joined in such action on the day of , and such issue still remains undetermined by this court."

That, &c.

Similar allegations as in last, *mutatis mutandis*, down to the words, "production and discovery thereof."

From that, continue as follows:

If applicant be plaintiff, continue thus:

"Is material and necessary to enable your petitioner to maintain this action, and to prepare for the trial thereof."

If a defendant, thus: "is material and necessary to the defence of your petitioner in this action, and to prepare for the trial thereof."

Pray, as in the foregoing form, adding, before concluding prayer for further relief, "and so as to enable your petitioner to use the same, upon the trial of the issue joined in this action as aforesaid, in such manner, at such time, and under such terms and restrictions as this court shall prescribe and direct."

DISCOVERY OF ENTRIES.

Where a partial discovery of the contents of books, &c., is sought, modify statements according to circumstances.

Pray that the may be ordered forthwith to discover and to deliver to your petitioner sworn copies, duly verified by the oath of him, the said , of all entries whatsoever in the aforesaid books, papers, and documents, or any of them contained, relating to the several matters hereinbefore alleged, or any of them, or to any other matter relative or pertinent thereto. And also, that the same books, papers, and documents may be ordered to be produced and discov-

ered by him the said on the trial of this action, in such manner, and so as to enable your petitioner to use the same on such trial, under such restrictions, if any, as this court may prescribe, in relation to the perusal and inspection thereof respectively, so far as the same do not relate to the matters of which discovery is not hereby sought as aforesaid. Or that, &c.

VERIFICATION AND AFFIDAVIT AS REGARDS ALL THE FOREGOING.

Use general form of verification, as prescribed in No. III. Add to that form as follows: "That the books, papers, and writings, whereof discovery is thereby sought, are not in the possession nor under the control of him, the said petitioner."

N. B.—It is not absolutely necessary that the application should be by petition, but the above must appear by affidavit in all cases. See Rule 15, Vol. II., p. 255.

If the application be upon affidavit and ordinary notice of motion, vary the following forms accordingly.

NOTICE OF MOTION.

Title, notice, &c., as in No. I.

Grounded "upon *the petition*, of which a copy is herewith served, and upon the pleadings in this cause;" if before issue, allege according to the then state of the action.

That, &c. Frame notice in exact accordance with the forms for prayer of petition above given, adding, "or for such further or other order as may be just."

ORDER THEREUPON.

Title, commencement, &c., as in No. IV.

State order to be made "on reading and filing *the petition* hereunto annexed." Order as follows:

It is ordered that the said do, within days after service of a copy of this order, produce, &c.

Draw order in exact accordance with the terms of the *petition*, or notice of motion, *mutatis mutandis*, unless alterations in those terms be made by the court; but, if so, then in accordance with those alterations. If a deposit be required, add, "And it is hereby further ordered, that such deposit shall continue, until after the trial of the issues so joined herein, as aforesaid;" or, "until the expiration of from the date of service of a copy of this order, as aforesaid," or, otherwise as may be directed.

PROCEEDINGS WHERE DISCOVERY INSUFFICIENT.

When the discovery made is insufficient, make affidavit, pointing out, in detail, the exact points on which that discovery is incomplete, and the extent to which further information is required.

Apply, on such affidavit, for order to show cause why the defendant should not be ordered to produce, &c. (specifying the further documents required), or, why he should not be ordered to deliver to the *plaintiff* further copies, &c. [particularize copies required], or, why in default thereof such further or other order should not be made for the relief of the *plaintiff*, and the punishment of him the said *defendant*, as may be just; and why he, the said *defendant*, should not pay the costs of this motion.

And draw up order, when made, in similar terms, *mutatis mutandis*, using or adapting any one or more of the foregoing forms, as may be requisite to carry out the actual directions of the court.

LX.

EXAMINATION OF PARTY.

Vol. II., § 204 (e).

NOTICE TO PARTY EXAMINED.

Title, &c.

To the above-named *defendant*, C. D.

Sir:

I hereby give you notice that I require you to attend before P. Q., a judge of this court,

(Or before R. S., county judge of the county of X—

Or, before one of the justices of this court), at [specify place,] on [specify time], to be examined in this action, as a witness on the part of the *plaintiff* pursuant to the provisions of the Code of Procedure for such purpose; and that if you refuse or neglect so to attend, I shall apply for such relief against you as is provided for by the same Code.

Date, &c.

E. F., Plaintiff's Attorney.

N. B. The above notice to be for not less than five days. If the party to be examined have books or documents in his possession, the production of which is desired; serve, with the notice, the usual process of *Subpoena duces tecum*.

SUMMONS TO ACCOMPANY NOTICE.

Title, &c.

You, C. D., the *defendant* above named, are hereby summoned to appear and attend before me, the undersigned, a *judge of this court* (county judge of the county of X.), at [specify place], on [specify time], to be examined as a witness in the above-entitled action, for, and at the instance of the *plaintiff* above named, pursuant to sections 390 and 391 of the Code of Procedure, and to the provisions of the statute, entitled, "Of taking conditionally the testimony of witnesses within this state;" and in case of your refusal or failure to attend and testify, you will be liable to be punished as for a contempt, and your *answer* (or complaint, or reply) may be stricken out.

Witness my hand, this day of , 1862.

A. B., Judge of the Court.

To C. D., the defendant above named.

NOTICE TO A CO-PLAINTIFF OR CO-DEFENDANT.

Title, &c.

Please to take notice that C. D., one of the *defendants* in this action, will be examined as a witness on the part of the *plaintiff*, before P. Q., a judge of this court (or otherwise as in last form), at, &c. (as in last), pursuant to the provisions of the Code of Procedure for that purpose.

Date, &c.

E. F.,
Plaintiff's Attorney.

To G. H.,

Attorney for the defendant I. K.

PROCEEDINGS TO PUNISH A PARTY NOT ATTENDING.

Vol. II, § 205.

AFFIDAVITS.

Of Service.

Prove service of the summons and notice on the party, and payment and tender of his fees as a witness, precisely as on service of a subpoena. See below, Form LXIX. Stating that at the time of service there was exhibited to the witness "the original summons, under the hand of M. N., a judge of this court, hereunto annexed."

Of Non-Attendance.

Title, &c.

County of X. ss. E. F., attorney for the *plaintiff* in this action, being duly sworn, saith, that on the day of , 186 , deponent attended at the *chambers of this court*, on the return of the summons and notice hereunto annexed, at the hour of *ten A. M.*, therein specified, and that the *defendant*, C. D., was then and there called, but said *defendant* did not appear. That deponent remained in said court room until the hour of *half-past ten A. M.*, but that said *defendant* did not appear in said room. That at the said hour of *half-past ten A. M.*, the said C. D. was again called, but did not appear or answer. (And deponent saith that he is acquainted with the said C. D., and would have seen him had he entered said room, and that he carefully watched for said C. D., and is positive that he did not attend during the period aforesaid.)

Sworn, &c.

E. F.

N. B. The last clause may be omitted, if necessary.

NOTICE OF MOTION.

Title, &c., and notice as in Number I., grounded on the summons and notice, the above affidavits, and the pleadings and proceedings.

That the said *defendant*, C. D., may be punished as for a contempt for not attending in pursuance of said summons and notice, and that the answer (or complaint, or reply) of said *defendant* may be stricken out; and that the *plaintiff* may have the costs of this motion, and such further or other order or relief as may be just.

LXI.

REQUEST FOR ADMISSION, UNDER SECTION 388 OF CODE.

Vol. II, § 209.

Title, &c.

The *plaintiff* hereby requests an admission in writing of the genuineness of the paper herewith exhibited to you, being [describe paper] pursuant to the provisions of section 388 of the Code of Procedure.

Date, &c.

E. F.,

Plaintiff's Attorney.

To G. H., Esq.,

Defendant's Attorney.

LXII.

EXAMINATION OF WITNESS ON INTERLOCUTORY PROCEEDING.

Vol. I., § 77 (a).

AFFIDAVIT.

Title, &c.

A. B., the above-named *plaintiff* (or C. D., attorney for, &c.), being duly sworn, deposes and says, that this action has been duly commenced and is now pending in this court, and that such action is brought, &c.

[State nature of action.]

That, &c.

[State nature of interlocutory application proposed to be made.]

That, for the purposes of the aforesaid motion, E. F. is a material witness, and it is necessary for the *plaintiff* to have his deposition.

[If in the Superior Court or New York Common Pleas, add:—that the said E. F. resides in street, in the city of New York, within the jurisdiction of this court.]

That application has been made by deponent to the said E. F. to make such deposition voluntarily, but he, the said E. F., has refused to do so, or to make such deposition at all, unless compelled by the order of this court.

ORDER FOR COMMISSION, WHERE APPLICATION IN SUPREME COURT.

On reading and filing the affidavit of , It is ordered that a commission do issue to A. B., of , and C. D., of , &c. (N.B. inhabitants of the county in which the witness resides), to take the testimony of E. F., a witness to be examined in this action, for the purposes in such affidavit mentioned, and to report the same to this court.

N. B.—On obtaining this order, fill in the usual form of commission (see below, Form LXV.), "*mutatis mutandis*," omitting any reference to interrogatories, if the examination be intended to be taken *viva voce*, and otherwise adapting it to this peculiar state of circumstances.

Serve upon the witness to be examined, the usual subpoena or summons, "*mutatis mutandis*," requiring him to attend before the commissioners. See below, Form LXIX.

N. B.—In the New York courts, these last forms are not required, but the mere service of the summons below given, is sufficient to insure the witness's attendance.

SUMMONS IN NEW YORK LOCAL TRIBUNAL.

Title, &c.

To E. F.

Sir:

You are hereby summoned and required to attend before—

[State name of officer, place, date, and hour, as in foregoing forms], to make your deposition in this cause on the part of the plaintiff, on a proceeding by him in this court, in default whereof obedience to this summons will be enforced against you, as in the case of a subpoena issued by this court.

Date, &c.

(Judge's signature.)

LXIII.

EXAMINATION OF WITNESS, DE BENE ESSE.

Vol. II., § 210 (a).

AFFIDAVIT.

Title, &c.

C. D., the above-named _____, (or E. F., attorney, &c.), being duly sworn, deposes and says, that the nature of this action, and of the plaintiff's demand therein, is, &c.

[State nature.]

That the nature of the defence in this action is,

[State nature of defence.]

[N. B.—If the application be made by the plaintiff, omit the last clause. In either case, any circumstances may be added, tending to show the materiality of the testimony in question.]

That the testimony of G. H., who resides at _____, is material and necessary for this deponent (or for the said _____) in the prosecution (or, in the defence) of this action, and that, without such testimony, he, this deponent (or he, the said _____), cannot safely proceed to the trial thereof (as he is advised by his counsel, and verily believes).

N. B.—When affidavit by attorney, omit this last clause.

That the said G. H. is about to depart from this state on [state date of proposed departure], or, that the said G. H. is so sick and infirm, as to afford reasonable grounds of apprehension that he will not be able to attend the trial of this action.

ORDER TO APPEAR.

Title, &c.

Being satisfied that the circumstances of this case require the examination of G. H. as a witness on the part of the *defendant*, in order to attain justice between the parties: I do hereby order and require the *plaintiff* to appear before me, and attend the examination of the said G. H. at, &c. _____ on, &c. [specify time and place, as usual.] See Vol. II., p. 300.

ORDER TO SHOW CAUSE.

Title, &c., and same as last down to the words, "between the parties," then proceed as follows:

I do hereby order and require the *plaintiff* to show cause before me at, &c. _____ on, &c. [specify time and place as usual], why the testimony of said G. H. should not be taken by a referee to be appointed by me. And I do hereby direct that this order be served *before three P. M. of this day, by delivering a copy thereof to the plaintiff's attorney* (or otherwise, as the court may direct).

ORDER OF REFERENCE.

Title, &c.

On reading and filing the affidavit of C. D., the *defendant* in this action, and the order to show cause granted by me thereon, on the _____ day of _____, 186____, with proof of the due service thereof, and no sufficient cause having been shown against the same:

(Or, if the order has been opposed, insert instead of "with proof of due service thereof," the usual statement as to counsel for the parties having been heard.)

I do hereby order that P. Q., of the city of X., counsellor-at-law, be, and he is hereby, appointed referee to take the testimony of G. H., in said affidavit and order mentioned. And I do hereby order and require the *plaintiff* to appear before said referee, and attend the examination of said G. H., at, &c. on, &c. [specify time and place, as usual.]

LXIV.

PROCEEDINGS TO PERPETUATE TESTIMONY.

Vol. II., § 211.

AFFIDAVIT.

Title, &c. (if suit commenced).

County of X., ss.

A. B., of the city of Y., in said county, being duly sworn, deposes and says, that this action is actually pending in a court of record in this state, to wit: in the *Supreme Court of the State of New York*, and that deponent is a party *plaintiff* thereto (or the *plaintiff* therein.)

[If suit is not commenced, substitute as follows: "That deponent has good reason to expect, and does expect, to be made a party to an action in some court of record in this state;" and state reason for such expectation.]

That this (or said) action is (intended to be) brought by *deponent against C. D.*, for, &c. [State nature of action, and any other circumstances tending to show the materiality of the testimony.]

That the testimony of (said) G. H., a witness within this state, who resides in the said city of Y., is material and necessary to deponent in the prosecution (or defence) of this (or said) action, as deponent is advised by E. F., his counsel in his action, and verily believes.

(If the suit is not commenced, add: That the said C. D., who is the party expected to be adverse to deponent, resides within this state, to wit, at the said city of Y., and is of full age.) Sworn, &c. A. B.

APPOINTMENT FOR EXAMINATION.

Title, &c. (if suit commenced).

A. B., having produced to me due proof by affidavit, that he is a party *plaintiff* to (or the *plaintiff* in) this action, and that the same is actually pending in a court of record in this state, to wit, in the *Supreme Court of the State of New York*;

(If suit is not commenced, substitute as follows: "That he has good reason to expect to be made a party to an action in some court of record in this state.")

And that the testimony of G. H., a witness within this state, who resides in the city of Y., is material and necessary to the prosecution (or defence) of this (or said) action:

(If the suit is not commenced, add: And that C. D., who is the party expected to be adverse to said A. B., resides within this state, to wit, at the said city of Y., and is of full age.)

I do hereby appoint *the chambers of this court, in the City Hall of the city of Y.*, as the place, and the day of , 186 , at A. M., as the

time, for the examination of such witness, with a view to the perpetuation of his testimony, pursuant to the statute in such case made and provided.

Dated, &c.

P. Q.,

A Justice of the Supreme Court.

[N. B.—The time appointed must be not less than fourteen days from the date of the order, and the place must be within the county where the witness resides.]

LXV.

COMMISSION TO EXAMINE WITNESSES.

Vol. II., § 213 (c).

AFFIDAVIT.

Title, &c.

A. B., the above-named *plaintiff* (or C. D., attorney, &c.), being duly sworn, deposes and says, that an issue of fact was joined in this action by the service of the *defendant's answer* on the day of : That L. M., not residing within this state, but residing at X., in the state of Y., is a material and necessary witness for this deponent in the prosecution (or in the defence) of this action, and deponent saith he is advised by C. D., his counsel in this action, and verily believes, that he cannot safely proceed to the trial of this action, without the testimony of the said L. M.

Or, if opposition be anticipated, the affidavit may be made more explanatory, showing the nature of the action, the nature of the testimony proposed to be given by the witness in question, and the materiality of that testimony ; according to the special circumstances of the case.

NOTICE OF MOTION.

Notice, &c., as in No. I.

Grounded on the pleadings in this action, and the affidavit of which a copy is served herewith.

That a commission do issue in this action, directed to O. P. and Q. R., of X., in the state of Y., authorizing them, or any one of them, to examine on oath L. M., of said X., as a witness on the part of the *plaintiff*, on interrogatories to be annexed to the said commission, with the usual directions in such cases, and that all further proceedings on the part of the *defendant* be stayed, until after the execution and return of the said commission, or for such further or other order as may be just.

ORDER.

Title, &c.

On reading and filing the notice of motion hereto annexed, and proof of due service thereof on the *defendant*, and on motion of E. F., of counsel for the *plaintiff*, no one appearing on the part of the *defendant*;

(Or otherwise, as the case may be.)

It is ordered that a commission do issue in this action, directed to (names and addresses of commissioners), authorizing them to examine on oath (names and addresses of witnesses) witnesses on the part of the plaintiff (and witnesses

on the part of the defendant, if both join), upon interrogatories to be annexed to the said commission, and to take and certify the depositions of such witnesses, and to return the same, according to the directions to be given with such commission. And it is further ordered, that all proceedings in this action on the part of the defendant be stayed, until after the execution and return of the said commission, but with liberty to either party to apply to the court in the mean time, as they may be advised.

INTERROGATORIES.

Interrogatories to be administered to A. B. and C. D., witnesses to be produced, sworn, and examined on the part of the plaintiff (and to E. F. and G. H., witnesses to be at the same time produced on the part of the defendant, if the fact be so), in a certain cause now pending in (title of court), wherein O. P. is plaintiff, and S. T. is defendant, under the commission issued out of the said court, directed to (give names of commissioners), and hereunto annexed.

First Interrogatory.—What is your name, age, occupation, and residence? Do you know the parties, plaintiffs and defendants in this action, in the title of these interrogatories named, or any or either of them? If yea, for how long have you known them, respectively?

Second Interrogatory.—Proceed to interrogate the witnesses on the point desired, taking care that the questions asked are sufficiently specific and searching. If any point be more than usually important, the following words may be added at the end of the interrogatory: "Declare the same, and all circumstances connected therewith, fully, to the best of your knowledge, remembrance, information, or belief." Or thus, more shortly: "Give full and detailed particulars."

If any interrogatories be not general, but addressed to particular witnesses only, so state, at the commencement of each.

Lastly.—Do you know, or can you set forth, any other matter or thing material to the subject of this your examination, or which may in any wise tend to the benefit of the *plaintiffs* in this action (or any or either of them?) If yea, set forth the same, and all the particulars and circumstances thereof, according to the best of your knowledge, remembrance, information, and belief.

COMMISSION.

Vol. I., p. 588.

[L. s.] *The People of the State of New York*, to O. R., of, &c., and S. T., of, &c. (names and descriptions of commissioners), Greeting:

Know ye, That we, with full faith in your prudence and competency, have appointed you commissioners (or commissioner), and by these presents do authorize you (and each and every of you) to examine A. B. and C. D., both of, &c., and E. F., of, &c. (give names and description of witnesses), as witnesses (or as a witness), in a cause pending in the

[Describe court, taking care that it appear, upon the face of the description, to be a court of the state of New York.]

Between A. B., plaintiff, and C. D., defendant, on the part of the plaintiff (or defendant), on oath, upon the interrogatories annexed to this commission, and to take and certify the depositions of the witnesses (or witness) and return the same, according to the directions hereunto annexed.

Witness (add name of judge, and reference to court, in usual form of teste, see form on execution), the day of , one thousand eight hundred and

(Signature of judge.)

(Obtain seal of court.)

DIRECTIONS FOR EXECUTING THE COMMISSION.

Subjoin, *in extenso*, the statutory directions, which will be found in the text, vol. II., pp. 312 and 313.

Add to them as follows:

The above is an extract from the Revised Statutes of the state of New York, relating to the taking of testimony out of the state.

Indorse, on sheet containing as above:

This commission, when executed, is to be returned [here give special directions as to the exact mode in which the commission is to be returned.] See vol. II., p. 320.

Also the following return, to be signed by the commissioner or commissioners who execute it:

The execution of this commission appears in certain schedules hereunto annexed.

(Signature.)

Commissioner.

N. B.—The above is all that is essentially necessary. Special instructions are also appended to the printed forms usually sold, and are highly useful, as affording a safe guide to the commissioners named. They should, therefore, on no account be omitted.

In filling them up, care should be taken to adapt them to the precise circumstances of the case, and to cancel any portions which are clearly inapplicable.

 LXVI

NOTICES OF TRIAL.

Vol. II., § 215.

NOTICE OF TRIAL FOR CIRCUIT, ETC., IN A JURY CASE.

Name of court.

Title of cause.

Please take notice, that the issue of fact in this action will be brought to trial, *and an inquest taken therein*, at a circuit court to be holden in and for the county of _____, at _____, in the said county, on the _____ day of _____ next (or instant), at _____ o'clock in the forenoon of that day.

Dated the _____ day of _____, 186 .

A. B., *Attorney for Plaintiff.*

To C. D. and F., Esqrs., *Attorneys for Defendants.*

If for a special or trial term, vary accordingly. If the notice be by the defendant, substitute for the words, "an inquest taken therein," the words, "the complaint therein dismissed," or some equivalent expression.

NOTICE OF TRIAL BEFORE THE COURT WITHOUT A JURY.

Same as above, substituting for the words "an inquest," the word "judgment," and stating the nature of the issue, as "the issue of law," or "the issues of law and fact," according to the circumstances.

Admission of service to be indorsed, or the usual affidavit of service made. See Form No. V.

NOTICE OF TRIAL BEFORE REFEREE.

Same as above, down to "trial," then proceed: before C. D., the referee (or referees), appointed by this court, at *his office*, No. , street, in the city of X., on the day of , 186 , at A. M.

LXVII.

NOTE OF ISSUE.

Vol. II., § 216.

Supreme Court,
(or other, as the case may be.)

| | | |
|---------------------------------|---|--|
| A. B. vs. C. D. and E. F. | } | <i>Plaintiff's</i> Note of Issue. (<i>Circuit</i>) or "General," or "Special," or "Trial" Term, as the case may be. |
|---------------------------------|---|--|

G. H., attorney for plaintiff.

L. and M., attorneys for defendant, C. D.

W. and X., attorneys for defendant, E. F.

Issue of *fact*, joined 1st of *January*, 1863.

Or,

Issue of law (demurrer), joined, &c.

Or,

Issues of law and fact, joined, &c.,

(As the case may be. If on appeal, state whether from judgment or order.)

LXVIII.

AFFIDAVIT OF MERITS.

Vol. II., § 217.

Title, &c.

County of X. ss. A. B., of , the defendant in the above-entitled cause, being duly sworn, doth depose and say, that he has fully and fairly stated the case in the above cause to C. D., his counsel, who resides at No. street, in the city of Y., and that he has a good and substantial defence, on the merits, to the whole of the plaintiff's demand, as he is advised by his said counsel, and verily believes to be true.

Sworn, &c.

(Signature and jurat as usual.)

N. B.—If the affidavit be made by any other person than the defendant himself, state at the outset the reasons why it is so made, and introduce allegations to show that the deponent has full knowledge of the matters in question. See heretofore, under the head of *Verification*.

LXIX.

PROCEEDINGS TO COMPEL OR OBTAIN TESTIMONY.

Vol II., § 218 (a, b, c).

SUBPŒNA.

The People of the State of New York, to L. M. and N. O.

Greeting: We command you, that, all and singular business and excuses being laid aside, you and each of you appear and attend before one of the justices of our Supreme Court, at a *Circuit Court*, to be holden in and for the county of , at the , in the city of , on the day of , at o'clock, in the noon.

Or,

Before one of the judges of our Court of Common Pleas for the City and County of New York, at a special term thereof, to be holden at the City Hall, in the city of New York, on the first Monday of 'next, at 10 o'clock in the forenoon.

Or,

Before one of the justices of our Superior Court of the City of New York, at a trial term thereof, to be holden at, &c. (as in last.)

Or,

Before [give names] the referees appointed by the court at [state place], on [state day and hour, in forenoon or afternoon], to testify and give evidence in a certain action, now pending in the [state name of court in full, or, if [L. s.] name given before, say, "in said court"], then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the plaintiff, [or, of the defendant],—and for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness, E. F., Esquire, one of the justices of our said Supreme Court [or, the Hon. G. H., one of the judges of the said court], at the *City Hall*, in the city of X. [or otherwise, according to the place in which jurisdiction is exercised], the day of , in the year 186 .

Per curiam.

P. Q., Clerk.

R. S., *Plaintiff's* Attorney.

SUBPŒNA TICKET.

By virtue of a writ of subpœna, to you directed and herewith shown, you are commanded, that all business and excuses being laid aside, you appear and attend before, &c. [state name of officer, place of attendance, day and hour of attendance, and other particulars, precisely as in subpœna], to testify and give evidence in a certain action now pending in the said court [or, in the court of , giving description], then and there to be tried between A. B., plaintiff, and C. D., defendant, on the part of the plaintiff (or defendant), and for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit fifty dollars in addition thereto.

Dated the day of , 186 .

By the Court.

R. S., *Plaintiff's* Attorney.

To [name of witness].

**SUMMONS IN NATURE OF SUBPŒNA, REQUIRING WITNESS TO ATTEND
AND GIVE TESTIMONY, BEFORE JUDGE, OR OFFICER OF
COURT, OR COMMISSIONERS.**

N. B.—A copy of this summons also to be served upon the witness.
The People of the State of New York to G. H.

Greeting: You are hereby summoned and commanded that, all business and excuses being laid aside, you do appear and attend before A. B., a justice, &c. [state name of officer, place, date, and hour of attendance; and if to appear before the officer who issues the summons, add to his name and description, "the officer signing this summons."]

Or,

Before C. D. and E. F., the persons named in a commission issued by [give description of court] to take the testimony of you, the said G. H., to testify and give evidence in a certain action, &c. [as in ordinary subpœna].

Or,

To make your deposition in this cause on the part of the plaintiff (or defendant), on a proceeding by him in a certain action, &c. And for a failure to attend, &c.

[Conclude and add *teste*, &c., as in ordinary subpœna.]

To be under the hand of the judge or officer issuing the same, see 2 R. S., 392, 393, 398, 401.

SUBPŒNA DUCES TECUM.

The same as an ordinary subpœna, inserting before the concluding clause, "and for a failure," &c., the following: and that you bring with you, and produce, at the time and place aforesaid, a certain, &c. [give exact and careful specification of the books and papers required to be produced], now in your custody, and all other deeds, evidences, and writings, which you have in your custody or power, concerning the premises.

AFFIDAVIT OF SERVICE.

County of, &c.

A. B., of, &c., being duly sworn, deposes and says, that on the day of , at , he served the within subpœna upon C. D., E. F., G. H., and J. K., respectively therein named, by exhibiting the same, under the seal of the within-named court, to each of them, the said witnesses, by delivering to each of them a ticket containing the substance thereof, and by paying to each of them the sum of fifty cents, the fee allowed by law for one day's attendance, and by likewise paying to each of them, the said C. D. and J. K., who respectively reside more than three miles from the place of attendance, the fees allowed by law for travelling to and returning from the place where they are respectively required to attend, to wit, to the said C. D., the sum of , and to the said J. K., the sum of .

N. B.—The above form is drawn up on the supposition that the affidavit is indorsed on the subpœna, and that several witnesses are included in the latter. It will be easy to modify it, so as to apply to a single witness, or, where the affidavit is made in a separate form. In the latter case, the original subpœna had better be annexed to the affidavit, and referred to as such.

ATTACHMENT AGAINST WITNESS FOR NON-ATTENDANCE.

The People of the State of New York, to the Sheriff of
Greeting: We command you to attach C. D., and forthwith bring him before one
of the justices of, &c. [State name of court by which attachment issued], at
&c. [state place where court is sitting], to answer for his misconduct in not obey-
ing our writ of subpoena, to him directed, and on him duly served, commanding
him to appear before the said court, at the place aforesaid, and give evidence
in a certain action pending between A. B., plaintiff, and E. F., defendant, on the
part of the *plaintiff*, and have you then there this writ.

Witness the Hon. G. H., a justice of said court, at the city of New York, the
day of , one thousand eight hundred and

Per curiam.

K. L., *Plaintiff's* Attorney.

W. Z., Clerk.

N. B.—If the attachment be issued in respect of a contempt, in not obeying a
summons in the nature of a subpoena in the form before directed, modify the
above accordingly. If the contempt is for non-attendance before commissioners,
the process to be made returnable before the court which issued the commission

HABEAS CORPUS AD TESTIFICANDUM.

Affidavit.

Title, &c.

County of X., ss.

A. B., being duly sworn, saith that he is the *plaintiff* in this action; that
the same is brought [state nature of action and defence]. That the testimony
of L. M., who is now a prisoner in the custody of the sheriff of the county of
X., for [state cause of detention, showing that the same is not on sentence
for a felony], is material and necessary to deponent on the trial of this action,
as he is advised by counsel and verily believes; and that, without the benefit
of such testimony, deponent cannot safely proceed to the trial of this action, and
that such trial is noticed for [state when]. Deponent lastly saith, that this
application, to procure the attendance of said L. M., as a witness for this de-
ponent, is without any fraud or connivance between him and the said prisoner.

A. B.

Sworn, &c.

Writ.

The People of the State of New York to the Sheriff of the County of X.
Greeting:

We command you that you have the body of L. M., detained in our prison
under your custody, as it is said, under safe and secure conduct, before, &c.
[as in a subpoena to and including the words, "on the part of the plaintiff"
(or defendant)], and immediately after the said L. M. shall then and there have
given his testimony, that you return him to our said prison, under safe and
secure conduct, and have you then there this writ.

Witness the Honorable E. F., a justice of said court,
L. s. at the City Hall, in the city of Y., the day of
186 .

G. H., Clerk.

K. L., *Plaintiff's* Attorney.

Indorse as follows:

Allowed this day of , 186 .

E. F., Justice, &c.

NOTICE TO PRODUCE PAPERS ON TRIAL.

Title, &c.

Take notice, that you are hereby required to produce, on the trial of this action, a certain [describe paper required], or, in default thereof, parol or secondary evidence will be given of its contents.

Dated, &c.,

A. B., *Plaintiff's* Attorney.

To C. D., Esq., *Defendant's* Attorney.

MOTION TO EXCLUDE EVIDENCE.

Apply on affidavit, showing that the adverse party has not furnished particulars of an account, when duly required; or, that papers, ordered to be produced, have not been so, as the case may be; giving full particulars, so as distinctly to define the document sought to be excluded, and to prove, either a non-compliance, or an insufficient compliance.

Move, on affidavit, as above,

That the *plaintiff* may be precluded, on the trial of this cause, from giving any evidence of the account alleged in his *complaint* in this action, and of which he has not furnished a copy, as in the said affidavit mentioned, or of any of the items in such account contained.

Or,

If exclusion be for insufficiency, add, so far as regards, &c. [define extent of insufficiency], but no further or otherwise.

Where in respect of non-production of paper, move,

That, &c. [define paper], in the said affidavit mentioned, may be excluded from being given in evidence on the trial of this cause, on the part of the *defendant*.

If exclusion be partial, qualify as above directed, *mutatis mutandis*.

LXX.

SECURITY FOR LOST NOTE OR BILL.

Vol. II., § 219 (a).

Bond in ordinary form (see Form No. XXIII.), with two sureties, the penalty to be at least double the amount of note or bill, conditioned as follows:

Whereas the said A. B. has commenced an action in the Court, against the said C. D., founded upon a certain negotiable *promissory note* (or bill of exchange), made by, &c. [Give full description of note or bill.] And whereas it appears on the trial of such action, that such *note* was lost while it belonged to said A. B., the party claiming the amount due thereon. Now the condition of this obligation is such, that if the said A. B. shall well and truly indemnify and hold harmless the said C. D., his heirs, executors, administrators, and assigns, against all claims by any other person on account of such *note* (or bill of exchange), and against all costs and expenses by reason of such claim, then, &c.

LXXI.

DECISION ON DEMURRER.

Vol. II, § 231 (c).

Title, &c., and commencement, as in No. IV.

This cause coming on for trial in its order, on the issue of law joined by the demurrer of the *defendant* to the *complaint* of the *plaintiff*.

[Or, otherwise, as the case may be.]

And after hearing Mr. A., of counsel for the *defendant*, in support of such demurrer, and Mr. B., of counsel for the *plaintiff*, in opposition thereto. This court doth hereby decide and find, as a conclusion of law, that, &c.

[Here state conclusion come to by the court, using the precise words of the subdivision or subdivisions of section 144, under which the demurrer is allowed.]

And it is therefore ordered that the said demurrer be, and the same is hereby allowed, and that the *defendant* have judgment thereon, dismissing the complaint with costs.

Or, "disallowed," and "that the plaintiff have judgment thereon for the relief demanded in his complaint."

Or, otherwise, as the case may be.

If the demurrer be partial only, specify its nature at the commencement, and, at the conclusion, stop at the words, "have judgment thereon."

If demurrer allowed, and leave to amend granted, add,

And it is further ordered, that the *plaintiff* have leave to amend his said *complaint* within *twenty* days from the service of a copy of this order, on payment of the costs of the said demurrer, and that judgment be, in the mean time, suspended.

If demurrer disallowed, and leave granted to plead over, substitute for the words, "to amend his said *complaint*," as follows: to withdraw his said demurrer, and to answer (or reply to) said complaint (or answer).

LXXII.

MOTION FOR NEW TRIAL.

Vol. II, § 240.

ORDER STAYING PROCEEDINGS.

Title, &c.

That the entry of judgment, and all other proceedings on the part of the *plaintiff* in this action, be stayed, until after the exceptions (or, the case), made on behalf of the *defendant*, shall have been settled and filed.

If motion on a case, then add:

And also until _____ days after the motion for a new trial on the part of the *defendant*, on the said case, when so settled, shall have been heard and decided in its order upon the calendar of the _____ term of this court.

Or, if this further stay be not granted by the judge in the first instance, enter order as in first clause, and then, after settlement, apply thus:

That the entry of judgment, and all other proceedings on the part of the

plaintiff, in this action, be stayed, until days after the motion for a new trial on the part of the *defendant*, on the case made and settled in this action, shall have been heard and decided, in its order upon the calendar of the term of this court.

And obtain, in connection with the notice of motion for this purpose, an *interim* stay of proceedings.

If the application be by order to show cause, add to the order, "and, in the mean time, let all proceedings on the part of the *plaintiff* be stayed."

If notice of motion be given, obtain a separate stay, by order, to the following effect, to be served with the notice, viz. :

"That all proceedings on the part of the *plaintiff*, in this action, be stayed for twenty days from the service of this order, or until after the hearing and decision of the motion mentioned in the annexed notice, if the same shall be heard and decided within such twenty days."

If the motion be on the judge's minutes, or on the ground of irregularity or surprise, apply simply for stay, "for twenty days from the service of this order, or, until after the motion of the *plaintiff* for a new trial of the cause, on the ground, &c. [state on what ground], shall have been heard and decided, if," &c., (as in last.)

Or, if stay obtained at the trial, or granted on notice, enter order peremptorily, without limitation, as above.

ORDER TO HEAR EXCEPTIONS AT GENERAL TERM.

Title, &c.

I hereby direct that the exceptions taken at the trial of this cause, on the part of the , when the same shall be duly settled and filed, be heard in the first instance, at the general term, and not at a special term of this court. And I do hereby further direct, that the entry of judgment in this cause be suspended in the mean time, and until after the hearing of such exceptions, and the decision of the general term thereon.

Dated, &c.

(Judge's signature.)

NOTICE OF MOTION FOR SURPRISE, IRREGULARITY, OR NEWLY DISCOVERED EVIDENCE.

To be grounded on affidavit, giving full details, so as to make the facts, on which the motion is made, clearly and conclusively apparent. See Vol. II., § 245.

Notice, on the pleadings and proceedings in this cause, and on the affidavit, &c.,

That a new trial of this action be granted, on the grounds in the said affidavit stated, or that such further or other order may be made in the premises as may be just.

And, if necessary, an *interim* stay of proceedings may be obtained, as before directed.

N. B.—The above may serve as a precedent for a notice or order to show cause, on a motion for a new trial on the judge's minutes, the application, in that case, being grounded on the pleadings and proceedings in this cause, and on the minutes of the honorable G. H., a justice of this court, on the trial thereof before him the said justice, on the day of , &c.

ORDER GRANTING NEW TRIAL.

On, &c. [state on what grounded]. It is ordered that the said motion, on the part of the , be, and the same is hereby granted, and that a new

trial of this action be had (and, also, that the costs of the application therefor, do abide the event of such new trial).

ORDER REFUSING NEW TRIAL.

It is ordered that the application for a new trial of this action be denied, with costs of such application, to be paid by the *defendant*.

LXXIII.

NOTICE OF SETTLEMENT OF CASE OR EXCEPTIONS.

Vol. II, § 241 (f).

Title, &c.

Take notice, that the case (or, exceptions) in this action, with the amendments proposed by the *defendant* thereto, will be submitted, for settlement, to the Hon. A. B., the justice (or, referee) before whom this case was tried, at, &c. [specify place], on, &c. [specify time].

Dated, &c.

C. D., *Plaintiff's* Attorney.

To E. F., Esq., *Defendant's* Attorney.

LXXIV.

ORDER DECLARING CASE OR EXCEPTIONS ABANDONED.

Vol. II, § 241 (i).

[Apply, *ex parte*, on affidavits, showing that the case or exceptions has not been filed, the time of settlement, and that more than ten days have elapsed since the settlement.]

Title, &c..

On reading and filing the affidavit of A. B. (*attorney for the plaintiff*), showing that the case (or, exceptions) made by the *defendant* has not been filed, that the same *was* settled on the day of , 186 , and that more than ten days have elapsed from the time of such settlement: It is hereby ordered, that the said case (or, exceptions) be, and the same is, hereby, declared abandoned, and that the said *plaintiff* may proceed as if no case (or, exceptions) had been made.

LXXV.

PRELIMINARIES TO JUDGMENT, ON DEFAULT TO ANSWER.

NOTICE OF APPLICATION FOR JUDGMENT FOR RELIEF, BY DEFAULT.

Vol. II, § 260; Code, § 246.

Title, &c.

Take notice, that an application will be made, on behalf of the plaintiff, at a special term of this court, to be holden at *the City Hall*, in the city of B., on

the day of , at , A. M., or as soon thereafter as counsel can be heard, for the relief demanded in the complaint in this action, and that judgment may be given for the plaintiff.

NOTICE OF ASSESSMENT BY CLERK ON DEFAULT, WHERE COMPLAINT
NOT SWORN TO.

Vol. II., § 257 (c); Code, § 246.

Title, &c.

Take notice, that the amount which the plaintiff is entitled to recover in this action, will be assessed and ascertained by the clerk of this court, at his office, at , in the city of , on , the day of , at the hour of , A. M.

AFFIDAVIT OF NO ANSWER, ON TAKING JUDGMENT BY DEFAULT.

Vol. II., § 257 (a); Code, § 246.

Title, &c.

County of ss.:

A. B., managing clerk to C. D., plaintiff's attorney in this action, being duly sworn, says, that no copy of an answer or demurrer to the complaint in this action, has been received by the said C. D., or at his office, No. street, in the city of .

Sworn, &c.

A. B.

N. B.— If made by attorney himself, alter accordingly.

STATEMENT ADMITTING COUNTER-CLAIM, ON TAKING JUDGMENT BY DEFAULT
FOR EXCESS.

Vol. II., § 257 (d); Code, § 246.

Title, &c.

The plaintiff, by this statement, made in pursuance of the provisions of section 246 of the Code of Procedure, admits the counter-claim set up in the answer of the defendant, and claims to have judgment for the excess of his claim in this action over the said counter-claim.

Dated, &c.

C. D.,

Plaintiff's Attorney.

PRELIMINARY JUDGMENT FOR ASSESSMENT BY SHERIFF'S JURY.

Vol. II., § 260 (g); Code, § 246.

Title, &c.

Usual commencement, establishing existence of default to answer or appear. See below, forms of prefaces to *Postea*.

Thereupon it is adjudged, that the plaintiff do recover against the defendant his damages by him sustained, by occasion of the premises in the said complaint set forth; but because it is unknown what amount of damages the plaintiff has sustained, the plaintiff hereupon requiring that the damages be assessed by a jury, It is ordered, that the sheriff of the county of , by the oaths of twelve good and lawful men of his county, assess such damages; and that said sheriff return to this court, at the office of the clerk of the county of , the inquisition he shall thereupon take, under his hand, together with this order; and, It is further ordered, that judgment be given for the plaintiff, for the amount of damages to be so assessed, as aforesaid, with costs.

If the recovery be of specific real or personal property, alter commencement

accordingly, by inserting before "his damages by him sustained," the words, "the possession of the real (or personal) property described in the complaint, and also his damages, &c."

REFERENCE ON DEFAULT.

Vol. II., § 260 (*f*); Code, § 246.

On Recovery of Money.

Title and preface as above.

Thereupon it is adjudged, that the plaintiff do recover against the defendant the amount claimed by him in his complaint in this action; but, because such amount is unknown, and the taking and examination of a long account is involved in, and is necessary, to enable the court to give judgment therefor, It is ordered, that it be referred to L. M., of, &c., a counsellor of this court, to take such account, and to assess the amount due to the plaintiff thereon, and to report thereupon to this court with all convenient speed. And it is further ordered, that judgment be given for the plaintiff for the amount to be assessed, as due to him by the said referee, as aforesaid, with costs.

REFERENCE IN OTHER CASES.

Title and preface as above.

Whereupon, it is adjudged, That the plaintiff is entitled to have against the defendant the relief demanded by his complaint in this action; but inasmuch as the taking of an account is necessary, to enable the court to give judgment therefor, (Or, inasmuch as the proof of certain facts is necessary, to enable the court to give judgment therefor, and to carry such judgment into effect:

Or, is necessary to enable the court to carry the judgment to be given in favor of the said plaintiff into effect:

Or modify or combine the above, as the case may require :)

It is ordered, that it be referred to L. M., of, &c., a counsellor of this court, to take all such accounts (and also proof of all such facts) as are necessary to enable the court to give judgment in this action (and to carry the judgment so given, into effect), and to report thereupon to this court, with all convenient speed.

(Or, and to report the same to this court, with his opinion thereon, with all convenient speed.)

And it is further ordered, that upon the coming in of the report of the said referee, such judgment be given thereupon, in favor of the plaintiff, as may be just, with such further directions as may be necessary to carry the same judgment into effect, and that the plaintiff be at liberty to apply for the same accordingly.

Or modify, according to the circumstances.

LXXVI.

PRELIMINARIES TO ENTRY OF JUDGMENT ON SERVICE BY PUBLICATION.

AFFIDAVIT THAT ATTACHMENT HAS BEEN ISSUED AND LEVY MADE.

Vol. II., § 261; Rule 25.

Title, &c.

C. D., being duly sworn, deposes and says, that he is one of the deputies of the sheriff of the county of X.; that on the day of , 1863, a warrant of attachment in this action was issued against the property of the defendant, by

the Hon. L. M., a justice of this court, to the said sheriff of said county, and that under said warrant, a levy was on the *same day* made by the said sheriff, upon property within said county belonging to said defendant. That the following is a description of such property and a statement of its value, to wit: the same consists of

[Here specify distinctly the particulars so required.]

UNDERTAKING.

Vol. II, § 261; Rule 25.

Title, &c.

The plaintiff in the above-entitled action, wherein the summons has been served by publication, being about to make application for judgment therein, against the defendant: Now therefore, we, G. H., of, &c., and J. K., of, &c., do undertake, pursuant to the statute and rule of court, in such case made and provided, that the said plaintiff will abide the order of the court touching the restitution of any estate or effects, which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under, or by virtue of such judgment, in case the defendant or his representatives shall apply, and be admitted to defend the action, and shall succeed in such defence.

Date and signatures.

Add justification in usual form, to amount sufficient to satisfy the judge that the undertaking, if enforced, is adequate to insure a full restitution.

If the court decline to take, in person, the proof of the plaintiff's demand, and to examine him or his agent upon oath, respecting any payments that have been made to him, or to any one for his use, on account of such demand, before rendering judgment, according to the specific directions contained in section 246, subdivision 3, and shall direct a reference, enter order, as follows:

ORDER OF REFERENCE.

Upon reading and filing the summons in this action, and reading the complaint therein, which was duly filed on the day of last, and the order for publication of said summons, made in this action on the day of last, whereby the service of such summons was directed to be made upon the defendant, C. D., by the publication thereof in two newspapers designated as most likely to give notice to the person to be served, to wit, in the and the , during the time therein specified, and by depositing a copy of such summons and complaint in the post-office in the city of X., directed to the said defendant at his place of residence, with the postage paid thereon, as thereby directed; together with the affidavit on which said order was granted: And, upon also reading and filing affidavit proving the due publication of the said summons in the said two newspapers, in all respects according to the directions of said order, and likewise the depositing of copies of the said summons and complaint in the said post-office, directed to the said defendant, at his residence, and payment of the postage thereon, as thereby also directed: And, likewise, upon reading and filing the affidavit of R. S., attorney for the said plaintiff, that no answer or demurrer, or copy thereof, has been received by him, or at his office, as in such affidavit stated.

Now, on motion of R. S., the plaintiff's attorney, no one appearing to oppose: It is ordered, that it be referred to N. O., counsellor-at-law, as sole referee, to take proof of the demand mentioned in the complaint, and to examine the plaintiff or his agent, on oath, respecting any payments that have been made to him, the said plaintiff, or to any one for his use, and to make report to this court in the premises, with all convenient speed.

REFEREE'S REPORT.

Title.

I, N. O., the referee to whom, by an order of this court, made on the day of instant, it was referred to take proof, &c. [state precise terms of order], do report that I have, pursuant to said order, taken proof of the demand mentioned in the complaint, and have likewise examined (P. Q., the agent of) the plaintiff, on oath, respecting any payments that have been made to said plaintiff, or to any one for his use, on account of such demand; and I find and report, that the demand of the plaintiff is just and true, and that no payment has been made to him, or to any one for his use, on account thereof.

[Or, if payments have been made, state particulars, and when, and to what amounts.]

And I do further find and report, that (after giving credit for all such payments so made by the defendant, as aforesaid) there is due from the defendant to the plaintiff, and he, the said plaintiff, is entitled to recover from the said defendant in this action, the sum of , with interest from , making in all, the sum of

All which I do hereby certify and report to this court.

Dated, &c.

ORDER FOR JUDGMENT.

Title, &c.

When the proof has been taken by the court, use the same formal preface as in the order for reference above given.

Add as follows :

And this court having thereupon required proof to be made of the demand mentioned in the complaint, and such proof having been made accordingly, and having also examined the plaintiff (or P. Q., agent of the plaintiff), on oath, respecting any payments that have been made to him, the said plaintiff, or to any one for his use, on account of such demand: And it appearing on such proof so made, and after such examination so taken as aforesaid, that, &c.

("after giving credit for all payments made by the defendant to the plaintiff, or to any one for his use, on account of such demand,"

Or, if so, "that no payments have been made by the defendant to the plaintiff, or to any one for his use, on account of such demand, and that" there is due from the defendant to the plaintiff, and he, the said plaintiff, is entitled to recover from the said defendant, the sum of

[Here state, as at close of report, above given.]

And it also appearing that the plaintiff, at the time of making the application for judgment, showed by affidavit, that an attachment has been issued in the action, and levied upon specific property belonging to the defendant, which affidavit contained a specific description of such property and a statement of its value; and that such affidavit has been read and attached to, and filed with, the aforesaid affidavits of publication; and the plaintiff having, at the same time, produced and filed with the clerk an undertaking, with two sureties, approved by the court, that the plaintiff will abide the order of the court touching the restitution of any estate or effects which may be directed by the judgment in this action to be transferred, or delivered, or the restitution of any money that may be collected under, or by virtue of such judgment, in case the defendant or his representatives shall apply, and be admitted to defend this action, and shall succeed in such defence. Now, therefore, on motion of E. F., attorney for the plaintiff, no one appearing for the defendant to oppose: It is ordered, adjudged, and decreed, that A. B., the plaintiff in this action, do recover of C. D., the defendant therein, the said sum of dollars , so found to be

due to him as aforesaid, together with his costs of this action, and that judgment be entered therefor in favor of him, the said A. B., accordingly.

When the proof has been taken by a referee, commence the preface thus :

Upon reading the order heretofore, and on the day of ,
instant, made and entitled in this action, whereby it was referred, &c.

[State precise terms of order of reference.]

And, upon also reading and filing the report of said referee, in the premises, bearing date the day of , instant, whereby it appears that he has, pursuant to said order, taken proof, &c.

[State precise terms of report.]

And it also appearing, that the plaintiff, at the time of making the application for judgment, showed by affidavit, &c.

[Continue down to the end of the preface, given in the last form.]

Now, therefore, on motion of E. F., attorney for the plaintiff, no one appearing for the defendant to oppose—

It is ordered, that the said report be, and the same is hereby, in all things, approved and confirmed. And, it is further ordered, adjudged, and decreed, &c.

[Conclude as in foregoing form.]

LXXVII.

PRELIMINARIES TO JUDGMENT ON FORECLOSURE AND SIMILAR CASES.

VOL. II., § 260 (b); Rule 71.

ORDER OF REFERENCE TO COMPUTE.

All Due—No Absentees.

Title, &c.

The defendants, C. D. and E. F., having failed to answer the complaint in this action within the time allowed for that purpose, and the rights of the plaintiff, as stated in the complaint, being admitted by the answer of the defendant G. H.

[Or state preface otherwise, according to the actual circumstances.]

Now, on motion of W. X., attorney for the plaintiff, it is ordered, that it be referred to the clerk of this court.

[Or, to O. P., of, &c., a suitable person selected by the court.]
as sole referee to compute and ascertain the amount due to the plaintiff, for principal and interest upon the bond and mortgage set forth in the plaintiff's complaint, which is filed in this action, the whole of which has become due;

[Insert, "and also to such of the defendants as are prior encumbrancers of the mortgaged premises," if there be any such defendants; if not, omit it].
and that he make report thereon with all convenient speed.

REFERENCE.

Whole Amount not Due. Infant and Absentee Defendants.

Title, &c.

It appearing, from the proceedings in this action, that the complaint was filed for the foreclosure or satisfaction of a mortgage; that the whole amount secured, or intended so to be, by said mortgage, is not due. That the defend-

ants C. D. and E. F. have failed to answer the said complaint within the time allowed for that purpose: that the right of the plaintiff, as stated in the complaint, is admitted by the answer of the defendant G. H. That the said defendant, E. F., is an absentee, and that the said defendant, G. H., is an infant, and has put in a general answer by his guardian.

[Or, if the case have been actually tried, insert allegation accordingly from one of the subsequent judgment forms, according to the circumstances.]

Now, on motion of A. B., attorney for the plaintiff, it is ordered, that it be referred to the clerk of this court,

(Or to O. P., of, &c., a suitable person selected by the court—)
to take proof of the facts and circumstances stated in the said complaint, and to examine the plaintiff, or his agent, upon oath, as to any payments which have been made, and to compute the amount due to the plaintiff, upon the bond and mortgage mentioned in the complaint.

[If there be any such, add, "and to such of the defendants as are prior encumbrancers of the mortgaged premises."]

And also, to ascertain and report the amount secured to be paid by said bond and mortgage, and which remains unpaid, including interest thereon to the date of such report. And also, to ascertain and report the situation of the mortgaged premises, and whether, in his opinion, the same can be sold in parcels, without injury to the interests of the parties; and, if he shall be of opinion that a sale of the whole of said premises, in one parcel, will be most beneficial to the parties, then that he report his reasons for such opinion.

REFEREE'S REPORT.

Under Second of above Orders.

Title, &c.

To the court. In pursuance of an order of this court, made in the above-entitled action, on the day of , in the year one thousand eight hundred and , by which it was referred to the undersigned referee, &c., (state order granted:)

I, E. F., the referee in the said order named, do report, that I have computed and ascertained the amount due to the plaintiff upon and by virtue of the said bond and mortgage, and that I find, and accordingly report, that there is due to the plaintiff, for principal and interest, on the said bond and mortgage, at the date of this my report, the sum of .

And I do further certify and report, that schedule A, hereunto annexed, shows a statement of the amounts due for principal and interest respectively, the period of the computation of the interest, and its rate.*

And I do further certify and report, that I have computed and ascertained the amount secured to be paid by said bond and mortgage, and which remains unpaid, including interest thereon to the date of this my report, and the same is the sum of dollars.

And I do further certify and report, that the schedule marked B, to this my report annexed, and forming a part thereof, contains a statement of the said last-mentioned principal and interest money respectively, the period of the computation of the interest and its rate.

And I do further certify and report, that G. H. and J. L., the above-named defendants, are prior encumbrancers of the said mortgaged premises, and that I have computed the amount due to them for principal and interest respectively. That the amount due to the said G. H., for principal and interest, up to and including the date of this my report, is the sum of dollars; and the amount due to the said J. L., for principal and interest, up to and including the date of this my report, is the sum of dollars.

And I do further certify and report, that the schedule marked C, to this my

report annexed, and forming a part thereof, contains a statement of the said principal and interest moneys, respectively due to the said G. H. and J. L., as aforesaid, the period of the computation of the interest, and its rate; and to which, for greater certainty, I refer.

And I do further certify and report, that I have taken proof of the facts and circumstances stated in said complaint, and have examined the complainant A. B. on oath, as to any payments which may have been made to him, or to any person for his use, on account of the demand mentioned in said complaint, and which ought to be credited thereon; and such proofs, except those which are documentary, and such examinations, are to this my report annexed; and I am of opinion that the facts and circumstances stated in said complaint are true.

And I do further certify and report, that I have ascertained the situation of said mortgaged premises, and am of opinion that the same can be sold in parcels, without injury to the interests of the parties, (or, cannot be sold, &c., for the reason that, &c., state reason.)

All which is respectfully submitted.

Dated, &c.

E. F., *Referee*.

[Add schedules as referred to.]

N. B.—The report, under order No. 1, is the same as the foregoing, but omitting all the different statements after*.

AFFIDAVIT OF REGULARITY.

Title, &c.

L. M., being duly sworn, says, that he is (managing clerk of) the attorney of the plaintiff in the above-entitled action; that the complaint in this action was filed to foreclose a mortgage; and that none of the defendants have appeared in the action, so as to entitle them to a notice of the application to the court for the relief demanded by the complaint.

[Or, if the facts be otherwise, vary these allegations accordingly.]

And this deponent further says, that at least twenty days before the application for judgment in this action, to wit, on the day of now last past, and at (or after) the time of filing the complaint in this action, which complaint was on (the same day), filed in the same office, a notice of the pendency of this action, containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mortgage, and the time and place of recording the same, was filed in the office of the clerk of the county of X., that being the county in which the mortgaged premises are situated.

[If foreclosure affects premises in more than one county, vary this allegation accordingly.]

And deponent saith that, since the filing of the said notice, the complaint in this action has not been amended by making new parties to the action, or so as to affect other property not described in the original complaint, or so as to extend the claims of the plaintiff against the mortgaged premises.

[Add allegation; if the fact be so.]

And deponent lastly saith, that none of the defendants in this action are infants or absentees.

N. B.—If the filing of the complaint and notice of *lis pendens* be proved by the certificate of the county clerk, as authorized by the rule, omit that allegation in the affidavit.

PARTITION OR DIVORCE.

Vol. II., § 260 (c, d); Rules 78, 86, 87.

N. B.—The orders for a preliminary reference to take proof, on default of the defendant to answer, or to controvert the plaintiff's allegations, in these cases,

may be drawn upon the same general model as the preliminary reference in foreclosure, *mutatis mutandis*; but in the actual order, the precise *formulae*, prescribed by the rules, must be followed. That in partition will be found in rule 78; that in divorce, in rule 86.

See also, as to preliminary affidavits, required in certain cases of the latter class, rule 87.

LXXVIII.

ORDER FOR JUDGMENT, AGAINST JOINT DEBTORS NOT SERVED WITH ORIGINAL PROCESS.

Vol. II., § 271.

Title, &c.

Insert proper preface, showing default to answer; or, if the defendant have answered, then showing the action of the court, by default taken, or trial had, as in other cases; add:

And on reading and filing the summons issued herein, requiring the defendant, C. D., to show cause why the judgment rendered, &c., [describe judgment], should not be enforced against him, the said defendant, and the affidavit of the plaintiff accompanying the same.

[If any other papers read and filed, specify them.]

And it appearing to the court that the whole of the said judgment (or part of the said judgment, to wit, the sum of) is still due and unpaid, and that such judgment is still in full force, it is ordered, that the plaintiff have judgment against the defendant for the amount (or, for \$, the balance) of the aforesaid judgment, and interest, together with the costs of this proceeding, and that the plaintiff have execution therefor.

Where against representatives of deceased judgment debtor, modify as follows:
Title.

| | | |
|--|---|--|
| A. B. (former Plaintiff), <div style="text-align: center;"><i>vs.</i></div> E. F., executor, &c., of C. D. (former Defendant). | } | |
|--|---|--|

Commence as in foregoing. Describe summons, as, to show cause why the judgment, &c., should not be enforced against the estate of the said C. D., in the hands of the said defendant.

After "it appearing to the court," proceed, that the said C. D. died on the day of , leaving the said judgment wholly (or in part) unpaid and unsatisfied, and that on the day of , the said defendant, E. F., was appointed his *executor*, and that the whole, &c.

Order,

That the plaintiff have judgment against the said defendant, as *executor* as aforesaid, for the amount (or, for \$, the balance) of the judgment, and interest, together with the costs of this proceeding, And it is further ordered, that the property and estate of the said C. D., deceased, in the hands of the said defendant, be charged with and applied to the payment thereof, and that the plaintiff have execution therefor, with leave to him, the said plaintiff, to apply to the court, if necessary, to compel the application of the property so charged, to the payment of the said judgment.

Where against heirs, devisees, legatees, or tenants of deceased judgment debtor; modify thus:

First part of allegations to stand. After that of death of debtor, add, "intestate," or, "having first made his last will and testament, and appointed E. F. executor thereof."

[Here insert allegation as to devise or bequest to parties against whom judgment is sought to be enforced, if devisees or legatees.]

That letters of administration (or, letters testamentary) of the estate and effects of the said C. D., were, on the day of , duly granted to E. F. (Or, to E. F., as such executor of the said C. D. as aforesaid.) That more than three years have expired since the granting of such letters of administration (or, letters testamentary), as aforesaid. Then describe capacity in which the persons stand, against whom the application is made, if heirs or tenants, and, in the latter case, state of what property they are tenants.

Modify foregoing order accordingly, so as to give proper description of parties against whom it is taken.

LXXIX.

MONEY JUDGMENT.

Vol. II., § 254 (b).

POSTEA.

Title, &c.

Use one or other of the formal prefaces subjoined, according to the circumstances under which judgment is entered, then add :

Now, on motion of E. F., the *plaintiff's* attorney, it is hereby adjudged that A. B., the *plaintiff*, recover of C. D., the *defendant*, the sum of dollars, the amount claimed by him, and interest, with dollars, costs and disbursements, amounting in the whole to dollars.

A short description of the nature of the recovery may, in some cases, be inserted.

If the judgment be separate, insert the words, "by way of separate judgment," after "the defendant."

If the judgment be for costs and disbursements only, as on judgment of dismissal, in favor of a defendant, vary accordingly.

FORMAL PREFACES

To Judgment on default, to answer Complaint sworn to.

Vol. II., § 257 (e); Code, § 246.

, 1863. The summons in this action, having been duly served on C. D., the defendant, on the day of , and no copy of an answer or demurrer to the complaint, by him the said defendant, having been served on the plaintiff's attorney, as required by the said summons: Now, on motion, &c.

If the complaint has been served with the summons, add after summons, "and a copy of the complaint."

If the complaint has been served on the defendant's demand, vary thus, and after statement of the service of the summons, add,

And the said defendant having demanded a copy of the complaint in this action, and the same having been duly served upon him by the plaintiff, pursuant to such demand, and no copy of an answer or demurrer to the said complaint having been served by the said defendant, upon the plaintiff's attorney, as required by the said summons, in due time, after service of a copy of the complaint as aforesaid: Now, &c.

Preface, where Amount assessed by the Clerk.

Vol. II, § 257 (c); Code, § 246.

Use one or other of the forms last given, adding at the close, "and the amount which the plaintiff is entitled to recover in this action, having been assessed and ascertained by the clerk of this court, at the sum of _____" Now, &c.

If the defendant have appeared, insert after the word "court,"
"On due notice to the defendant."

Where assessed by a Sheriff's Jury.

Vol. II, § 260 (g); Code, § 246.

Commence preface as above, then add, "and the damages of the plaintiff, by occasion of the premises in the complaint set forth, having been assessed by a jury summoned by the sheriff of the county of _____, as directed by an order of this court, made the _____ day of _____, at the sum of _____ dollars, and due return having been made of such assessment, under the hand of such sheriff: Now, on motion, &c.

Where assessed by a Referee.

Vol. II, § 260 (j); Code, § 246.

And the amount due to the plaintiff, and which he is entitled to recover in this action, having been assessed by L. M., a referee appointed by the court, at the sum of _____:

Now, on motion, &c.

Where taken for Balance, after allowing Counter-claim.

Vol. II, § 257 (d); Code, § 246.

Commence as above, as to service of summons and complaint. Add:

And the defendant having answered the complaint in this action, not denying the plaintiff's claim, but setting up a counter-claim, amounting to less than such claim of the plaintiff, to wit, for the sum of _____ dollars; and the plaintiff having filed with the clerk of this court a statement, admitting such counter-claim: Now, on motion, &c.

Describe sum for which judgment is taken, as, "the excess of his, the said plaintiff's claim, over the said counter-claim of the said defendant, so admitted, as aforesaid."

On Service by Publication.

Vol. II, § 261; Code, § 246.

, 1863. The summons in this action having been duly served upon the defendant, by publication, and no copy of any answer or demurrer of the said defendant to the complaint having been received by the plaintiff, or by his attorney, and this court having thereupon required proof to be made of the demand mentioned in the complaint, and having required the plaintiff, or his agent, to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and such proof having been thereupon made of said demand; and the plaintiff (or S. F., the agent of the plaintiff) having been so examined on oath, as aforesaid; and the plaintiff having produced and filed, at the time of making application for judgment, an affidavit, showing that an attachment has been issued in the action, and levied upon property belonging to the defendant; and having also, at the same time, produced and filed with the clerk an undertaking, with two sureties, as

required by the court; and the court having thereupon rendered judgment in favor of the plaintiff, against the defendant, for the sum of dollars, and for the costs of the said plaintiff: Now, on motion, &c.

On Offer.

Vol. II., § 262 (b); Code, § 384.

, 1863. The defendant in this action having, on the day of , served upon the plaintiff an offer, in writing, to allow judgment to be taken against him for the sum of , with costs; and the plaintiff having accepted such offer, and given notice thereof in writing, within ten days, to wit, on the day of ; and having filed the summons, complaint, and offer, with an affidavit of notice of acceptance, pursuant to the provisions of section 385 of the Code of Procedure; and the costs and disbursements of the plaintiff having been adjusted, at the sum of : Now, on motion, &c.

On Default to Appear at Trial.

Plaintiff's Default.

Vol. II., § 259.

This cause being at issue, and being called on in its order, on the *circuit* calendar of this court, and the plaintiff having been duly called in court, and failing to appear; and this court having thereupon ordered that the complaint in this action be dismissed with costs: Now, upon motion, &c.

Judgment for costs and disbursements only.

Defendant's Default.

This cause being at issue, &c., (as in last, down to "failing to appear," substituting "defendant" for "plaintiff.")

If at circuit, add:

[and a trial by jury having been waived in this cause, by the defendant's failing to appear, as aforesaid.]

And a trial of this cause having been thereupon had by the court, the honorable O. P., justice, presiding, whose decision in writing has been filed with the clerk, whereby judgment is ordered for the plaintiff for : Now, on motion, &c.

On Inquest.

Vol. II., § 259.

No affidavit of merits having been filed by the defendant in this action, and the same having been called on, on motion of counsel for the plaintiff, and the defendant having been called to come forth and defend the same,* and having failed to appear, and a trial by jury having been waived by the said defendant so failing, and a trial of this cause having been had, &c., as in last form.

N. B.—If the defendant appear, and the inquest be taken before a jury, commence as above, down to *, and conclude in the ordinary form on trial by jury, as below given.

On Striking Out Pleading.

Vol. II., § 258; Code, §§ 152, 247.

The *answer* of the *defendant* in this action having been stricken out, as sham and irrelevant,

(or, having been declared to be frivolous)

by order of this court, made the day of : Now, on motion, &c.

On Issue of Law, where no Leave to Amend.

Vol. II., § 253.

This cause having been tried by the court, the Hon. , justice, presiding, on the issue of law joined by the demurrer of the *defendant*, and the decision in writing of the said justice, in favor of the *plaintiff*, and allowing (or overruling) such demurrer, having been filed: Now, on motion, &c.

If leave have been given to amend or plead over, but not acted upon, add statement of leave being granted, and that the party has not acted upon it within the time limited by the order, according to the facts.

On Trial by Jury.

Vol. II., § 254.

This action being at issue, and having been tried on the issue of fact, before the Hon. , a justice of this court, and a jury, on the day of , and the verdict of the jury having been entered, whereby they find for the in the sum of dollars; (or, whereby they find for the , and assess his damages at the sum of dollars.) Now, upon motion.

On Trial by the Court.

Vol. II., § 254.

This action being at issue, and triable by the court, or, and a trial by jury having been waived by (state under what circumstances, bringing the case within the exact terms of section 266), and the trial of the issue of fact being had, on the day of , by the court, the Hon. , justice, presiding, whose decision in writing has been filed (or, has been entered) with the clerk, whereby judgment is ordered, for the for : Now, on motion, &c., as in last.

On Trial by Referee.

Vol. II., § 254.

This action being at issue, and having been duly referred to , to hear and determine the issue joined therein, and the report of the said having been filed, whereby they find (or, he finds) to be due from the to the the sum of dollars: Now, on motion, &c.

*On Summons against Joint Debtors, &c., not Originally Served.**Preface and Postea.*

Vol. II., § 271.

This action having been brought to trial on, &c., (state date,) and judgment ordered for the plaintiff, for the amount of the judgment referred to in the summons and pleadings, and the interest on such judgment having been computed, and the costs in this action adjusted by the clerk of the court, and the total amount due on such judgment, and for interest and costs as aforesaid, having been assessed by the said clerk at the sum of \$: Now, on motion of G. H., attorney for the plaintiff, it is ordered and adjudged that the plaintiff A. B. do recover of the defendant E. F. the said amount so ordered to be paid, and interest and costs as aforesaid, amounting in the whole to the sum of \$, and that the defendant pay the same to the plaintiff, and that the plaintiff have execution therefor.

If against representatives, &c.

Modify thus: The recovery not to be personal, but, "as against the property of the said C. D., in the hands of the defendant E. F.," the said amount so ordered, &c. Proceed thus:

And that the property of the said C. D., in the hands of the said E. F., as such [describe] as aforesaid, be charged with and applied to the payment of such judgment, and that the said defendant do pay the same thereout accordingly. And further, that the plaintiff have execution therefor against such property as aforesaid, or that such application of the same be compelled by attachment, if necessary

LXXX.

SPECIFIC JUDGMENTS.

FOR PLAINTIFF IN REPLEVIN.

Vol. II., § 265 (a).

When Property in Possession.

Preface as in last set of forms, on trial by jury, down to "the verdict of the jury having been entered."

Continue:

Whereby they find in favor of the plaintiff, and assess his damages for the detention, taking, and withholding the possession of the personal property described in the complaint, at dollars. Now, upon motion of C. D., attorney, &c., it is adjudged, that the said plaintiff have possession of the personal property described in the complaint, and that the plaintiff recover of the said defendant the sum of dollars, damages as aforesaid, and also the further sum of , costs and disbursements, amounting together to the sum of

When Property out of Possession.

Preface as above, down to "in favor of the plaintiff." Continue thus:

"And assess the value of the personal property described in the complaint at the sum of ; and the plaintiff's damages for the detention, taking, and withholding thereof, at the sum of dollars. Adjudge, "that the plaintiff recover possession of the personal property described in the complaint, or, in case a return and delivery thereof cannot be had, then that the said plaintiff recover of the defendant the said sum of dollars, the value of the same property assessed as aforesaid. And further, that the said plaintiff recover of the said defendant, the sum of dollars, damages as aforesaid, and also the sum of dollars, costs and disbursements, amounting together to the sum of ."

FOR PLAINTIFF IN EJECTMENT.

Vol. II., § 265 (b).

Preface as above, showing verdict of jury in favor of plaintiff, and that they assess his damages in the premises at the sum of dollars.

Adjudge, that the plaintiff recover of the defendant the possession of the real property described in the complaint, and also the sum of dollars, his damages, assessed as aforesaid, and likewise the sum of dollars, costs and disbursements, amounting together to the sum of

JUDGMENTS IN EQUITY CASES.

To attempt to give precedents for the various forms of decree incident to controversies of this description, would involve an undesirable extension of the bulk of the present work, and would in itself be unsatisfactory, as, after all, no certain precedents can be framed applicable alike to all cases of the same class, inasmuch as the relief taken in each must necessarily vary in each specific case, according to its peculiar circumstances.

In framing those which depend upon any of the provisions of the Revised Statutes, those statutes must be carefully consulted, and their directions, and, so far as practicable, their phraseology, should be precisely followed.

The only exception the author has made to this rule, is the single case of foreclosure, in relation to which forms will be found below. Those in partition are fully given in the second volume of Barbour's Chancery Practice, chapter 9 of Appendix of Precedents, at p. 698 to p. 742 inclusive; and likewise in the third volume of Hoffman's Chancery Practice, from p. 272 to p. 352 inclusive. These, with some slight verbal alterations to conform them to the present practice, and the phraseology of the Code of Procedure, will be found easily adaptable, and of essential service.

JUDGMENT IN FORECLOSURE.

Vol. II, § 265; Rule 72.

Title, &c.

On reading and filing the affidavit of A. B., clerk to C. D., attorney for the plaintiff, proving the service of the summons and complaint in this action; that no answer has been put in;

[If the cause have been actually heard, vary preliminary allegations accordingly.]

And that due notice of the pendency of this action was duly filed in the office of the clerk of the county of _____, on the _____ day of _____, one thousand eight hundred and _____;

[Or, if the filing be proved by the certificate of the clerk, vary accordingly.]

And an order of reference having been made, to compute the amount due to the plaintiff upon the bond and mortgage set forth in the complaint; and on reading and filing the report of the referee named in the order of reference, by which report, bearing date the _____ day of _____, 186____, it appears that _____ was due thereon at the date of said report.

[Or, if otherwise, vary allegation.]

And on motion of E. F., attorney for the plaintiff, it is adjudged and decreed, that the mortgaged premises described in the complaint in this action, as hereinafter set forth, or so much thereof as may be sufficient to raise the amount due to the plaintiff, for principal, interest, and costs, and which may be sold separately without material injury to the parties interested, be sold at public auction in the county of X., by or under the direction of the sheriff of said county:

(Or, by E. F., of, &c., counsellor at law, who is hereby appointed referee for that purpose.)

That the said sheriff (or, the said referee) give public notice of the time and place of such sale, according to law, and the practice of this court; that the plaintiff, or any other party, may become a purchaser on such sale; that the said sheriff (or, the said referee) execute a deed or deeds of the premises so sold to the purchaser or purchasers thereof; that out of the proceeds of such sale, after deducting thereout the amount of his fees and expenses on such sale, and any lien or liens upon the said premises so sold, at the time of such sale, for taxes or assessments, and paid by him, he, the said sheriff (or, referee), do pay to

[If an amount be reported as due to prior encumbrancers, and payable out of the sale-moneys, insert, at this point, directions for payment of that amount. Add: and after making such payments as aforesaid, then he, the said sheriff, or he, the said referee, do pay to]

the plaintiff, or his attorney, the amount of his debt, interest, and costs, to wit, the sum of , adjudged to the plaintiff for his costs and charges in this action, with interest from the date hereof, and also the sum of , the amount so reported due as aforesaid, for his debt and interest, together with the legal interest thereon, from the date of the said report, or so much as the purchase-money will pay of the same; and that he, the said sheriff (or, referee), do take the receipt of the plaintiff or his attorney for the amount so paid, and do file the same with his report of sale; and that the purchaser or purchasers at such sale be let into possession of the said premises, on production of the deed or deeds to be executed to him or them as aforesaid. And it is further adjudged and decreed that all surplus moneys, if any, arising from the sale of the said mortgaged premises, under this judgment, be paid by the said sheriff (or, referee), within five days after the same shall be received and be ascertainable, to the county treasurer of the county of X.

[In New York cases, substitute, "to the chamberlain of the city of New York,"] subject to the further order and direction of this court, and do take a proper voucher therefor, and do file the same with his report of sale. And that he, the said sheriff (or, referee), do make a report of such sale, and do file it with the clerk of this court, with all convenient speed; and, if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff, with the interest and costs as aforesaid, then, that he, the said sheriff (or, referee), do specify the amount of such deficiency in his report of sale, and that the defendant, C. D., pay the same to the plaintiff, with interest from the date of the said report, and that he, the said plaintiff, have judgment and execution therefor.

And it is further adjudged, that the defendants, and all persons claiming under them, or any or either of them, after the filing of such notice of pendency in this action, be forever barred and foreclosed of all right, title, interest, and equity of redemption, in the said mortgaged premises so sold, or any part thereof.

The following is the description and particular boundaries of the mortgaged premises adjudged to be sold as aforesaid, so far as the same can be ascertained from the aforesaid mortgage:

[Copy description in mortgage.]

LXXXI.

APPLICATION TO OPEN INQUEST OR DEFAULT.

Vol. II., §§ 225, 274; Code, § 174.

Apply, on the pleadings and proceedings, and,

Move on affidavit, showing the taking of the inquest or default sought to be relieved against, and that the application for relief is made with due diligence, and also alleging circumstances evidencing the existence of either "mistake, inadvertence, surprise, or excusable neglect," on the part of the applicant, or his attorney or counsel.

If the defendant applies, the substance of an affidavit of merits should be subjoined. See Form LXVIII.

If the default sought to be opened be a default to answer, the affidavit should also disclose the nature of the defence proposed to be put in, either by state-

ment upon its face, or by reference to a copy of the proposed answer, to be served with it.

Move as follows:

If before Judgment.

That the *defendant* be relieved from the *Inquest* taken against him by the *plaintiff*, on the day of , and be allowed to *defend* this action, on such terms as may be just, and that the entry of judgment on such *Inquest*, and all proceedings of the *plaintiff* thereon, be stayed; or, that the *defendant* may have such further or other order or relief in the premises as may be just.

Substitute "default" for "inquest," if the application be of that nature, and "prosecute" for "defend," if the application be made by the plaintiff.

If after Judgment.

Code, § 174.

Use form as above, down to, "on such terms as may be just," specifying, also, the amount and date of entry of the judgment; then add, "and that this defendant may be relieved from the judgment entered against him on such *Inquest*, as aforesaid, and that such judgment may be set aside and taken off the roll, and due entry thereof made accordingly, by the clerk of this court, and by the clerks of the several counties, if any, wherein the said judgment has been docketed [If known to be docketed in any, vary allegation], or for such further order or relief as may be just."

As to motion to set aside an irregular proceeding, see next form.

LXXXII.

APPLICATION TO SET ASIDE JUDGMENT FOR IRREGULARITY.

Vol. II, § 273.

Apply on the pleadings and proceedings and affidavit, showing the existence, amount, and mode of entry of the judgment sought to be set aside, and, if execution has been issued, stating that fact, and, also, specifying exactly, and in detail, the precise irregularities complained of (see Rule 39), making all allegations of fact, if any, necessary to substantiate their existence.

If the application be made by a defendant, to set aside judgment taken against him, on an inquest or default, he should swear to merits, as directed in the last form. The time at which the irregularity complained of was first discovered, should also be disclosed, and, if the application has been delayed, a sufficient excuse for the delay must be shown.

Move,

That the *defendant* may be relieved from the judgment taken against him by the *plaintiff* in this action, on the day of , for the sum of , as in the said affidavit stated, and that such judgment, and all proceedings under the same, may be vacated and set aside, for the irregularity thereof, and that the same may be taken off the roll, and due entry thereof made by the clerk of this court, and by the clerks of the several counties, if any, where the said judgment has been docketed

[If known to be docketed in any, vary allegation], and that the *defendant* may have his costs of this motion, and also such further or other relief as may be just.

If execution have been issued, insert, before last clause, "and also that the execution issued under such judgment, and the levy made under the same, as in the said affidavit stated, and all proceedings thereunder, may likewise be vacated and set aside as aforesaid."

LXXXIII.

OPENING OF PROCEEDINGS ON SERVICE BY PUBLICATION.

Vol. II, § 275; Code, § 135.

MOTION FOR LEAVE TO DEFEND BEFORE JUDGMENT.

Affidavit.

A. B., &c., deposes and says, That service of the summons in this action hath not been personally made on this deponent, but that an order hath been made for the service of such summons by publication. That no judgment hath yet been entered in this action against this deponent. That, &c. Then swear to merits in the usual form. See above, Form LXVIII. State, also, the nature of the defence proposed to be put in, show sufficient cause why the defendant should be allowed to make it, and, if any special circumstances exist, tending to show surprise, hardship, or the existence of a *bona fide* defence, allege them.

Move, on the complaint and affidavit,

That the defendant be allowed to defend this action, and that in the mean time all proceedings on the part of the plaintiff be stayed.

If necessary, apply by order to show cause, or obtain collateral stay of proceedings.

WHEN MADE AFTER JUDGMENT.

Affidavit.

A. B., &c., the above-named defendant, being duly sworn, deposes and says, that judgment was entered in this action, in favor of the plaintiff, against this defendant, in the above-named court, on the day of , for the sum of dollars, on service of the summons herein by publication, and not on personal service on this defendant. That this action is brought on contract (or otherwise, as the case may be), and is not an action for divorce. That he, this defendant, never received any copy of the summons and complaint in this action, and was wholly ignorant of, and never had notice of such judgment, so entered, as aforesaid, until (give date), when he was first informed thereof by (state mode of notice), to wit, within one year now last past, and within seven years after the rendition of the said judgment. That, &c. [Swear to merits, &c., as directed in the preceding form of affidavit.]

If the defendant actually received notice before the entry of judgment, but was unable to come in and defend in time to prevent the entry, vary the allegations accordingly, stating facts to prove that inability as strongly as possible.

NOTICE OF MOTION.

Move on the pleadings, proceedings, and affidavit.

That the said defendant, C. D., may be allowed to defend this action, notwithstanding the judgment entered against him therein on service by publication, as in the said affidavit stated, and that such judgment may be vacated and set aside, and all proceedings thereunder vacated or stayed, in such manner, and upon such terms as may be just. Or, that the defendant may have such further or other order or relief in the premises as may be just.

LXXXIV.

SATISFACTION OF JUDGMENT.

Vol II, § 276.

Title, &c.

County of

Satisfaction is acknowledged between A. B., plaintiff, and C. D., defendant, for the sum of . Judgment entered in the judgment-book of the clerk of the county of , the day of , one thousand eight hundred and

Acknowledged before me, the day of , 186 , by the said A. B., personally known to me to be the plaintiff (or, the attorney for the plaintiff) in the above action.

Signature of party; or of attorney, if satisfied within two years after entry.

(Signature of commissioner of deeds.)

LXXXV.

MOTION FOR LEAVE TO ISSUE EXECUTION AFTER FIVE YEARS.

Vol II., § 278 (d); Code, § 284.

Affidavit.

Title, &c.

County of X.; ss. A. B., of the city of Y., in said county, being duly sworn, aith, that he is the *plaintiff* in this action; that judgment was recovered therein on the day of , 186 , by deponent against C. D., the above-named *defendant*, for the sum of dollars, and that said judgment remains wholly unsatisfied and due.

Or, if so, substitute for last,

That deponent has received, on account of said judgment, the sums following, to wit: on the day of , the sum of \$; and on the day of , the sum of \$; leaving due thereon the balance or sum of \$, which part of said judgment remains unsatisfied and due.

If the affidavit be made by the attorney or agent of the *plaintiff*, vary allegations accordingly, and show reason why it is not made by the *plaintiff* himself.

If the *defendant* be absent, add, That the said C. D. is absent from this state at P., in the state of Q.; that deponent has made inquiries of *the wife of said C. D.* (or his partner, or otherwise, as the case may be), *and is by her informed that said C. D. will not probably return to this state for several months* (or otherwise showing a necessity for other than personal notice).

If non-resident, add, instead, That the said C. D. is not a resident of this state, but resides at P., in the state of Q.

If defendant cannot be found, add, instead, That the said C. D. cannot be found within this state, to make personal service of notice of motion for leave to issue execution on said judgment. That (here insert statements showing that efforts have been made to serve the notice, and giving all the information that can be obtained as to the last place of residence and present position of the defendant).

NOTICE.

Title, &c., and notice, as in No. I., directed to party personally, grounded on "the judgment-roll in this action, and the affidavit, a copy of which is herewith served."

That the *plaintiff* have leave to issue execution upon the judgment in said affidavit mentioned; and such further or other order or relief as may be just.

If defendant be absent, or non-resident, or cannot be found, procure the signature of the judge to a direction indorsed on the notice, as follows:

It appearing to me that C. D., the *defendant*, to whom the within notice is addressed, is absent from this state (or, is not a resident of this state, but resides), at P., in the state of Q. (or, cannot be found to make personal service thereof), I do hereby direct that service of said notice be made by [here let court direct mode of service].
L. M., Justice, &c.

Date, &c.

ORDER.

Title, &c.

On reading and filing the affidavit of A. B., the *plaintiff* in this action, and notice of a motion to be this day made thereon, and proof of due personal service thereof (or due service thereof, pursuant to the direction of this court, indorsed thereon), and after hearing Mr. H., of counsel for the *plaintiff*, *no one appearing on the part of the defendant* (or otherwise, as the case may be), it is ordered, that the *plaintiff* have leave to issue execution against the *defendant* upon the judgment entered in this action on the day of , 186 .

LXXXVI.

EXECUTIONS.

Vol. II, § 179 (b); Code, § 289.

ORDINARY EXECUTION AGAINST PROPERTY.

N. B.—Observe directions there given as to indorsements. For forms, see below.

The People of the State of New York, To the Sheriff of the County of ,
Greeting:

Whereas judgment has been rendered, on the day of , one thousand eight hundred and , in an action in the court, between A. B., plaintiff, and C. D., defendant, in favor of the said A. B., against the said C. D., for the sum of , as appears to us by the judgment-roll, filed in the office of the clerk of the county of . And whereas the said judgment was docketed in your county on the day of , in the year one thousand eight hundred and , and the sum of is now actually due thereon:* Therefore we command you, that you satisfy the said judgment out of the personal property of the said judgment-debtor, within your county; or, if sufficient personal property cannot be found, then out of the real property in your county belonging to such judgment-debtor, on the day when the said judgment was so docketed in your county, or at any time thereafter, in whose hands soever the same may be, and return this execution, within sixty days after its receipt by you, to the clerk of the county of

Witness, the honorable E. F., our justice of the said court, at , the
day of , one thousand eight hundred and

X. Y., Plaintiff's Attorney.

N. B.—The judge whose name is inserted *pro forma*, as above, should be a judge of the court in which the judgment is entered.

EXECUTION AGAINST PROPERTY IN THE HANDS OF REPRESENTATIVES, ETC.

Same as foregoing, down to *.

Therefore we command you that you satisfy the said judgment, out of the personal property of C. D. (deceased), in the hands of A. B.,

Executor and personal representative,
 administrator and personal representative,
 heirs, or, devisees, or, legatees,
 tenants of the real property,
 trustees,

(as the case may be, following the precise wording of subdivision 2 of section 287, in so far as applicable),

of the said C. D., within your county, or, if sufficient personal property cannot be found, then out of the real property in your county, late of the said C. D., now in the hands of the said A. B.; as aforesaid, and return this execution, &c. [Rest as in last form.]

EXECUTION AGAINST PERSON.

Vol. II., § 285.

Same as first form down to *: add:

And whereas an execution against the property of the said judgment-debtor, has been duly issued to the sheriff of the proper county, and returned unsatisfied: Therefore we command you, that you arrest the said judgment-debtor, and commit to the jail of your county until shall pay the said judgment, or be discharged according to law.

Witness, &c. [Conclude as in foregoing.]

EXECUTION FOR DELIVERY OF PERSONAL PROPERTY.

Commence as in first form.

After statement as to granting judgment, add: "For the delivery of the possession of the personal property hereinafter described, to wit, of

[Give particular description of property],

Or, if a delivery thereof cannot be had, then for the sum of dollars, the value of the said property, duly assessed according to law, and judgment was also rendered against the said C. D. in favor of the said A. B., as aforesaid, for the sum of , &c.,

[State nature of judgment, and of sums recovered for damages and for costs, making the whole of these statements in exact accordance with the postea on the judgment-roll], as appears to us," &c. [Rest as in the first form.]

Therefore, we command and require you, that you deliver the possession of the personal property, as the same is herein described, to the said , the party entitled thereto; or, if a delivery thereof cannot be had, then that you do satisfy the sum of , the value thereof, as hereinafter directed; and we further command and require you, that you satisfy the said judgment, and also the said sum of , the value of the aforesaid property, if a delivery thereof cannot be had, but not otherwise, and likewise the said sum of , so recovered by the said plaintiff against the said defendant, for damages and costs as aforesaid, out of, &c., [as in first form].

FOR DELIVERY OF REAL PROPERTY.

Use last form, omitting the directions as to the sum awarded as the value of the property, if a delivery cannot be had, and substituting the word "real" for "personal" throughout.

FORMS OF INDORSEMENT.

Vol. II., § 279 (c).

Ordinary Form.

Title, &c.

To the Sheriff of the County of : Levy, as within directed, the sum of \$, (the amount of debt and costs), besides your fees.

X. Y., Plaintiff's Attorney.

Where Judgment entered against Joint-Debtors, on Service on one.

Levy, as within directed, the sum of \$, besides your fees (as in the last, adding), "but not out of the sole property of the defendant A. B., who was not served with the process by which this action was commenced."

Where only an Instalment due.

Levy, &c., "being the amount now due on the judgment within mentioned, with interest thereon, and the costs of such judgment, the same being in respect of an instalment which has become due thereon."

Where Judgment for Debt secured by Mortgage.

Levy, &c., but not out of, [give short description of property], being the premises mortgaged by the defendant to the plaintiff [if plaintiff an assignee, vary allegation] by indenture of mortgage bearing date the day of , and recorded in the office of the Register (or clerk) of the county of , in liber of mortgages, page , for securing the debt for which this action is brought, or on any part thereof.

On Execution against Person of a Joint-Debtor.

Where against joint-debtors, one of whom has not been served with process, indorse as follows:

"The within execution is not to be served upon the person of the defendant A. B., who was not served with the process by which this action was commenced."

PRECEPT FOR COSTS.

Vol. II., § 289.

The People of the State of New York, To the Sheriff of the County of ,
Greeting:

Whereas; by an order made at a *special* term of, &c., [state particulars as to court or judge making order], on [state date], and duly entered with the clerk of, &c., [state in whose office], in a certain action pending in said court, wherein A. B. is plaintiff and C. D. defendant: It is ordered, that the *plaintiff* do pay to the *defendant* ten dollars, the costs of the motion on which such order was made (or otherwise, as the case may be). And whereas, twenty days have elapsed since the making of such order, yet the *plaintiff* has not paid to the *defendant* the said costs, or any part thereof; and there is still due on such order,

from the *plaintiff* to the *defendant*, the sum of ten dollars. Now, therefore, we require and command you to satisfy the said order, and to levy the said sum of ten dollars out of the personal property of the *plaintiff*, A. B., within your county, and return this execution, and what you have done thereupon, to the clerk of, &c., within sixty days after its receipt by you.

Witness, &c. [as in ordinary execution].

LXXXVII.

INDEMNITY TO SHERIFF.

Vol. II., § 282.

Bond as in No. XXVII., with two sureties conditioned as follows :

Whereas the above bounden A. B. did obtain judgment in the Court, against C. D., for the sum of dollars, whereupon execution has been issued to the said P. Q., as such sheriff, requiring him, out of the personal property of the said judgment-debtor, to satisfy the judgment aforesaid. And whereas certain personal property, that appears to belong to the said C. D., is claimed by some other person or persons. Now, therefore, the condition of the above obligation is such, that if the above bounden A. B. shall well and truly save, keep, and bear harmless and indemnify the said P. Q., and all and every person and persons aiding and assisting him in the premises, of and from all harm, let, trouble, damage, liability, costs, expenses, suits, actions, judgments, special proceedings, and executions that shall or may, at any time, arise, come, accrue, happen, or be brought against him, them, or any of them, as well for the levying and making sale under, and by virtue of, such execution of all or any personal property, which he or they shall or may judge to belong to the said judgment-debtor, as well as in entering any shop, store, building, or other premises, for the taking of any such personal property, then this obligation to be void, else to remain in full force and virtue.

See Vol. II., page 624. 3 Duer, 21.

LXXXVIII.

SUPERSEDEAS.

Vol. II., § 285 (f).

AFFIDAVIT.

Title, &c.

County of X., ss.

A. B., of Y., in said county, being duly sworn, saith that judgment was rendered against deponent in this action in term, 186 , to wit, on the day of , 186 , in the court, in favor of the above-named *plaintiff*, C. D., for the sum of dollars : * that, at the time such judgment was rendered against him, deponent was in the custody of the sheriff of the county of X., *upon process in the action on which such judgment was rendered, to wit, upon an order of arrest made in said action by the Hon. P. Q., a justice of said court, upon the day of , 186 , (or, if so, substitute for the words in italics, "upon being surrendered in discharge of his bail upon").* Deponent further saith, that more than three months have elapsed since the last day of

term, 186 , being the term next following that at which such judgment was obtained, and that the plaintiff in such judgment has wholly neglected to charge deponent in execution thereon.

Sworn, &c.

A. B.

If defendant surrendered after judgment and bail exonerated, substitute as follows from * :

That after such judgment was so obtained against him, to wit, on the day of , 186 , deponent surrendered himself (or, was surrendered), in discharge of his bail, upon an order of arrest made in said action by the Hon. P. Q., a justice of said court, upon the day of , 186 ; that thereupon, and on the day of , 186 , the said bail were duly exonerated; and that deponent has ever since been, and now is, in the custody of the sheriff of the county of X., upon such surrender.

[If an execution against property was issued, here insert : That theretofore, on the day of , 186 , an execution against the property of deponent had been issued to said sheriff, and that the return day of such execution was the day of , 186 .]

That more than three months have elapsed since *such surrender* (or, the return day of such execution), and that the plaintiff in such judgment has wholly neglected to charge deponent in execution thereon.

NOTICE OF MOTION.

Title, &c., and notice as in No. I., grounded on the affidavit.

That the defendant may be discharged from custody by a supersedeas, to be allowed by a judge of this court, unless good cause to the contrary be shown, and for such other, &c.

WRIT.

The people of the state of New York to the sheriff of the county of X.,
Greeting :

Whereas, A. B. is detained in your custody, by virtue of a certain order of arrest made by the Hon. P. Q., a justice of the court, on the day of , 186 , in a certain action then pending in said court, wherein C. D. was plaintiff and the said A. B. defendant (or, if so, substitute for the words "by virtue of" the words, "upon being surrendered in discharge of his bail upon"); and whereas the said C. D., in term last past, obtained judgment in our said court against the said A. B., in said action, and because it appears to us that the said C. D. hath not proceeded to charge the said A. B., in execution, within three months after the last day of the term next following that at which such judgment was obtained, according to the form of the statute in such case made and provided.

Therefore we command you, that from further taking the said A. B., attaching, imprisoning, or in anywise molesting him on that account, you entirely supersede. And if you have taken, and do detain him in prison on that account, and on no other, then cause him, the said A. B., to be, without delay, delivered out of the prison wherein he is so detained, at your peril.

Witness, &c. [*Teste as in ordinary writs.*]

If defendant surrendered after judgment and bail exonerated, substitute the following recitals, the commencement and conclusion of the writ being the same :

Whereas C. D., on the day of , 186 , obtained a judgment against A. B., in the Court, for the sum of dollars. And whereas the said A. B., afterwards, and on the day of , 186 , rendered himself (or was

rendered) to prison in the jail of our said county, in discharge of his bail, upon an order of arrest made in the action in which said judgment was rendered by the Hon. P. Q., a justice of said court, upon the day of , 186 , and thereupon the said bail were duly exonerated, and the said A. B. has ever since been, and now is, detained in your custody upon such surrender. (If an execution against property was issued, here insert: And whereas theretofore an execution against the property of said A. B. had been issued to you, and the return day of such execution was the day of , 186 .) And because the said C. D. hath not proceeded to charge the said A. B., in execution, within three months next after *such surrender* (or, the return day of such execution), according to the form of the statute in such case made and provided.

LXXXIX.

PROCESS OF CONTEMPT.

Vol. II., § 288 (a, b).

ORDER TO SHOW CAUSE.

Title, &c., and order as in No. II., grounded on the judgment or order disobeyed, and affidavits showing due service thereof and disobedience thereto:

Why the said *defendant* should not be punished, as for a contempt of court, for his misconduct in disobeying the said order (or judgment), or why an attachment should not issue to arrest said *defendant*, and to bring him before this court to answer for such misconduct, or why, &c. [Usual demand for further relief.]

ATTACHMENT.

The people of the state of New York to the sheriff of the county of X., Greeting:

We command you to attach A. B., if he may be found in your bailiwick, and bring him forthwith (or, on the day of instant), personally, before our Court, at , to answer unto us for certain trespasses and contempts against us in not obeying [recite order or judgment disobeyed]; and you are further commanded to detain him in your custody until he shall be discharged by our said court, and have you then there this writ.

Witness, &c. [Usual teste.]

(Indorsed.) Allowed, this day of , 186 .

P. Q., Justice, &c.

If the attachment is not issued by special order, fixing amount of bail, indorse on the attachment:

Ordered, that A. B., within named, do give a bond in the penalty of dollars, for his appearance to answer to the matters alleged against him, according to the exigency of the within attachment.

Date, &c.

P. Q., Justice, &c.

ORDER FOR COMMITMENT.

Title, &c.

The *defendant* having been brought before this court, on an attachment issued by the Hon. P. Q., a justice of this court, on the day of , 186 , to answer for his misconduct and contempt of court in not [specify contempt], pursuant to an order (or judgment) of this court, made in this action, on the

day of , 186 , and interrogatories having been filed, and the *defendant* having made answer thereto (and after hearing the allegations and proofs of the respective parties). This court doth adjudge that the defendant has been guilty of the contempt and misconduct aforesaid. It is therefore ordered that a fine of dollars be, and the same is hereby imposed upon the said *defendant*, and that he be imprisoned for the space of months in the county jail of the county of X. It is therefore further ordered, that a warrant issue committing said defendant to the county jail of the county of X., for the space of months, and until such fine and the expenses of this proceeding be paid (and until he shall further [specify act required to be done]).

COMMITMENT.

By P. Q., a justice of the court:

A. B., having been adjudged guilty of a contempt of court, in disobeying a certain order (or judgment) of said court, made on the day of , 186 , in a certain action therein pending, wherein one C. D. is *plaintiff* and the said A. B. is *defendant*; I do, therefore, in the name of the people of the state of New York, command the sheriff of the county of X. forthwith to convey the said A. B. to the jail of said county, and there commit him to close custody, in such jail, without being allowed the liberties thereof, there to remain for the space of months, and until he shall pay the sum of , being the amount of the fine imposed upon him by said court, and the further sum of , costs and expenses (and shall further [specify act required to be done]), and the jailer is commanded to receive and keep him accordingly.

Given under my hand and seal at , on the day of , 186 .
 [L. s.] P. Q., Justice, &c.
 R. S., *Plaintiff's* Attorney.

XC.

PROCEEDINGS FOR EXAMINATION OF JUDGMENT-DEBTOR.

Vol. II, § 293 (a, b, c).

AFFIDAVIT.

Title, &c.

A. B., the above-named plaintiff (or attorney, &c.,), being duly sworn, deposes and says, that judgment was recovered in this action by him the said plaintiff, against the said defendant, on the day of , for the sum of , and that the judgment-roll was duly filed, and a transcript of such judgment was duly docketed in the office of the clerk of the county of X.

[If the roll filed in one county, and transcript filed and execution issued in another, allege accordingly.]

N. B.—If the judgment has been assigned, embody short statement of assignment in the affidavit. (See 5 How., 308; 1 C. R. (N. S.), 25.)

That the said defendant resides (or has a place of business) in the said county of X. ("or, that the said defendant does not reside in this state, but at P., in the state of Q., as this deponent has been informed and believes"), according to the facts. (See Code, § 292.)

That an execution against the property of the aforesaid judgment-debtor was, on the day of , 186 , duly issued to the sheriff of the said county of

X., and that such execution has been returned unsatisfied, in whole (or, unsatisfied in part, to wit, in the sum of).

Sworn, &c.

A. B.

ORDER THEREUPON.

Title, &c.

It appearing to me, by the affidavit of, &c., the plaintiff, that judgment has been recovered in the above-entitled action in favor of the said plaintiff, against him, the above-named defendant, and that an execution against the property of C. D., the defendant in this action, has been duly issued to the sheriff of the proper county, upon the judgment herein, and returned unsatisfied, in whole (or, in part), *I do hereby require the said C. D. to appear before me, at , on the day of , at o'clock in the . noon, and answer concerning his property.

Adding interim injunction, as follows:

And the said defendant C. D. is hereby forbidden to transfer or make any other disposition of any property belonging to him, not exempt by law from execution, or in any manner to interfere therewith, until further order in the premises.

Dated, &c.

(Judge's signature.)

ORDER WHERE PROPERTY SEQUESTERED.

Vol. II, § 295.

Substantially the same as foregoing.

Insert after *: "and that the said C. D. has property which he unjustly refuses to apply towards the satisfaction of the said judgment," and alter the last sentence to "answer concerning the same."

N. B.—In the affidavit, with a view to obtain this last description of order, special allegations must be inserted, tending to show the nature of the property sought to be reached, and that the defendant unjustly refuses to apply it, as above.

If a warrant be applied for, insert further allegations, calculated to show that there is danger of the debtor's leaving the state, or concealing himself, and that there is reason to believe that he has property, which, &c., as above.

WARRANT TO ARREST JUDGMENT-DEBTOR.

Vol. II, § 296.

The People of the State of New York, To the Sheriff of the County of X., Greeting: It appearing to us by the affidavit of A. B. that, &c. [allege as in last form, and then add], And it also appearing to us by the said affidavit that there is danger of the said judgment-debtor absconding, Therefore we command and require you to arrest the said C. D., and bring him before the Honorable E. F., a judge, &c. (description), the officer signing this warrant, to be dealt with according to law.

Given under my hand, &c., this day of , in the year, &c.
(Judge's signature.)

UNDERTAKING BY DEBTOR WHEN ARRESTED.

Title, &c.

Whereas the defendant, C. D., has been arrested by the sheriff of the county of , upon a warrant issued by , and has been brought before said : Now, therefore, we, the said C. D. and E. F., as surety, do

hereby undertake, that the said C. D. will attend from time to time before the said , as he shall direct, during the pendency of the proceedings for enforcement of the judgment in this action, and until the final determination thereof, and will not, in the mean time, dispose of any portion of his property, not exempt from execution.

C. D.
E. F.

Add affidavits of justification, &c., as in No. XIII.

WARRANT OF COMMITMENT.

Substantially the same as warrant to arrest, but concluding with usual form of commitment for contempt.

XCL

PROCEEDINGS FOR EXAMINATION OF THIRD PARTY.

Vol II, § 297.

AFFIDAVIT.

County of : A. B. (or E. F., attorney of A. B.), the above-named plaintiff, being duly sworn, says, that judgment was recovered in this action, against the above-named defendant, C. D., on the day of , for the sum of

That an execution thereon, against the property of the said judgment-debtor, has been duly issued to the sheriff of the county of X.

(Add, if the facts be so, "and that such execution has been returned unsatisfied.")

And that G. H., of , has property of such judgment-debtor, to an amount exceeding ten dollars,

(Or, is indebted to the said judgment-debtor, in a sum exceeding the sum of ten dollars, to wit, in the sum of or thereabouts),

As this deponent has been informed and believes.

ORDER THEREUPON.

It appearing to me, by affidavit on behalf of the plaintiff, that an execution against the property of C. D., the defendant in this action, has been duly issued to the sheriff of the proper county, upon the judgment herein (and returned unsatisfied), and that G. H. has property of such judgment-debtor, to an amount exceeding ten dollars:

(Or, that G. H. is indebted to such judgment-debtor, &c., as in the last.)

Now I do hereby command and require the said G. H., to appear before me, at, &c. (see preceding form), and be examined and answer concerning the same.

And I do hereby forbid the transfer or disposition of the aforesaid property, and also of any other property of the said judgment-debtor, not exempt from execution, and any interference therewith; and I do order and enjoin the said G. H., that he do absolutely desist from any interference therewith, until the further order of the court.

XCII.

ORDER FOR APPLICATION OF PROPERTY IN HANDS OF DEFENDANT.

Vol. II., § 298.

Title, &c.

It appearing to me, by affidavit, that an execution against the property of C. D., the defendant in this action, has been duly issued to the sheriff of the proper county, upon the judgment herein, and returned unsatisfied;* and the said C. D. having been examined before me, and it appearing upon such examination, that certain property, not exempt from execution, to wit (give description of property), is now in the hands of the said C. D., I do hereby order, that the same be applied towards the satisfaction of the judgment in this action, and that the said C. D. do forthwith, upon the service on him of a copy of this order, deliver over said property to the receiver appointed in this action (or, if the property be money, substitute as follows:—pay said sum to the attorney for the plaintiff herein).

IN THE HANDS OF THIRD PARTY.

Use above form down to *; then modify as follows:

And that G. H. has property of such judgment-debtor to an amount exceeding ten dollars.

(Or, that G. H. is indebted to such judgment-debtor, in a sum exceeding ten dollars, to wit, in the sum of ,)

And the said G. H. having been examined before me, and it appearing upon such examination, that certain property of the said judgment-debtor, not exempt from execution, to wit (here give description of the property), is now in the hands of the said G. H.,

(Or, that the said G. H. is indebted to the said C. D., as aforesaid, and that the sum of , property of the said C. D., not exempt from execution, being a debt due to him from the said G. H., is now in the hands of the said G. H.,)

I do hereby order, that, &c. (as in the last).

XCIII.

ORDER FOR RECEIVER.

Vol. II., § 300.

Title, &c.

The judgment-debtor in the above-entitled action having been examined before me concerning his property, in pursuance of an order heretofore made by me; I do hereby order, that E. F., of , be, and he hereby is appointed receiver of all debts, property, equitable interests, rights, and things in action of the said judgment-debtor; that such receiver, before he enter upon the execution of his trust, execute to the clerk of this court a bond, with sufficient sureties, to be approved by me, in a penalty of dollars, conditioned that he will faithfully discharge the duties of such trust, and file the said bond with the clerk of the county of X.; and that the said receiver, upon filing such bond, be invested with all rights and powers, as receiver, according to law.

Dated, &c.

P. Q., Justice, &c.

XCIV.

ORDER FOR INTERIM INJUNCTION, WHERE INTEREST
CLAIMED BY HOLDER OF PROPERTY.

Vol. II, § 300 (a).

Title, &c.

It appearing to me that G. H. has certain property in his hands, alleged to belong to C. D., the above-named defendant, a judgment-debtor, but the said G. H. claims an interest in the property, adverse to him, the said C. D.:

(Or, that G. H. is alleged to be indebted to C. D., &c., but denies such debt;)

And E. F., of, &c., having been duly appointed receiver of the estate and effects of the said judgment-debtor, by order made in this cause, bearing date the day of : Now I do hereby forbid a transfer or other disposition of the said property (or debt), till a sufficient opportunity be given to the said receiver to commence an action against the said G. H., for the recovery of the aforesaid property (or debt), and to prosecute the same to judgment and execution. And I do hereby order and enjoin that you, the said G. H., do absolutely desist from any interference therewith, until after such action shall have been commenced, and prosecuted to judgment and execution, as aforesaid; or until the further order of this court.

P. Q., Justice, &c.

Date, &c.

XCV.

NOTICE OF JUDGMENT.

Vol. II, § 256 (a).

Title, &c.

Take notice, that judgment was entered in this action on the day of , 186 , in favor of the *plaintiff*, against the *defendant*, for the sum of dollars and cents.

Date, &c.

A. B., *Plaintiff's* Attorney.To C. D., *Defendant's* Attorney.

N. B.—If judgment be for special relief, serve a copy thereof, with a notice indorsed, that “within is a copy of the judgment entered in this action on the day of , 186 .”

XCVI.

NOTICES OF APPEAL.

Vol. II, § 306.

FROM JUDGMENT TO GENERAL TERM OF SAME COURT.

Title, &c.

Take notice, that the *defendant* appeals to the general term from the judgment entered in this action, on the day of , upon the direction of a judge of this court,

(Or, upon the report of L. M., the referee to whom this action was referred), in favor of the *plaintiff*, against the *defendant*, for the sum of damages and costs,

(Or, if special, describe the exact nature of the judgment,) and from every part thereof.

Dated.

To G. H., Plaintiff's Attorney,

and

J. K., Clerk of this court.

E. F., Defendant's Attorney.

TO GENERAL TERM FROM INTERIOR JURISDICTION.

Entitle in court below, and address to the clerk of that court, and to the adverse attorney. Code, §-327.

Modify, by appealing to the Supreme Court, from the judgment rendered in the above-entitled action by this court, on the day of , in favor, &c. (As in last).

If appeal from only part of judgment, modify above forms thus:

"From all that part," or, "from all and singular such part or parts of the judgment entered, &c," whereby it was adjudged that (insert *verbatim* that portion of the judgment which is appealed from).

Or, in so far as the same do not reverse, but modify only (or, do not affirm altogether, but modify) the judgment heretofore entered in this action on the day of , in favor of, &c. (as above).

ON APPEAL TO COURT OF APPEALS.

Title, &c.

(N. B.—Entitle in and address to clerk of court from which appeal is taken, &c., as above directed.)

From Judgment of Affirmance.

Take notice, that the *defendant* appeals to the Court of Appeals, from the judgment in favor of the *plaintiff*, rendered by this court, at a general term thereof, in the above-entitled action commenced therein,

(Or, brought to this court from the *county court* of X., by appeal from the judgment of said court,)

And entered in this court on the day of , whereby the judgment of the *special term* of this court,

(Or, the judgment of the said county court, or otherwise, as the case may be,) entered therein on the day of , in favor of the *plaintiff*, against the *defendant*, for &c.,

[Here describe judgment below was affirmed,]

And also for the sum of , costs of appeal from the said judgment, and from the determination of the said general term awarding such judgment, and from the said judgment so affirmed, as aforesaid, and from each and every part thereof, respectively.

From Judgment of Reversal.

Follow the above form, *mutatis mutandis*, but omit at the close the words, "and from the said judgment so affirmed, as aforesaid."

NOTICES OF APPEAL FROM ORDER.

Code, § 349.

To General Term of same Court.

Formal parts of notice same as on appeal from judgment.

Appeal from

A certain order made at a special term by a single judge of this court, to wit :
by the Hon. L. M., a judge thereof,

(Or state otherwise, by what officer the order was granted, bringing the case
precisely within one of the categories prescribed by section 349,)

On the day of , 1863, whereby, &c.

[Here state substance of order appealed from],

And from every part thereof.

If appeal partial only, modify thus :

Take appeal

From all such part or parts of a certain order, made, &c., as order and direct
that

[Here state portions appealed from].

TO SUPREME COURT, FROM ORDER OF AN INTERIOR COURT.

Code, § 344.

Appeal as above, "to the Supreme Court."

From a certain order, affecting a substantial right of the *defendant*, made by
the county court of the county of X.

(Or by L. M., county judge of the county of X.)
in the above-entitled action.

(Or "proceeding," if so.)

on the day of , 1863, whereby &c.

[State substance of order as above directed].

FROM ORDER TO COURT OF APPEALS IN ORDINARY CASES.

Code, § 11.

Title, &c.

(Entitled in cause or matter, as the case may be.)

Take notice that *the defendant*,

(Or if in a matter, describe the appellant accordingly,)

Appeals to the Court of Appeals, from a certain order, affecting a substantial
right of *this defendant* (made in the above-entitled action or matter, &c.), by
this court, at a general term thereof, on the day of , whereby

[State substance of order.]

Such order, in effect, determining this action, and preventing a judgment from
which an appeal might be taken, and from every part thereof, and from the
determination of the said general term thereon.

(Adding, if so, and from the said order of the said Court, so affirmed, as
aforesaid.)

If taken under subdivision three of section 11, vary thus :

From a certain final order affecting a substantial right of the said A. B., made
in a special proceeding, to wit, in the above-entitled matter, by this court, &c., as
above.

Or, from a certain final order affecting a substantial right of this *defendant*,
made in the above-entitled action, upon a summary application after judgment,
by this court, &c. (as above).

TO COURT OF APPEALS.

From Order Granting a New Trial.

Appeal, as above.

From a certain order made in the above-entitled action by this court, at a general term thereof, on the day of , whereby a new trial of the above-entitled action was granted;

(Or, state otherwise, according to the terms of the order as made,) and from the determination made by the said general term thereon; and the said appellant hereby, by this, his notice of appeal, assents that if the said order so appealed from by him, as aforesaid, be affirmed, judgment absolute shall be rendered against him, the said appellant.

APPEAL FROM JUDGMENT AND ORDER.

In this case, state both appeals, *seriatim*, as in forms above given: the judgment coming first, and the order following.

APPEAL FROM JUDGMENT.

From Justices' Court, and from New York Marine and District Courts.

Vol. II, § 323 (a). Code, §§ 354-371.

Title, &c.

Take notice, that the *defendant* appeals to the *County Court of the County of X.*, from the judgment entered in this action on the day of , 186 , in favor of the *plaintiff*, against him, the said *defendant*, for the sum of dollars, and that the grounds upon which such appeal is founded, are as follows:

First. That the justice erred in (*state errors fully and carefully, making a separate statement of each ground of appeal, as in exceptions to the decision of the court, or a referee, in the higher tribunals.*)

Lastly. That the justice erred in not rendering judgment in favor of the *defendant*.

And the said appellant hereby claims that the said judgment should have been more favorable to him in the following particulars:

[State judgment claimed.]

Dated, &c.

A. B., *Defendant's* Attorney.

To C. D., Esq., *Plaintiff*.

and E. F., Esq., Justice.

XCVII.

UNDERTAKINGS ON APPEAL

Vol. II, § 308 (a, b, c). Code, §§ 334, 335.

UNDERTAKING FOR COSTS, AND ON OBTAINING STAY, WHERE JUDGMENT FOR MONEY RECOVERY.

Title, &c.

Whereas, on the day of ; 186 , in the Court, A. B., the above-named respondent, recovered a judgment against the above-named appellant, for damages and costs.

And the above-named appellant, feeling aggrieved thereby, intends to appeal therefrom to

(N. B.—If appeal of a partial nature, modify statement accordingly.)

Now, therefore, we, C. D., of No. _____ street, in the _____ of _____, and E. F., of _____ street, in said _____, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal, not exceeding two hundred and fifty dollars; and do also undertake, that if the said judgment so appealed from, or any part thereof, be affirmed or dismissed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the said appellant on the said appeal.

Dated _____, 186 .

[Add affidavits of sureties and acknowledgment, as in No. VII.]

N. B.—If proceedings are not sought to be stayed, omit second clause, as above. The first is necessary in all appeals to the Supreme Court from an inferior Court, or to the Court of Appeals.

DO. WHERE JUDGMENT FOR RELIEF.

If the undertaking be under section 336, insert statement as to nature of judgment appealed from, and modify second clause, as follows: "that, if the said judgment, &c., the appellant will obey the order of the appellate court, upon the appeal, when made in relation to the matters aforesaid."

DO. WHERE JUDGMENT FOR RECOVERY OF REAL PROPERTY.

If the undertaking be under section 338, modify second clause, as under, describing judgment, and property affected thereby, in the introductory portion.

"That, during the possession of the aforesaid property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that, if the said judgment be affirmed, he, the said appellant, will pay the value of the use and occupation of the said property, from the time of the said appeal, until the delivery of possession thereof, pursuant to the judgment, not exceeding the sum of _____, (sum to be fixed by the judge, and specified), and will also pay all costs," &c.

[Conclude with undertaking, as in first form given.]

DO. WHERE JUDGMENT FOR SALE OF MORTGAGED PROPERTY.

If the judgment appealed from be for the sale of mortgaged premises, and payment of deficiency, modify clause 2, so as to provide for that deficiency.

ON APPEAL FROM NEW YORK MARINE OR DISTRICT COURTS.

Vol. II, § 323 (b); § 354.

Undertaking as above:

That the said appellant will pay all costs, disbursements, and extra costs, awarded against him in the court below, if such judgment be affirmed by the appellate court, on such appeal, together with all costs and damages which may be awarded against him thereon, and do also undertake that, if judgment shall be rendered against the said appellant upon his aforesaid appeal, and execution thereon shall be returned unsatisfied, in whole or in part: We, the said _____ and _____ will pay the amount unsatisfied thereon.

[N. B.—If no stay desired, omit second clause.]

ON APPEAL FROM JUSTICE'S COURT, WHERE STAY DESIRED.

Code, § 356.

Same as last, omitting first clause.

GENERAL INSTRUCTIONS.

N. B.—In all cases, the affidavits of justification and acknowledgment must be added, as in No. VII. For forms in relation to exception to and justification of sureties, see same number.

XCVIII.

MOTION TO DISPENSE WITH OR LIMIT SECURITY.

Vol. II., § 308 (e).

Make affidavit, showing that the appellant is an executor, administrator, trustee, or person acting in another's right; see Code, § 339: or, where the application is to limit the security, on the ground of its exceeding \$50,000, state circumstances of hardship, or others, tending to lead the court to the conclusion that a less amount of security than that which may technically be required, will be adequate for the protection of the respondent.

Move,

Upon the pleadings and proceedings in this action, and on the affidavit, &c., That the security to be given by the *defendant*, on the appeal taken by him from the judgment in favor of the *plaintiff* in this action, be (dispensed with, or that the same be) limited, in such manner and on such terms as to this court shall seem meet, or that such further or other order may be made, for the relief of him, the said *defendant*, as may be just.

N. B.—Where the application is not made by persons *en autre droit*, and is merely to limit the security, omit the words between brackets.

XCIX.

MOTION FOR ENTRY OF, SECURED ON APPEAL.

Vol. II., § 256 (b).

MOTION FOR SPECIAL ENTRY ON DOCKET OF JUDGMENT.

If judgment docketed elsewhere than in county of entry, show, by affidavit, the counties in which it is docketed.

Apply, on the pleadings and proceedings in this cause, and on the undertaking on the appeal of the therein, on file in the office of the clerk, &c. Refer also to affidavit, if made.

Move,

That the words "secured by appeal" be entered upon the docket of the judgment entered in this action, in favor of the *plaintiff* against the defendant, on the (date), for the sum of \$, and that such entry be made accordingly, by the clerk of this court. (And also by the clerks of the counties of and , mentioned in the said affidavit.)

C.

JUDGMENTS ON APPEAL.

Vol. II, § 265 (k).

OF AFFIRMANCE, BY HIGHER JURISDICTION.

This cause having been brought into this court, on appeal from a judgment entered in the court, in favor of, &c., for, &c. [Describe court and judgment.] And the said appeal having been heard, and this court having thereupon ordered and decided that the said judgment be in all things * affirmed; on motion, &c., It is adjudged that the said judgment be, and the same is hereby in all things affirmed, and that the said, &c. [Continue in ordinary form of judgment for original amount and costs of appeal. See No. LXXX.]

REVERSAL, BY HIGHER JURISDICTION.

Same as last, down to *: substitute, "be in all things reversed." Adjudge that the said judgment be, and the same hereby is in all things reversed, and that the said, &c., making judgment for recovery of costs only.

JUDGMENT BY GENERAL TERM ON APPEAL.

Commence as follows:

This cause having been brought before the general term of this court, on appeal from a judgment entered therein, on the day of , on the direction of the Hon. , a justice of this court, in favor, &c. And the said appeal having been heard, &c. [Continue as in foregoing, but enter up judgment for costs only, whether that by the single judge be affirmed or reversed.] Vol. II., p. 553.

ON APPEALS FROM ORDERS.

By Higher Jurisdiction, as follows:

An appeal having been taken to this court from an order of the general term of the court, made in this cause on the day of , whereby, &c., [describe order], and the said appeal having been heard, and this court having thereupon ordered and decided that the said order be in all things approved and confirmed: Now, it is hereby ordered, that the said order be, and the same is hereby in all things approved and confirmed as aforesaid, and it is ordered that the appellant do pay to the respondent the costs of the said appeal, to be taxed by the clerk of the aforesaid court.

On reversal, substitute the words "reversed and set aside," and invert direction as to payment of costs.

By General Term, as follows:

An appeal having been taken to the general term of this court, from an order made in this cause on the day of , by the Hon. , a judge of this court [describe order]. And the said appeal, &c., as in first form.

CL

DISMISSAL OF APPEAL TO COURT OF APPEALS, FOR
NEGLECT TO FILE RETURN OR SERVE CASE.

Vol. II, § 320 (j).

NOTICE.

Title, &c.

Take notice, that I require *the return* on the appeal of the above-named appellant to this court, in this action, to be *filed* within ten days after the service of this notice.

Date, &c.

A. B., Respondent's Attorney.

To C. D., Esq., Appellant's Attorney.

If the neglect be to serve the case, substitute for "the return," "three printed copies of the case," and for "filed," "served on me."

CERTIFICATE OF NON-FILING OF RETURN.

Title, &c.

I certify that no return has been filed in my office, on the appeal in this action.

Date, &c.

G. H., Clerk.

AFFIDAVIT OF DEFAULT TO FILE RETURN.

Title, &c.

County of X., ss.

A. B., *Attorney for the respondent* in this action, being duly sworn, saith, that the appeal to this court, in this action, was perfected on the day of , 186 , by the filing in the office of the clerk of the court, of a notice of appeal and undertaking, and by the service on *deponent* of a like notice and a copy of said undertaking. That, &c., (usual affidavit of service of notice, as in No. V., or it may be by a separate affidavit).

Sworn, &c.

A. B.

AFFIDAVIT OF DEFAULT TO SERVE CASE.

Same as last, adding as follows :

That no printed copies of the case on the appeal of the above-named appellant to this court, in this action, have been served on deponent by said appellant or his attorney, or received by deponent.

Sworn, &c.

A. B.

ORDER ON DEFAULT TO FILE RETURN.

Title, &c.

The appellant having failed to cause the proper return to be made and filed with the clerk of this court on his appeal in this action, within twenty days after said appeal was perfected, and the respondent having, by notice in writing, required *such return to be filed* within ten days after the service of such notice, and *such return not having been filed* in pursuance of such notice : Now, on reading and filing the affidavit of A. B., attorney for the respondent, proving *when the said appeal was perfected*, and the service of such notice (and the certificate of the clerk of this court that no return has been filed) : It is ordered that the appellant be deemed to have waived his appeal in this action, and that the said appeal be dismissed for want of prosecution, and that the respondent recover against the appellant his costs of said appeal to be taxed.

ORDER ON DEFAULT TO SERVE CASE.

Omit words in brackets, and substitute for words in italics, as follows (to serve three printed copies of the case, on his appeal in this action, on the attorney for the respondent, within forty days), (the service of such copies), (such copies not having been served), (such default).

 CII.

NOTICE OF ARGUMENT OF APPEAL.

GENERAL TERM.

Title, &c.

Please to take notice, that the appeal, in the above-entitled action, will be brought on for argument, before the justices of this honorable court, at a general term thereof, to be holden at the _____, in the city of _____, on the _____ day of _____, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Date, &c.

A. B.,

Attorney for *Appellant*.

To C. D., Esq., attorney for *Respondent*.

COURT OF APPEALS.

• In the Court of Appeals, use form in substantial accordance with the last, but headed as follows:

In the Court of Appeals. On appeal from the _____ judicial district (essential).

The notice to be, that the appeal in this case will be brought on for argument before the justices of this court, at a term thereof appointed to be held at the *Capitol of the City of Albany, &c.*, as in last; or, when term appointed to be there held, at the *City Hall in the City of New York*. Code, section 13.

 CIII.

ORDER FOR JUDGMENT ON REMITTITUR.

Vol. II., § 265 (1).

Title, &c., and heading, as in No. IV.

On reading and filing the remittitur in this action by the Court of Appeals, remitting the proceedings in this action, with the judgment of the said Court of Appeals, into this court, to be enforced according to law, and on motion of A. B., attorney for the *plaintiff*, It is ordered, adjudged, and decreed, that (judgment in accordance with decision of Court of Appeals).

CIV.

DISMISSAL OF APPEAL FROM NEW YORK MARINE OR DISTRICT COURTS, FOR NEGLECT TO FILE RETURN.

Vol. II, § 325.

NOTICE TO FILE.

Title, &c.

Take notice, that I require you to procure the return to be made to this court, on the appeal of the above-named appellant to this court, in this action, within ten days after the service of this notice, and that, in default thereof, I shall apply to the General Term of this Court, to be held on the *third Monday* of next, on the first day thereof, for an order dismissing said appeal.

Date, &c.

A. B.,

Attorney for Respondent.

To C. D., Esq.,

Attorney for Appellant.

Prove service by affidavit, as in No. V., and non-compliance, by certificate of clerk, or by affidavit of attorney, "that he has examined the records of this court, and that no return has been filed on the appeal in this action."

ORDER OF GENERAL TERM.

Title, &c., and heading, as in No. IV.

The appellant not having procured the return to be made to this court, on his appeal in this action, within the time prescribed in section 360 of the Code of Procedure, and the respondent having served a notice in writing, requiring the same to be done within ten days thereafter, and that in default thereof he would apply to this General Term, on the first day thereof, for an order dismissing such appeal: Now, on reading and filing the affidavit of A. B., *Attorney for the respondent*, proving service of such notice, and the (certificate of the clerk of this court), proving a non-compliance therewith, It is ordered that said appeal be, and the same is, hereby, dismissed.

CV.

SKETCH OF BILL OF COSTS.

Vol. II, § 336.

PLAINTIFF'S COSTS.

| | | |
|------------|--|---------|
| | Proceedings before notice of trial | \$10 00 |
| | (Or \$15, if action be for relief), | |
| | Additional defendants served (\$2 each), | |
| | (Not exceeding 10 in foreclosure, and 5 in other cases.) | |
| | Subsequent proceedings before trial | 10 00 |
| 186 . Jan. | Attending and taking deposition of A. B., conditionally | 10 00 |
| " Feb. | Attending to perpetuate testimony of C. D. | 10 00 |
| " Mar. | Drawing interrogatories to annex to commission for taking testimony of E. F. | 10 00 |

| | | |
|------------|---|----------|
| 186 . Jan. | Term-fee, cause on calendar and not tried | \$10 00 |
| | (Or, if so, "postponed by order of court"), A similar fee for each term, not exceeding five. | |
| " June. | Trial-fee, issue of law | 15 00 |
| | Trial-fee, issue of fact | 20 00 |
| | Defendant appealed to general term. | |
| | Costs before argument | 15 00 |
| | Term-fees as above, not exceeding five. | |
| | Argument | 30 00 |
| | Defendant appealed to Court of Appeals. | |
| | Costs before argument | 25 00 |
| | Term-fees as above, not exceeding five. | |
| | Argument | 50 00 |
| | | <hr/> |
| | | \$ <hr/> |

DEFENDANT'S COSTS.

Vary from the above, as follows :

Proceedings before notice of trial, \$10 only, in all cases, and no allowance for additional defendants served.

Allowances the same in other respects, and bill may be drawn in same manner, *mutatis mutandis*.

If any interlocutory costs be payable by either party, under special direction of the court, proceed thus :

Costs of motion to change venue, ordered to abide event of suit . 10 00

Insert any similar items of surcharge, if any exist, specifying their nature.

DISBURSEMENTS, AS UNDER :

Affidavits. (Give number, 12½ cts. each.)

Acknowledgments (if security given).

(State amount paid commissioner of deeds.)

Postages—give amount.

Advertisements (if service by publication, as paid).

Witnesses, days each (50 cts. per *diem* each witness).

One witness, A. B., from , in county of , distant
miles, in attendance days.

Paid travelling fees of do. miles (at 8 cts. per mile), going and
returning. See Vol. II., p. 943.

[Insert a separate item for each witness, or class of witnesses.]

Paid jurors' fees (in country, 25 cts., in New York and Albany, 12½ cts. each juror).

Paid clerk, fees on trial and judgment, \$1 50 (or \$2, if salaried officer).

Do. For certified copy of order (5 cts. per folio of 100 words).

Do. Do. For return on appeal (same rate).

Transcript, 6 cts. ; filing, 6 cts.

Paid Printer's bill for Case, on, &c.

Do. Do. for Points, on, &c.

Paid Sheriff his fees, as under :
For serving complaint (if served, \$1), and 6 cts. per mile going only.
See Vol. II., p. .
Do. Fees, Cause on Circuit calendar, terms (50 cts. per term).
Do. Do. Execution, 69 cts.
Entering satisfaction, 12½ cts. If transcript required, charge in addition.
N. B.—Insert any other disbursements, if any.

If allowance have been made, add :
Statutory allowance (in foreclosure, &c.).
Allowance of per cent. on \$, amount of verdict (or judgment), as per order of instant.

If losing party entitled to any deductions, proceed thus :
Deduct costs, directed to be allowed to , as follows :
Costs of term, 186 ; trial postponed on that condition . . . 10 00
(Insert any other similar items, as for inquest set aside, &c., to a deduction in respect of which the losing party may be entitled.)
Total costs \$
Interest on \$, amount of verdict from to
Total \$

CVI.
AFFIDAVIT OF DISBURSEMENTS.

Vol. II., § 338 (h); Code, § 311.

To be subjoined to bill of costs.
County of X. ss. A. B., attorney for the *plaintiff* in this action, being duly sworn, saith, that the disbursements charged in the foregoing bill of costs of the *plaintiff* in said action, have been actually and necessarily made, or will be necessarily incurred therein.
Sworn, &c. A. B.

If witnesses' fees are charged, add :
And deponent saith that the following persons necessarily attended as witnesses on the part of the , on and previous to the trial of this action, and that the following sums were paid to them respectively, for such their attendance respectively, and for travelling fees allowed by law, and that the distances hereinafter specified were respectively actually travelled, by such of them, the said witnesses, as respectively reside more than three miles from the place of their attendance.
To the witness A. B., for 6 days' attendance on (state days), . . . \$3 00
To the witness C. D., for 6 days' attendance on, &c., . . . \$3 00
Do. for travelling fees from C., 100 miles distant, 200 miles travelled, going and returning, . . . \$8 00
N. B.—4 cents each way, making in the whole 8 cents for mile of actual distance. See 2 R. S., 643. And so on, giving particulars as to each witness.

CVII.

NOTICE OF ADJUSTMENT OF COSTS.

Vol. II, § 253; Code, § 311.

Serve copy of the bill of costs, and subjoin the following notice:

Take notice, that the costs of the *plaintiff* in this action, of the items of which the foregoing is a copy, will be adjusted, and the amount thereof inserted in the entry of judgment herein, by the clerk of this court, at his office in the *City Hall* of the *city* of X., on the day of , 186 , at o'clock in the forenoon.

Date, &c.

A. B., Plaintiff's Attorney.

To C. D., Esq., Defendant's Attorney.

CVIII.

NOTICE OF MOTION FOR ADDITIONAL ALLOWANCE.

Vol. II, § 337.

Title, &c.

Sir:

Please take notice, that upon the pleadings and proceedings in this cause, a motion will be made before this court, the Hon. J. H., one of the justices thereof, presiding, at , in the city of , on , the day of instant, at A. M., that an allowance be made to the plaintiff, in addition to his costs in this action, in pursuance of the provisions of sec. 308 of the Code of Procedure.

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